

No. _____

In the Supreme Court of the United States

CATHARINE MILLER AND CATHY'S CREATIONS, INC.,
Petitioners,

v.

CIVIL RIGHTS DEPARTMENT,
Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FIFTH APPELLATE DISTRICT*

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APPENDIX TABLE OF CONTENTS

Order Denying Petition for Review, <i>Civil Rights Dep’t v. Cathy’s Creations, Inc.</i> , No. S289898 (Cal. May 28, 2025)	1a
Opinion, <i>Civil Rights Department v. Cathy’s Creations, et al.</i> , No. F085800 (Cal. Ct. App. Feb. 11, 2025), <i>as modified on denial of rehearing</i> (Mar. 5, 2025)	2a
Order Denying Petition for Rehearing and Modifying Opinion, <i>Civil Rights Dep’t v. Cathy’s Creations, Inc.</i> , No. F085800 (Cal. Ct. App. Mar. 5, 2025)	101a
Judgment and Statement of Decision, <i>DFEH v. Cathy’s Creations, Inc.</i> , No. BCV-18-102633 (Cal. Super. Ct. Kern Cnty. Jan. 5, 2023)	107a
Opinion, <i>DFEH v. Cathy’s Creations, Inc.</i> , No. F078245 (Cal. Ct. App. Sep. 9, 2020)	150a
Ruling on Defendants’ Motion to Enforce Judgment, <i>DFEH v. Cathy’s Creations, Inc.</i> , No. BCV-17-102855 (Cal. Super. Ct. Kern Cnty. Sep. 13, 2018)	229a
Abandonment of Appeal, <i>DFEH v. Cathy’s Creations, Inc.</i> , No. BCV-17-102855 (June 13, 2018)	244a

Ruling on Matters Submitted April 13, 2018, <i>DFEH v. Cathy's Creations, Inc.</i> , No. BCV-17-102855 (Cal. Super. Ct. Kern Cnty. May 1, 2018).....	246a
Judgment, <i>DFEH v. Cathy's Creations, Inc.</i> , No. BCV-17-102855 (Cal. Super. Ct. Kern Cnty. May 1, 2018).....	248a
Notice of Appeal, <i>DFEH v. Cathy's Creations, Inc.</i> , No. BCV-17-102855 (Cal. Super. Ct. Kern Cnty. Apr. 30, 2018).....	251a
Ruling on Order to Show Cause In Re: Preliminary Injunction, <i>DFEH v. Cathy's Creations, Inc.</i> , No. BCV-17- 102855 (Cal. Super. Ct. Kern Cnty. Feb. 5, 2018)	254a
Cal. Civ. Code § 51.....	268a
Cal. Civ. Code § 51.2.....	272a
Selected Trial Exhibits from July 22-29, 2022 Trial Proceedings, No. BCV-18-102633 (Cal. Super. Ct. Kern Cnty.)	275a
Notice of Filing of Discrimination Complaint, Letter from Clara Hernandez, DFEH Consultant, to Catharine Miller, Agent for Service for Cathy's Creations, Inc. (Oct. 26, 2017)	307a

Complaint of Discrimination, DFEH No. 935123-315628 (Oct. 18, 2017)	316a
Excerpted Exhibits of Declaration of Gregory J. Mann in Support of Plaintiff, <i>DFEH v. Cathy's Creations, Inc.</i> , No. BCV-18-102633 (Cal. Super. Ct. Kern Cnty. July 12, 2022).....	320a
Declaration of Catharine Miller in Support of Defendants' Motion for Summary Judgment, <i>DFEH v. Cathy's Creations, Inc.</i> , No. BCV-18-102633 (Cal. Super. Ct. Kern Cnty. Sep. 8, 2021).....	328a
Excerpts from Deposition of Jessica Criollo. <i>DFEH v. Cathy's Creations, Inc.</i> , No. BCV-18-102633 (Cal. Super. Ct. Kern Cnty. July 14, 2021).....	349a
Excerpts from Certified Reporter's Transcript of Trial Proceedings, <i>DFEH v. Cathy's Creations, Inc.</i> , No. BCV-18-102633 (Cal. Super. Ct. Kern Cnty. July 22-29, 2022).....	357a

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Court of Appeal, Fifth Appellate District
– No. F085800

S289898

IN THE SUPREME COURT OF CALIFORNIA

En Banc

CIVIL RIGHTS DEPARTMENT,
Plaintiff and Appellant,

v.

CATHY'S CREATIONS, INC., et al.,
Defendants and Respondents;

EILEEN RODRIGUEZ-DEL RIO et al.,
Real Parties in Interest.

The applications to appear as counsel pro hac vice
are granted. (Cal. Rules of Court, rule 9.40(a).)

The petition for review is denied.

GUERRERO
Chief Justice

Filed February 11, 2025

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Court of Appeal, Fifth District, California

CIVIL RIGHTS DEPARTMENT,
Plaintiff and Appellant,

v.

CATHY'S CREATIONS, INC., et al.,
Defendants and Respondents;

Eileen Rodriguez-Del Rio et al.,
Real Parties in Interest.

As Modified on Denial of Rehearing March 5, 2025

OPINION

MEEHAN, J.

* * *

INTRODUCTION

This appeal involves a bakery's refusal to sell a predesigned white cake, popularly sold for a variety of events, because it was intended for use at the customers' same-sex wedding reception. The State of California, through the Civil Rights Department (the CRD), filed suit on behalf of real parties in interest Eileen and Mireya Rodriguez-Del Rio (the Rodriguez-Del Rios) when Tastries Bakery (Tastries) refused to

provide them the cake for their wedding pursuant to the bakery's policy that prohibited the sale of any preordered cake for a same-sex couple's wedding. The case culminated in a bench trial on the CRD's claim of discrimination under the Unruh Civil Rights Act (Civ. Code, § 51 et seq. (UCRA)), and the free speech and free exercise affirmative defenses of defendants Tastries, Tastries's owner Cathy's Creations, Inc. (Cathy's Creations), and Cathy's Creations's sole shareholder Catharine Miller (Miller) (collectively defendants).¹

The trial court concluded there was no violation of the UCRA because the CRD failed to prove intentional discrimination, and concluded Miller's referral of the Rodriguez-Del Rios to another bakery constituted full and equal access under the UCRA. The trial court proceeded to consider defendants' affirmative defenses as an alternative matter, and concluded the preparation of a preordered cake by defendants *always* constitutes expression protected by the federal Constitution's First Amendment when it is sold for a wedding, and, as applied here, concluded the UCRA compelled defendants to speak a message about marriage to which they objected. The trial court rejected defendants' defense under the free exercise clause of both the federal and state Constitutions.

The CRD appeals and challenges the trial court's construction and application of the UCRA's intentional discrimination element, and its interpretation and application of decisional authority in concluding Miller's referral of the couple to a

¹ Unless indicated otherwise, all statutory references are to the Civil Code.

separate business constitutes full and equal access under the UCRA. The CRD and defendants also challenge the trial court's determinations as to defendants' affirmative defenses.

For the reasons explained below, we conclude the trial court erred in its determination that Tastries's policy was facially neutral and, as a result, misconstrued the intentional discrimination standard to require evidence of malice or ill will. Application of the policy here pivots upon the sexual orientation of the end user—the policy cannot apply or operate until the same-sex status of the couple is identified. Despite that the underlying rationale for the policy is rooted in a sincerely held religious belief about marriage, held in good faith without ill will or malice, the policy nonetheless requires a distinction in service that is based solely on, and because of, the end users' sexual orientation. The relevant and undisputed facts about the policy and its application here necessarily establish intentional discrimination.

We also conclude Miller's referral to a separate business did not satisfy the UCRA's full and equal access requirement. The applicable case authority does not contemplate, let alone authorize, a referral to an entirely separate business entity as full and equal access. Interpreting the UCRA in this manner would not only thwart the bedrock antidiscrimination purposes of the statute, it would entirely undermine the statute's operation as a public accommodations law. Under such a rule, business establishments would be free to refuse service to anyone on account of protected characteristics so long as they told those customers there was another comparable business in

existence confirmed to have no objection to providing service.

As for defendants’ constitutional affirmative defenses, under our independent review, we conclude defendants’ refusal to provide the Rodriguez-Del Rios the predesigned, multi-purpose white cake requested was not protected expression under the federal Constitution’s free speech guarantee. A three-tiered, plain white cake with no writing, engravings, adornments, symbols or images is not pure speech. Nor can the act of preparing a predesigned, multi-purpose, plain white cake—an ordinary commercial product—and delivering it prior to the wedding constitute the symbolic speech of the vendor. Further, we conclude the trial court properly rejected defendants’ free exercise challenges under governing case authority. Accordingly, we reverse and remand.

FACTUAL BACKGROUND

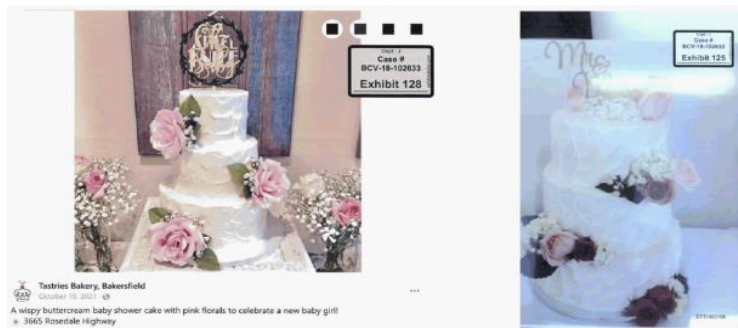
I. The Cake Tastries Refused to Sell to the Rodriguez-Del Rios

As this case involves a specific denial of service, we begin with a brief description of the cake Tastries refused to sell. For their wedding, the Rodriguez-Del Rios sought a cake with a simple design, and chose one based on a sample (nonedible) cake displayed in Tastries’s bakery. It was to have three tiers with white buttercream frosting without any writing, symbols, engravings, images or toppers.² According to the

² Mireya testified when she came into Tastries the first time, she had an idea of what she wanted. After she and Eileen discussed the cake with an employee of Tastries, there was nothing left in Mireya’s mind to discuss about the design of the cake. Eileen similarly testified that after their conversation with

6a

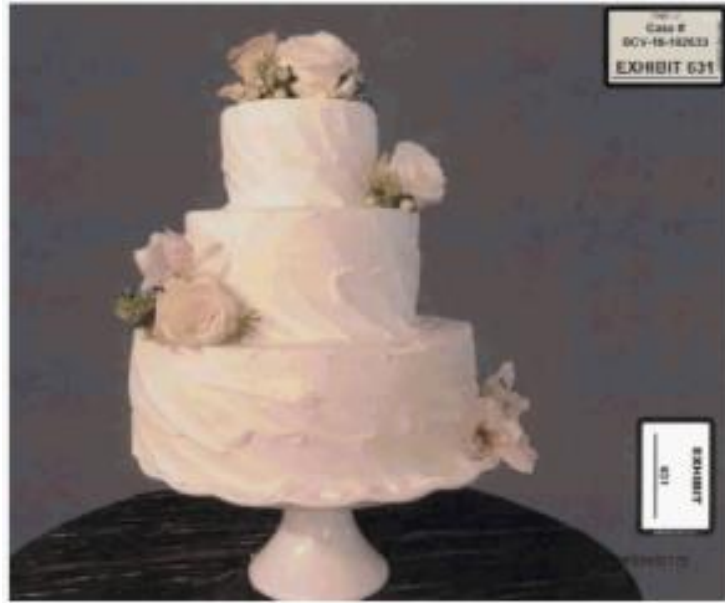
Tastries's manager who originally helped the couple with the order, it was a "very popular," "simple" design sold for a variety of events including birthdays, baby showers (left, *post*), weddings (right, *post*), and quinceaneras. Defendants refused to prepare and sell the cake to the Rodriguez-Del Rios, however, because the couple planned to serve it at their same-sex wedding reception.



After Tastries's refusal, the Rodriguez-Del Rios ultimately obtained a cake of the same design from another baker, pictured *post*:

the employee on their first visit, there were no "other choices" to make about the design of the cake beyond flavors. Additionally, while Mireya indicated they had separately purchased a wedding topper, she testified they never requested a cake topper from Tastries and the cake they ultimately obtained did not feature a topper. Eileen similarly testified they did not request or discuss a cake topper with the employee of Tastries, nor did they plan to purchase one from Tastries.

7a



We turn now to the broader, factual context surrounding this denial.

II. Tastries

Catharine Miller owns and operates Tastries, a small commercial bakery in Bakersfield, which employs approximately 18 people, including Miller and her husband. The bakery sells a variety of baked goods, which are available daily in a display case and can be purchased by anyone without restriction. The display case of daily goods can accommodate cakes, but only single-tiered cakes that are meant for last-minute purchasing. The bakery also sells preordered baked goods to be produced for a specific date, which encompasses cakes for a variety of occasions, including weddings. Tastries's policy is that all preordered baked goods are considered "custom," regardless of the type of product or its design specifications. If a customer wants a cake identical to one in the daily

display case, but wants the cake prepared for a specific date, it is considered by Tastries to be a “custom” cake.

Miller is a devout Christian. She believes that Tastries is God’s business, and that she and her husband work in service to God. She has Bible verses on her business cards, she prays with the staff before meetings, and they work as a family—helping each other and working together. They play Christian music at the store, and sell a small variety of boutique merchandise, some with Christian themes.

Approximately 30 percent of Tastries’s revenue comes from wedding cake sales. All preordered wedding cakes are considered custom products by Tastries, regardless of their design. When customers order a wedding cake, Tastries collects information such as the name of the bride and the groom, and a consultation will be scheduled where the cake’s design will be discussed. Typically, Miller will personally conduct this consultation, although in the past other employees have done it. Miller requires the engaged couple, except in certain circumstances, to both be present for the cake consultation. She has developed a packet, which she goes over with the couple during the consultation that explains various wedding traditions, including those relevant to a wedding cake, and the packet includes various Bible verses and talks about how marriage is between a man and a woman; Miller informs the couple of the Bible verses she has used in weddings and how many weddings she has coordinated. Given these circumstances, Miller intends each cake, regardless of appearance, to convey a message that the marriage is “ordained by God between a man and a woman and we are here to celebrate that with you.”

The consultation includes a tasting, where the couple has a chance to sample cupcakes with the different available fillings and flavors. When Miller conducts the consultation, they talk about the colors for the wedding, the flowers, and the number of guests they wish to serve because “all of that comes into play when [Miller] is designing their cake.” About 40 to 50 percent of the time, couples will bring in a picture of a cake design, and Tastries will replicate it so long as Miller believes the cake’s appearance is beautiful. Tastries also has many display cakes in the bakery and photographs of cake designs for couples to choose from. Some customers leave the design entirely up to Tastries after consulting about flavors and colors.

In completing a wedding cake order, usually at least five to eight different employees work on some aspect of the cake—from baking it, to making fillings and frostings, to decorating and then (often) delivering the cake to the wedding site. Approximately 95 percent of wedding cake orders are delivered, and setting up the cake at a reception site can take 15 minutes to an hour. Many times, some wedding guests or the wedding party are at the venue site at the time of delivery. Miller may be involved in all aspects of a cake order, but she does not necessarily bake or decorate any particular cake. Since the events of this case, Miller personally conducts most of the design/tasting consultations.

Since opening Tastries, Miller has developed design standards for Tastries’s products so that they reflect her beliefs. For the period of time relevant to this case, Tastries used the following design standards for its products:

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

- “• Requests portraying explicit sexual content
- “• Requests promoting marijuana or casual drug use
- “• Requests featuring alcohol products or drunkenness
- “• Requests presenting anything offensive, demeaning or violent
- “• Requests depicting gore, witches, spirits, and satanic or violent content
- “• Requests that violate fundamental Christian principals [*sic*]; wedding cakes must not contradict God’s sacrament of marriage between a man and a woman”³

The standards refer to Miller’s mission to create “custom designs that are Creative, Uplifting, Inspirational and Affirming” (boldface omitted), and that are “lovely, praiseworthy, or of good report[.]”

These design standards apply to all baked goods, and Miller has refused to make products that do not comport with the design standards. For example, she has refused to make products with a marijuana theme, and she refused to provide a cake for a man who

³ There were several versions of the design standards in existence during the relevant time frame, but, as the trial court found, they varied only in minor detail.

wanted to use the cake at his anniversary party to announce his intention to seek a divorce.

Miller developed the standards in consultation with her minister; the final standard was added in 2015 after same-sex marriage was recognized as a fundamental right. Miller intends the design policy to prohibit the provision of any preordered baked good for use in the celebration of same-sex marriage, including engagements, weddings and anniversaries. She believes that by providing any preordered product for the celebration of same-sex marriage, Tastries is placing its stamp of approval on that marriage, which is inconsistent with Miller's religious belief that marriage is between a man and a woman. Thus, specific to wedding cakes, Miller will not provide any preordered cake—no matter its design—for a same-sex wedding, even though she will sell the identical product for an opposite-sex couple's wedding. According to Miller, her purpose for refusing certain products for certain people is not to exclude anyone on the basis of sexual orientation, but to follow her conscience and her sincerely held religious beliefs that marriage is limited to couples comprising one man and one woman.

Miller has referred same-sex couples seeking a wedding cake to *Gimme Some Sugar* approximately three times. The referral process was developed when a same-sex couple sought to purchase a wedding cake from Tastries. Miller became uncomfortable and concluded she could not provide the cake because of her beliefs. She had already taken payment for the order, so she sought out the owner of *Gimme Some Sugar*, who agreed to take over the order. In that instance, the couple came back and thanked Miller,

told her the cake was wonderful, and they have been back at Tastries since then.

Despite her design policy prohibiting the sale of preordered cakes for same-sex weddings, four of Tastries's former employees had surreptitiously supplied wedding cakes on prior occasions to at least two same-sex couples without Miller's knowledge.

III. Rodriguez-Del Rios' Order Refused

Real parties in interest Mireya and Eileen Rodriguez-Del Rio are a same-sex couple who were married in December 2016 in a small ceremony with friends and family. The couple wanted to celebrate with a larger group and planned to exchange vows and host a traditional wedding reception in October 2017.

In planning the 2017 wedding event, the couple visited several bakeries, including Tastries. Eileen brought home cupcakes from *Gimme Some Sugar* to taste the flavors, but they decided the samples were too sweet. On August 16, 2017, they visited Tastries, where an employee, not Miller, assisted them in selecting a cake for their wedding. The couple chose a cake based on one of Tastries's preexisting, inedible sample cake displays, which the employee who assisted them described at trial as a simple and popular design sold for many different types of events: a round, three-tiered cake with no writing or cake topper that was to be delivered about an hour before their event; the employee suggested the couple come back to do a cake tasting. The employee never told them Tastries would not provide a cake for a lesbian couple. The Rodriguez-Del Rios returned to the bakery for a tasting on August 26, 2017, with two of their friends and Eileen's mother. When they got to the

bakery, the employee who assisted them previously told them Miller was going to take over.

Miller, who was unaware the Rodriguez-Del Rios had already discussed the cake design with the employee, asked them questions about the cake they wanted. Miller initially believed it was a heterosexual couple with their mother and a maid and man of honor. The order form Miller had was blank, so she handed it to Mireya thinking she was the bride. Miller's questions struck the Rodriguez-Del Rios as odd because they had already gone over this information in their first visit—they thought they were there only to taste flavors for the filling and frosting. Miller asked who the groom was, and that was when she discovered it was a same-sex marriage. At that point, Miller excused herself for a moment, and then returned to tell them she was sorry, she could not supply their wedding cake, and she would refer them to *Gimme Some Sugar*. Eileen asked why, and Miller said she could not be part of a same-sex wedding due to her religious beliefs. Although Miller told them they could stay and complete the sampling, the couple did not see the point of doing so. A member of the group took the order form or the clipboard from Miller, and the group walked out.

The Rodriguez-Del Rios were shocked, humiliated and frustrated to learn Tastries would not provide them a wedding cake. Mireya felt rejected, and Eileen was upset and angry because they hurt Mireya. Eileen was concerned about removing her mother and Mireya from the situation. When the group got to the parking lot, they decided to get coffee to process what had happened. Members of the group posted about their experience on social media. After the group left the

coffee shop, Mireya and Eileen ran additional errands. Mireya began crying, which resulted in a bloody nose.

Within hours after the group left the bakery, Tastries started receiving threatening telephone calls and pornographic emails; Tastries subsequently lost corporate accounts, and people left low ratings on social media accounts. Miller and her employees received threats; Miller had to shorten Tastries's hours of operation. An article was written about the Rodriguez-Del Rios that was untrue; hurtful and threatening comments were made about the Rodriguez-Del Rios, Miller and Tastries.

The Rodriguez-Del Rios ultimately obtained a cake from another bakery, which was very similar to the cake they had wanted Tastries to provide. The plain, white cake was three tiers, two of which were made of Styrofoam, and adorned with real flowers. It was placed in the center of the reception venue for a few minutes when it was cut during the event.

IV. Procedural Background

The CRD filed suit against defendants in October 2018 seeking injunctive relief and monetary damages for violations of the UCRA. In September 2021, the parties each filed motions for summary judgment, which were denied. The matter proceeded to a bench trial in July 2022. The trial court issued a tentative ruling in favor of defendants, and the CRD requested a statement of decision pursuant to Code of Civil Procedure section 632. After both parties filed various objections, the trial court adopted its tentative ruling as its statement of decision, and judgment was entered on December 27, 2022.

In its statement of decision, the trial court concluded defendants' design standard that precluded selling wedding cakes for same-sex couples was facially neutral. The trial court explained defendants would not design or offer to any person a wedding cake that contradicts "God's sacrament of marriage between a man and a woman." The trial court found no evidence indicating the facially neutral policy was merely a pretext to discriminate. The trial court also concluded Miller's referral to *Gimme Some Sugar* constituted full and equal access under the UCRA pursuant to the trial court's interpretation of relevant case authority. In sum, the trial court concluded the CRD had failed to prove that defendants violated the UCRA.

The trial court then, as an alternative matter, reached defendants' First Amendment defenses. Although concluding the UCRA substantially burdened Miller's free exercise of religion, the trial court found it was bound by the California Supreme Court's decision in *North Coast Women's Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145, 81 Cal.Rptr.3d 708, 189 P.3d 959 (*North Coast*), which held the UCRA is a valid and neutral law of general applicability that survives strict scrutiny. (*North Coast, supra*, at p. 1158, 81 Cal.Rptr.3d 708, 189 P.3d 959.

As for defendants' First Amendment compelled speech defense, the trial court found defendants' wedding cakes were all artistic expression that constituted pure speech and amounted to expressive conduct that conveys support for a man and a woman uniting in the "sacrament" of marriage, that the union is a marriage and should be celebrated. The trial court

applied strict scrutiny and found there was no compelling government interest that justified forcing defendants to convey a message about marriage with which they disagreed.

DISCUSSION

I. The UCRA Violation

The UCRA mandates that “All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” (§ 51, subd. (b).)

“The purpose of the [UCRA] is to create and preserve ‘a nondiscriminatory environment in California business establishments by “banishing” or “eradicating” arbitrary, invidious discrimination by such establishments.’ (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 167, 59 Cal.Rptr.3d 142, 158 P.3d 718 (*Angelucci*), citing *Isbister v. Boys’ Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 75–76, 219 Cal.Rptr. 150, 707 P.2d 212.) ‘The [UCRA] stands as a bulwark protecting each person’s inherent right to “full and equal” access to “all business establishments.” (§ 51, subd. (b); see *Isbister, supra*, 40 Cal.3d at p. 75, 219 Cal.Rptr. 150, 707 P.2d 212.)’ (*Angelucci*, at p. 167, 59 Cal.Rptr.3d 142, 158 P.3d 718.) In enforcing the [UCRA], courts must consider its broad remedial purpose and overarching goal of deterring discriminatory practices by businesses.

(*Angelucci*, at p. 167, 59 Cal.Rptr.3d 142, 158 P.3d 718.; see *Isbister*, at p. 75, 219 Cal.Rptr. 150, 707 P.2d 212.) [The California Supreme Court has] consistently held that ‘the [UCRA] must be construed liberally in order to carry out its purpose.’ (*Angelucci*, at p. 167, 59 Cal.Rptr.3d 142, 158 P.3d 718; see *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 28, 219 Cal.Rptr. 133, 707 P.2d 195, (*Koire*).)” (*White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1025, 250 Cal.Rptr.3d 770, 446 P.3d 276 (*White*).)

While the UCRA expressly lists sex, race and other types of protected-characteristic discrimination, its list is illustrative rather than restrictive, and its protection against discrimination is not confined to the expressly articulated classes. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 732, 180 Cal.Rptr. 496, 640 P.2d 115 (*Marina Point*) [the UCRA’s “language and its history compel the conclusion that the Legislature intended to prohibit *all arbitrary discrimination by business establishments*,’ “regardless of whether the ground of discrimination is expressly set forth in the statute]; *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1160–1169, 278 Cal.Rptr. 614, 805 P.2d 873 (*Harris*) [establishing analytical framework for determining whether unenumerated protected class is cognizable under the UCRA].)

“In general, a person suffers discrimination under the [UCRA] when the person presents himself or herself to a business with an intent to use its services but encounters an exclusionary policy or practice that prevents him or her from using those services.” (*White*, *supra*, 7 Cal.5th at p. 1023, 250 Cal.Rptr.3d 770, 446 P.3d 276.) Unless an UCRA claim is based on an

Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq. (ADA)) violation, a plaintiff is required to establish the defendant is a business enterprise that intentionally discriminates against and denies the plaintiff full and equal treatment of a service, advantage or accommodation based on the plaintiff's protected status. (Civ. Code, § 51, subd. (b); *Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910, 922, 313 Cal.Rptr.3d 330 (*Liapes*); *Martinez v. Cot'n Wash, Inc.* (2022) 81 Cal.App.5th 1026, 1036, 297 Cal.Rptr.3d 712 ["Unless an [UCRA] claim is based on an ADA violation," a plaintiff must prove intentional discrimination].) Intentional discrimination requires proof of "willful, affirmative misconduct." (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 853, 31 Cal.Rptr.3d 565, 115 P.3d 1212 (*Koebke*), quoting *Harris, supra*, 52 Cal.3d at p. 1172, 278 Cal.Rptr. 614, 805 P.2d 873.) To meet this standard, the plaintiff must show more than the disparate impact of a facially neutral policy on a particular protected group—e.g., establishing the policy was a pretext for discriminatory intent or was applied in a discriminatory manner. (*Koebke, supra*, at pp. 854–855, 31 Cal.Rptr.3d 565, 115 P.3d 1212.)

Generally, policies that make a facial distinction based on an enumerated protected characteristic have been held to be unlawful as arbitrary, invidious or unreasonable discrimination. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 32–33, 219 Cal.Rptr. 133, 707 P.2d 195 (*Koire*) [facially discriminatory pricing policies favoring women unlawful under the UCRA]; see also *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175–176, 59 Cal.Rptr.3d 142, 158 P.3d 718 (*Angelucci*) [pricing policies making facial distinction on the basis of sex violate the UCRA; the

plaintiffs sufficiently alleged injury when such a policy was applied to them].) Likewise, policies that make a facial distinction based on an unenumerated characteristic may be found unlawful if the distinction constitutes “arbitrary, invidious or unreasonable discrimination.”⁴ (*Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386, 1398, 195 Cal.Rptr.3d 706; see *Liapes, supra*, 95 Cal.App.5th at p. 926, 313 Cal.Rptr.3d 330 [program and algorithm that facially excludes women and older people from receiving ads combined with evidence of disparate impact adequately alleged violation of the UCRA]; *Marina Point, supra*, 30 Cal.3d at p. 745, 180 Cal.Rptr. 496, 640 P.2d 115 [exclusion of children from an apartment complex unlawful under the UCRA].) Strong public policy based on a compelling societal interest, typically evidenced by statutory enactments, may support as reasonable (and thus not arbitrary) an otherwise prohibited discriminatory distinction, such as, for example, excluding children from bars. (*Koire, supra*, 40 Cal.3d at p. 31, 219 Cal.Rptr. 133, 707 P.2d 195; accord, *Marina Point, supra*, at pp. 741–742, 180 Cal.Rptr. 496, 640 P.2d 115.)

A. Intentional Discrimination

In concluding defendants did not intentionally discriminate for purposes of the UCRA, the trial court found Miller’s “*only* intent, her only motivation, [in refusing the Rodriguez-Del Rios a wedding cake] was fidelity to her sincere Christian beliefs”—a motivation

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

the trial court concluded was not unreasonable or arbitrary under the statute. The CRD argues that, where a policy facially discriminates on the basis of a protected characteristic, as the wedding cake design standard does here, liability does not depend on *why* someone intentionally discriminates. The CRD contends the trial court's reliance on Miller's sincere religious beliefs as demonstrating no malice toward same-sex couples is irrelevant and misinterprets the standard for proving intentional discrimination.

Defendants contend the design standard at issue is facially neutral because, as the trial court concluded, it applies equally to everyone, regardless of sexual orientation: "Miller and Tastries do not design and do not offer to *any* person—regardless of sexual orientation—custom wedding cakes that 'contradict God's sacrament of marriage between a man and a woman.'" At best, defendants argue, the CRD presented evidence of a disparate impact based on sexual orientation stemming from a facially neutral policy, which is insufficient to show intentional discrimination under the UCRA. Moreover, defendants argue, there is no other evidence that supported a finding of intentional discrimination because the trial court found the design standards were not created or applied as a pretext to discriminate or to make a distinction based on a person's sexual orientation.

1. Tastries's Design Standard is Facially Discriminatory

A facially discriminatory policy is one which on its face applies less favorably to a protected group. (See, e.g., *Community House, Inc. v. City of Boise* (9th Cir. 2007) 490 F.3d 1041, 1048.) A facially neutral policy

applies equally to all persons; a disparate impact analysis “relies on the *effects* of a facially neutral policy on a particular group” (*Koebke, supra*, 36 Cal.4th at p. 854, 31 Cal.Rptr.3d 565, 115 P.3d 1212), and “it requires inferring discriminatory intent solely from those effects” (*Liapes, supra*, 95 Cal.App.5th at p. 925, 313 Cal.Rptr.3d 330). Here, there was no factual dispute as to the literal contents of Tastries’s design standards for the trial court to resolve, nor was there any dispute that Miller refused to provide a wedding cake to the Rodriguez-Del Rios pursuant to those standards. The CRD contends the trial court erred by concluding the standard at issue applied equally to everyone—i.e., that it was facially neutral.

In this context, whether a business establishment’s undisputed written policy is facially neutral or discriminatory under the UCRA involves application of the rule of law to the relevant and undisputed facts. As such, our review on this specific issue is *de novo*. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799, 35 Cal.Rptr.2d 418, 883 P.2d 960 [“When the decisive facts are undisputed, we are confronted with a question of law and are not bound by the findings of the trial court.”]; see *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 385, 112 Cal.Rptr.3d 853, 235 P.3d 152 (*Haworth*) [where legal question predominates in mixed question of law and fact, appellate review is *de novo*]; see also *Koebke, supra*, 36 Cal.4th at p. 854, 31 Cal.Rptr.3d 565, 115 P.3d 1212 [determining in summary judgment context that country club’s membership benefits policy was facially neutral].)

Here, Miller developed standards of service that restrict the design of products Tastries will create *and* the “intended purpose” for which the product will be

used. The standards of service list six types of requests for a preordered baked good that Tastries will not honor: (1) portraying explicit sexual content; (2) promoting marijuana or casual drug use; (3) featuring alcohol products or drunkenness; (4) presenting anything offensive, demeaning or violent; and (5) depicting gore, witches, spirits, and satanic or demonic content. These standards focus on the design of the product. The sixth and final category, however, specifies Tastries will not provide any preordered baked goods that “violate fundamental Christian princip[les],” and specifies “wedding cakes must not contradict God’s sacrament of marriage between a man and a woman.”

The trial court concluded this last standard, which was the basis for Miller’s refusal of Rodriguez-Del Rios’ wedding cake order, applies to everyone equally because Tastries will not sell a preordered cake to *anyone* for purposes of a same-sex wedding. But the sixth standard, which precludes a wedding cake whose design *or intended purpose* “contradict[s] God’s sacrament of marriage between a man and a woman,” is a status-based limitation because it expressly precludes a purpose that is defined around, and indelibly tied to, the sexual orientation of the end user for whom the cake is sold. That is what distinguishes it from all the other design standards concerning the design of the cake, and instead expressly targets an intended purpose inextricably tied to a protected characteristic.⁵ Different from the other standards,

⁵ To that end, Miller’s refusal to sell a so-called “divorce” cake as an example of how the policy applies equally to everyone is an inapt comparison. When Miller refused to make a cake for a gentleman who wanted to make a surprise request for a divorce

the preclusion on providing wedding cakes for the purpose of same-sex marriage cannot be applied until and unless the same-sex status of the marrying couple is ascertained because *that* is the criterion on which it pivots. (Cf. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n* (2018) 584 U.S. 617, 672, 138 S.Ct. 1719, 201 L.Ed.2d 35 (dis. opn. of Ginsberg, J.) (*Masterpiece*) [observing that baker’s declination “to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it” is distinct from cakes declined due to demeaning message requested, which did not turn on protected characteristic of the customer].) And, because this is so, it is a standard that does not apply “alike to persons of every ... sexual orientation” (§ 51, subd. (c).) Indeed, Miller testified she would have provided to a heterosexual couple the same cake she refused to provide to the Rodriguez-Del Rios under this standard.

The design standard is not transformed into a neutral policy simply because Tastries will sell *other* products (such as items in the bakery case or preordered baked goods not intended for same-sex weddings) to nonheterosexual customers. The UCRA “clearly is not limited to [wholly] exclusionary practices” but requires “equal treatment of patrons in all aspects of the business.” (*Koire, supra*, 40 Cal.3d at p. 29, 219 Cal.Rptr. 133, 707 P.2d 195.) Additionally, Tastries’s refusal to sell a wedding cake to anyone—regardless of sexual orientation—for the purpose of a same-sex wedding does not render the standard

during a wedding anniversary party, the prohibited purpose was not tied to and defined by the end user’s protected characteristics.

applicable alike to every person regardless of sexual orientation. Section 51, subdivision (e)(6), defines sexual orientation to include those persons associated with someone who has, or is perceived to have, that protected characteristic. As the CRD correctly contends, a customer buying a preordered cake for a same-sex wedding is doubtlessly associated with the same-sex couple who is marrying, and the refusal to furnish a product because it will be used by the customer to celebrate a same-sex wedding will invariably be based on that association.

Nor is the standard facially neutral because its limitation pertains to same-sex *marriage*. Drawing a distinction based on conduct (same-sex marriage), which is indelibly intertwined with a protected status (sexual orientation) has been rejected in several contexts. (See, e.g., *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez* (2010) 561 U.S. 661, 672, 689, 130 S.Ct. 2971, 177 L.Ed.2d 838 [no difference between organization's exclusion of those engaged in "unrepentant homosexual conduct" and exclusion of those based on their sexual orientation]; see also *Lawrence v. Texas* (2003) 539 U.S. 558, 575, 123 S.Ct. 2472, 156 L.Ed.2d 508 ["[w]hen homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination" (italics added)]; cf. *Bray v. Alexandria Women's Health Clinic* (1993) 506 U.S. 263, 270, 113 S.Ct. 753, 122 L.Ed.2d 34 [explaining some conduct is so tied to a particular group that targeting the conduct can be readily inferred as an attempt to disfavor the group by pointing out "[a] tax on wearing yarmulkes is a tax on Jews"].) Indeed, same-sex marriage has been recognized by the United

States Supreme Court as a fundamental expression of an individual's sexual orientation. (*Obergefell v. Hodges* (2015) 576 U.S. 644, 675, 135 S.Ct. 2584, 192 L.Ed.2d 609 [laws prohibiting gay marriage “impos[e] ... disability on gays and lesbians [and] serves to disrespect and subordinate them”]; *United States v. Windsor* (2013) 570 U.S. 744, 775, 133 S.Ct. 2675, 186 L.Ed.2d 808 [“[The federal Defense of Marriage Act (1 U.S.C. § 7)] singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty.”].)

Notably, the California Supreme Court considered this conduct/status distinction in the context of state marriage statutes and explained that “restricting marriage to a man and a woman cannot be understood as having merely a disparate impact on gay persons, but instead properly must be viewed as directly classifying and prescribing distinct treatment on the basis of sexual orientation. By limiting marriage to opposite-sex couples, the marriage statutes, realistically viewed, operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation. By definition, gay individuals are persons who are sexually attracted to persons of the same sex and thus, if inclined to enter into a marriage relationship, would choose to marry a person of their own sex or gender. A statute that limits marriage to a union of persons of opposite sexes, thereby placing marriage outside the reach of couples of the same sex, unquestionably imposes different treatment on the basis of sexual orientation.” (*In re Marriage Cases* (2008) 43 Cal.4th 757, 839–840, 76 Cal.Rptr.3d 683, 183 P.3d 384, fn. omitted, superseded by constitutional amend. as stated in *Hollingsworth v.*

Perry (2013) 570 U.S. 693, 701, 133 S.Ct. 2652, 186 L.Ed.2d 768.)

This reasoning applies with equal force here: a business policy that permits preordered wedding cake sales only for opposite-sex couples, while refusing those services to same-sex couples, unquestionably imposes differential treatment on the basis of sexual orientation. If a business refuses its services to and/or for same-sex couples, it realistically operates “clearly and directly to impose different treatment on gay individuals because of their sexual orientation.” (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 839, 76 Cal.Rptr.3d 683, 183 P.3d 384; cf. *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1155–1156, 51 Cal.Rptr.2d 700, 913 P.2d 909 [rejecting argument that refusing to rent to unmarried couple was aimed at assumptions about their sexual conduct rather than their marital status].)

Defendants draw a distinction between an exclusionary policy implemented because of a sincerely held religious belief about *marriage* and one aimed at individuals because of their sexual orientation. To conflate them, defendants argue, is a serious misstatement of Miller’s religious beliefs. We do not question the sincerity of Miller’s religious beliefs about marriage, and they are entitled to respect. But Miller’s good-faith religious basis for why she makes this distinction does not alter what the design standard requires on its face: disparate treatment in wedding cake service based on the sexual orientation of the end user. Thus, the legal issue for purposes of the UCRA concerns the implementation and application of a policy in a public-facing business establishment that facially excludes service to a

portion of the public because of a protected characteristic.

None of the facially neutral policies in other cases that defendants point to as analogous are comparable. For example, in *Turner v. Association of American Medical Colleges* (2008) 167 Cal.App.4th 1401, 85 Cal.Rptr.3d 94, the challenged policy involved the standards for administration of the medical college admissions test, including a time limit for each section of the test. (*Id.* at p. 1409, 85 Cal.Rptr.3d 94.) The plaintiffs, who had reading-related learning disabilities and/or attention deficit hyperactivity disorder, requested and were denied more time or a private room to take the medical college admissions test. (*Id.* at pp. 1404–1405, 85 Cal.Rptr.3d 94.) The court noted the administration standards were facially neutral because they extended to all applicants regardless of their membership in a particular group. (*Id.* at p. 1409, 85 Cal.Rptr.3d 94.)

The policy considered in *Koebke* was similarly neutral. (*Koebke, supra*, 36 Cal.4th at pp. 853–854, 31 Cal.Rptr.3d 565, 115 P.3d 1212.) There, a private country club maintained a policy that extended member benefits only to married spouses of members, which excluded same-sex partners who were prohibited by law from marrying at that time. The policy was deemed facially neutral because it applied equally to all unmarried individuals, regardless of their sexual orientation.⁶ (*Koebke, supra*, at p. 854, 31

⁶ The court held the plaintiff was entitled to pursue a discrimination claim based on *marital status* for the period of time following the passage of the California Domestic Partner Rights and Responsibilities Act of 2003 (Fam. Code, § 297 et seq.), and held the plaintiff was able to pursue an as-applied

Cal.Rptr.3d 565, 115 P.3d 1212.) The denial of member benefits could be made without knowing anything about the sexual orientation of the person seeking them because the policy applied to anyone who was not married to a member.

Here, the policy's application hinges not on the act of marriage, but on the same-sex status of the couple to be married. Thus, the policy's purposeful exclusion of same-sex couples is facial discrimination *because of* sexual orientation. When Miller refused to supply the cake the Rodriguez-Del Rios ordered, she did so *because* they were not a heterosexual couple. The issue is not *why* Miller created and applied the policy, but that it facially precludes some services based on a protected characteristic. As adoption and application of the policy was purposeful and the policy was facially discriminatory, there can be no other conclusion but that Miller's refusal under the policy was intentionally discriminatory.

2. Reason for Adopting the Facially Discriminatory Policy is Not Relevant

In concluding intentional discrimination was not proven, the trial court found "Miller's *only* intent, her only motivation, was fidelity to her sincere Christian beliefs. Miller's only motivation in creating and following the design standards, and in declining to involve herself or her business in designing a wedding cake for a marriage at odds with her faith, was to observe and practice her own Christian faith" and that

discrimination claim based on sexual orientation under the UCRA prior to passage of the Domestic Partner Rights and Responsibilities Act. (*Koebke, supra*, 36 Cal.4th at pp. 851–852, 31 Cal.Rptr.3d 565, 115 P.3d 1212.)

motivation “was not unreasonable, or arbitrary, nor did it emphasize irrelevant differences or perpetuate stereotypes.”

This line of reasoning appears premised on the conclusion that Tastries’s design standard regarding wedding cakes is facially neutral, evidencing only disparate impact insufficient by itself to show intentional discrimination. (*Harris, supra*, 52 Cal.3d at p. 1175, 278 Cal.Rptr. 614, 805 P.2d 873.) However, when the design standard is rightfully understood as facially discriminatory, the fact that Miller’s adoption of the discriminatory policy was driven by her sincerely held religious beliefs rather than malice or ill will is irrelevant to the issue of intentional discrimination. (Cf. *Smith v. Fair Employment & Housing Com.*, *supra*, 12 Cal.4th at pp. 1160–1161, 51 Cal.Rptr.2d 700, 913 P.2d 909 [assertion of sincerely held religious belief as the basis to deny unmarried couple housing evaluated only as a free exercise defense, and not in determining whether discrimination because of marital status constituted a violation of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) (FEHA)].)⁷ If it were

⁷ At the time of the refusal to rent in *Smith v. Fair Employment & Housing Com.* and currently, it is unlawful under FEHA for the owner of any housing accommodation to discriminate against any person because of marital status. (Gov. Code, § 12955, subd. (a); Stats. 1980, ch. 992, § 4, p. 3154.) In concluding that Smith’s refusal to rent to an unmarried couple violated FEHA, and thus supported the Fair Employment and Housing Commission’s administrative level decision that the landlord violated the statute, *Smith* deemed it unnecessary to decide whether the UCRA—which did not expressly enumerate marital status as a protected characteristic at that time—had the same effect.

otherwise, the assertion of a sincerely held religious belief (which is nonjusticiable) as justification for a facially discriminatory policy would always result in a finding of nonintentionality, absent direct evidence of pretext.⁸ This is why the intentionality required by the UCRA relates to the purposefulness of the discriminatory action; it does not necessarily entail malice or a bias-driven rationale for the discriminatory act or policy. (Black’s Law Dict. (12th ed. 2024) p. 964, col. 1 [intentional means “[d]one with the aim of carrying out a given act; performed or brought about purposely”].)

It is undisputed that Miller purposefully refused to supply any wedding cake to the Rodriguez-Del Rios, and that she did so based on Tastries’s facially discriminatory design standard, which she created. In such an instance, Miller’s underlying incentive for purposely adopting and applying the facially discriminatory policy does not affect, nor is it relevant to, the intentionality of the discrimination. (Cf. *Los Angeles Dept. of Water & Power v. Manhart* (1978) 435 U.S. 702, 705, 716, 98 S.Ct. 1370, 55 L.Ed.2d 657 [in the context of tit. VII of the Civ. Rights Act of 1964 (42 U.S.C. § 2000e et seq.), requirement that female employees make larger contributions to pension fund was a facially discriminatory policy despite that it was purportedly based on actuarial data related to lifespan and not on any malice or stereotyping].)

(*Smith v. Fair Employment & Housing Com.*, *supra*, 12 Cal.4th at pp. 1160–1161, fn. 11, 51 Cal.Rptr.2d 700, 913 P.2d 909.)

⁸ The potential implications of that proposition are astonishing in their breadth, and would undercut the entire purpose of the UCRA.

The standard jury instruction for UCRA claims (CACI No. 3060) underscores this conclusion. The instruction requires a plaintiff to prove (1) the defendant denied the plaintiff full and equal accommodations, advantages, facilities, privileges, or services; (2) that a substantial motivating reason for the defendant's conduct was the plaintiff's membership in a protected class; (3) that the plaintiff was harmed; and (4) that the defendant's conduct was a substantial factor in causing the plaintiff's harm. (CACI No. 3060.) The use notes for CACI No. 3060 indicate the term "substantial motivating reason" was imported from the employment discrimination context under FEHA as articulated in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232, 152 Cal.Rptr.3d 392, 294 P.3d 49, and was meant to express both the intent and causation between the protected classification and the defendant's conduct.⁹ Decisional authority in the FEHA context holds a "substantial motivating reason" need not be predicated on malice or ill will. (*Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 130–131, 199 Cal.Rptr.3d 462 [where there is direct evidence of employer's motivation, substantial motivating reason does not require ill will].)¹⁰

⁹ CACI No. 2507 explains that a "substantial motivating reason" "is a reason that actually contributed to the [discriminatory act]. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the [discriminatory act]."

¹⁰ Defendants provided CACI No. 3060 to the trial court, and argued BAJI No. 7.92, which likewise uses the *substantial motivating factor* standard, states the elements required by the UCRA. Neither party asserts "substantial motivating reason"

Here, the design standard regarding wedding cakes specifically applies and operates around the sexual orientation of the couple to be married—it cannot even be applied unless or until defendants have ascertained the same-sex status of the couple. Thus, a substantial motivating reason for refusing service under the policy necessarily was *because of* the sexual orientation of the couple, even though Miller bears no ill will or malice toward those of nonheterosexual orientation generally.

In sum, we conclude Tastries’s sixth design standard pertaining to wedding cakes is facially discriminatory. The evidence is undisputed that Miller purposefully created the policy and applied it to refuse to supply a cake for the Rodriguez-Del Rios. Because the denial was based on a policy that facially discriminated on the basis of sexual orientation, a substantial motivating reason for the denial was necessarily because of the sexual orientation of the couple. The underlying rationale for the policy—Miller’s sincerely held religious beliefs—does not make the facially discriminatory policy any less violative of the UCRA.

B. Referral to Separate and Independent Business Was Not Full and Equal Access Under the UCRA

The trial court found that when Miller determined she was unable to design the cake, she immediately referred the Rodriguez-Del Rios to “another good bakery,” but the couple declined her referral. The trial court then relied on *North Coast, supra*, 44 Cal.4th

standard is incorrectly applied to UCRA claims, and, as such, we do not comment on that issue.

1145, 81 Cal.Rptr.3d 708, 189 P.3d 959 and *Minton v. Dignity Health* (2019) 39 Cal.App.5th 1155, 252 Cal.Rptr.3d 616 (*Minton*) to conclude a refusal of service could satisfy the UCRA’s “full and equal access” requirement when accompanied by an immediate referral to a different business entity that served comparable products. The court applied this interpretation of the UCRA’s full and equal access requirement to the facts it found, and determined Miller’s immediate referral to *Gimme Some Sugar* constituted full and equal access under the UCRA because that bakery was analogous to the proposed alternative facility in *Minton*. The CRD contends the trial court misinterpreted this case law, and it applied an incorrect rule of law to the facts.

1. Standard of Review

In reviewing mixed questions of law and fact where we must determine whether the trial court properly applied the rule of law to the relevant facts, the review is conducted independently when the question is predominantly legal. (See *Haworth, supra*, 50 Cal.4th at p. 384, 112 Cal.Rptr.3d 853, 235 P.3d 152.) Here, because the “inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently.” (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 271, 32 Cal.Rptr.2d 807, 878 P.2d 566.)

2. Analysis

The trial court’s conclusion that defendants provided the Rodriguez-Del Rios full and equal access through a referral to another bakery was predicated

on its interpretation of *North Coast* and *Minton*, and so we begin with a brief overview of those cases.

In *North Coast*, an unmarried lesbian woman (Benitez) was denied intrauterine insemination (IUI) by physicians who had religious objection to performing the procedure on Benitez. (*North Coast, supra*, 44 Cal.4th at pp. 1150–1152, 81 Cal.Rptr.3d 708, 189 P.3d 959.) She was ultimately referred to a physician outside North Coast’s medical practice, and then filed suit against North Coast and its physicians, seeking damages and injunctive relief for, inter alia, sexual orientation discrimination in violation of the UCRA. (*North Coast, supra*, at p. 1152, 81 Cal.Rptr.3d 708, 189 P.3d 959.) Among their affirmative defenses, the defendants asserted the alleged misconduct, if any, was protected by the right of free speech and the freedom of religion under both the federal and state Constitutions. (*North Coast, supra*, at pp. 1152–1153, 81 Cal.Rptr.3d 708, 189 P.3d 959.)

Benitez moved for summary adjudication of that specific affirmative defense, which the trial court granted, ruling that neither the federal nor the state Constitutions provide a religious defense to a claim of sexual orientation discrimination under the UCRA. (*North Coast, supra*, 44 Cal.4th at p. 1153, 81 Cal.Rptr.3d 708, 189 P.3d 959.) In granting the defendant physicians’ writ petition, the Court of Appeal concluded summary adjudication was improper as to the physicians because it effectively precluded them from presenting evidence that they refused to perform the IUI for Benitez due to her unmarried status, as marital status was not an expressly protected characteristic at the time of the refusal. (*Ibid.*)

The Supreme Court agreed with the trial court that the federal Constitution's First Amendment right to the free exercise of religion did not exempt the defendant physicians in the case before it "from conforming their conduct to the [UCRA's] antidiscrimination requirements even if compliance poses an incidental conflict with [the] defendants' religious beliefs. (*North Coast, supra*, 44 Cal.4th. at p. 1156, 81 Cal.Rptr.3d 708, 189 P.3d 959, citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (*Lukumi*); accord, *Employment Div. Dept. of Human Res. of Ore. v. Smith* (1990) 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (*Smith*).) Moreover, "[f]or purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose. Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition." (*North Coast, supra*, at p. 1157, 81 Cal.Rptr.3d 708, 189 P.3d 959, quoting *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 558–559, 10 Cal.Rptr.3d 283, 85 P.3d 67 (*Catholic Charities*).) In turning to the California Constitution's free exercise guarantee (Cal. Const., art. I, § 4), the court assumed the physicians' religious exercise had been substantially burdened, further assumed strict scrutiny applied and concluded it was satisfied because the UCRA "furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal." (*North Coast, supra*, at p. 1158, 81 Cal.Rptr.3d 708, 189 P.3d 959.)

After reaching this conclusion, the court observed that to avoid any conflict between their religious beliefs and the UCRA, the defendant physicians could “simply refuse to perform the IUI medical procedure at issue here for any patient of North Coast, the physician’s employer. Or because they incur liability under the [UCRA] if they infringe upon the right to the ‘full and equal’ services of North Coast’s medical practice [citations], defendant physicians can avoid such a conflict by ensuring that every patient requiring IUI services receives ‘full and equal’ access to that medical procedure through a North Coast physician lacking defendants’ religious objections.” (*North Coast, supra*, 44 Cal.4th at p. 1159, 81 Cal.Rptr.3d 708, 189 P.3d 959.)

The high court held the trial court’s grant of summary adjudication correctly narrowed the issues in the case by disposing of the defendant physicians’ contention that their constitutional rights to free speech and the free exercise of religion exempted them from complying with the UCRA’s prohibition against sexual orientation discrimination while still leaving them free to offer evidence that their religious objections stemmed from Benitez’s unmarried status. (*North Coast, supra*, 44 Cal.4th at p. 1161, 81 Cal.Rptr.3d 708, 189 P.3d 959.)

In *Minton*, the plaintiff (Minton) was a transgender man diagnosed with gender dysphoria. (*Minton, supra*, 39 Cal.App.5th at p. 1158, 252 Cal.Rptr.3d 616.) To treat the gender dysphoria, Minton’s physician and two mental health professionals considered a hysterectomy medically necessary, and his physician scheduled the surgery at Mercy San Juan Medical Center (Mercy), a hospital owned and

operated by Dignity Health. (*Id.* at p. 1159, 252 Cal.Rptr.3d 616.) After the surgery was scheduled, Mercy’s president notified Minton’s physician the procedure had been cancelled and that she would “never” be allowed to perform the scheduled hysterectomy because it was a course of treatment for gender dysphoria as opposed to any other medical diagnosis. (*Ibid.*) Subsequently, the president suggested the physician obtain emergency admitting privileges at Methodist Hospital, a non-Catholic Dignity Health hospital about 30 minutes from Mercy. (*Id.* at pp. 1159, 1164, 252 Cal.Rptr.3d 616.) The physician was able to secure the privileges and performed the hysterectomy three days after the surgery had originally been scheduled. (*Id.* at p. 1159, 252 Cal.Rptr.3d 616.)

Minton filed suit, alleging a violation of the UCRA for discrimination based on his gender identity. (*Minton, supra*, 39 Cal.App.5th at p. 1158, 252 Cal.Rptr.3d 616.) The trial court sustained Dignity Health’s demurrer to an amended complaint, concluding Minton had failed to allege facts showing Dignity Health’s conduct violated the UCRA. (*Minton, supra*, at p. 1159, 252 Cal.Rptr.3d 616.) The trial court cited *North Coast* and reasoned it was not reasonably possible Minton could allege that his receiving the procedure he desired from the physician he selected to perform it three days later than planned at a different hospital than he desired deprived him of full and equal access to the procedure. (*Minton, supra*, at p. 1161, 252 Cal.Rptr.3d 616.)

The Court of Appeal reversed. (*Minton, supra*, 39 Cal.App.5th. at p. 1163, 252 Cal.Rptr.3d 616.) The court pointed out Minton had *not* alleged that

providing him with access to alternative hospital facilities violated the UCRA; rather, his complaint was that Dignity Health violated the UCRA when it cancelled the procedure and told his doctor she would never be allowed to perform the hysterectomy. (*Minton, supra*, at p. 1164, 252 Cal.Rptr.3d 616.) That refusal, the appellate court noted, was not “accompanied by advice that the procedure could instead be performed at a different nearby Dignity Health hospital.” (*Ibid.*) The court reasoned that when Minton’s surgery was cancelled, he was subjected to discrimination. (*Ibid.*) “Dignity Health’s subsequent reactive offer to arrange treatment elsewhere was not the implementation of a policy to provide full and equal care to all persons at comparable facilities not subject to the same religious restrictions that applied at Mercy.” (*Id.* at p. 1165, 252 Cal.Rptr.3d 616.)

On examination of these cases, neither *North Coast* nor *Minton* support the trial court’s conclusion that full and equal access under the UCRA can be accomplished by referral to a separate and independent business entity. We, like *Minton*, do not question *North Coast*’s observation that “ensuring” a patient full access to medical treatment through an alternative physician *at the same hospital* could constitute full and equal service. (*North Coast, supra*, 44 Cal.4th at p. 1159, 81 Cal.Rptr.3d 708, 189 P.3d 959.) But *North Coast* never suggested that full and equal access under the UCRA could be satisfied by simply identifying for the patient an independent hospital that would offer comparable treatment. Indeed, the full and equal access to which the high court referred was the right to the “full and equal” access to that medical procedure through a *North*

Coast physician” (*North Coast*, *supra*, at p. 1159, 81 Cal.Rptr.3d 708, 189 P.3d 959, italics added.)

Nor did *Minton* extend *North Coast* in such a manner. First, the issue addressed in *Minton* was *not* whether Dignity Health’s “subsequent reactive offer to arrange treatment” at a different hospital constituted full and equal access under the UCRA. (*Minton*, *supra*, 39 Cal.App.5th at p. 1165, 252 Cal.Rptr.3d 616.) *Minton* expressly limited its holding to “narrower grounds”: “Without determining the right of Dignity Health to provide its services in such cases at alternative facilities, as it claims to have done here, we agree that [the] plaintiff’s complaint alleges that Dignity Health initially failed to do so and that its subsequent rectification of its denial, while likely mitigating [Minton’s] damages, did not extinguish his cause of action for discrimination in violation of the [UCRA].” (*Id.* at p. 1158, 252 Cal.Rptr.3d 616.) It is axiomatic that an opinion is not authority for a proposition not considered, and the scope of “[l]anguage used in any opinion [must] be understood in the light of the facts and issues then before the court” (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2, 39 Cal.Rptr. 377, 393 P.2d 689; see *California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1043, 232 Cal.Rptr.3d 64, 416 P.3d 53.) We cannot agree that reliance on *Minton* to determine whether Miller’s referral fulfilled the UCRA’s full and equal access requirement is appropriate.

Second, even if *Minton* could be read to suggest in dicta that Dignity Health’s alternative treatment proposal at a different hospital could have constituted full and equal access under the UCRA had it been

timely offered, it was contemplating a related hospital facility *also* owned and operated by Dignity Health. (*Minton, supra*, 39 Cal.App.5th at p. 1160, 252 Cal.Rptr.3d 616.) Moreover, it was a facility where Minton’s chosen physician could obtain emergency admitting privileges, and where the time-sensitive procedure was performed only three days later than originally scheduled by Minton’s physician. Not only did *Minton* expressly decline to address whether and what type of hospital alternative would constitute full and equal access, any suggestion the alternative would have sufficed if timely offered is necessarily cabined to the specific facts alleged, which bear no similarity to Miller’s referral here.

The record reflects Miller had confirmed with *Gimme Some Sugar* at some point prior to the events in this case that it would provide wedding cake products and services to same-sex couples whom Miller referred, but there is no evidence a referral under that agreement would ensure the Rodriguez-Del Rios a wedding cake on the needed date, let alone the wedding cake they wanted to order from Tastries. It is irrelevant the trial court found the referral bakery to be a “comparable, good bakery.” Merely identifying a separate bakery that is willing, in the abstract, to provide a wedding cake for same-sex couples says nothing about its ability to ensure a “comparable” wedding cake in terms of taste, design, cost or date availability. Indeed, testimony established the Rodriguez-Del Rios had already rejected *Gimme Some*

Sugar’s cakes as overly sweet before they met with Miller.¹¹

Discriminatorily denying service and then telling would-be customers they may take their business down the street (or farther) to a separate, unassociated establishment where they may be served by way of referral in no way ensures full and equal access to the product or service at the same price and under the same conditions. Miller’s successful referral of another same-sex couple to *Gimme Some Sugar* in the past does not change this reality. Moreover, a referral to a separate and independent business subjects the customer to “the deprivation of personal dignity that surely accompanies denials of equal access to public establishments” that public accommodation laws like the UCRA are generally designed to address. (*Atlanta Motel v. United States* (1964) 379 U.S. 241, 250, 85 S.Ct. 348, 13 L.Ed.2d 258; see *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 625, 104 S.Ct. 3244, 82 L.Ed.2d 462.)

An analogous application of *North Coast*’s observation as to an UCRA-compliant alternative might exist if Miller herself, as an employee of Tastries, declined to do any work on the cake and turned the project over to another Tastries employee, ensuring continuity of service and price with access to the same product. But extending *North Coast* to encompass Miller’s referral to a wholly separate and independent business is not only an unrecognizable

¹¹ It is irrelevant that Miller would have referred the Rodriguez-Del Rios to yet another bakery had the couple informed her they did not want a cake from *Gimme Some Sugar*. The same issues of ensuring full and equal service access with a referral to any other separate business entity.

distortion of the alternative *North Coast* articulated, it fundamentally undermines the UCRA’s purpose to stand “as a bulwark protecting each person’s inherent right to ‘full and equal’ access to ‘all business establishments.’” (*Angelucci, supra*, 41 Cal.4th at p. 167, 59 Cal.Rptr.3d 142, 158 P.3d 718.) There is no evidence Miller’s referral to *Gimme Some Sugar* involved anything more than ascertaining ahead of time this bakery was willing to provide service for same-sex weddings Miller would not serve—nothing showed an agreement that *Gimme Some Sugar* necessarily would or could provide the specific cake (by taste and design) desired, on the date needed, for the price Tastries offered.

As a practical matter, this referral is indistinguishable from hanging a sign in Tastries’s window saying *no cakes for same-sex weddings provided here—try Gimme Some Sugar; we have confirmed it has no objection to providing service*. Under a referral practice like this, any business establishment would be authorized to refuse goods or services to customers based on any type of protected characteristic so long as they could point to a separate business confirmed to be theoretically willing to provide what the referring business subjectively considers to be similar goods or services. Embracing such a referral model would invite and endorse an untold number of discriminatory practices wholly antithetical to the UCRA’s purpose (*White, supra*, 7 Cal.5th at p. 1025, 250 Cal.Rptr.3d 770, 446 P.3d 276), effectively repealing the UCRA by judicial fiat. Whatever alternative offer of service might otherwise comport with the UCRA as articulated in *North Coast*, Miller’s referral to a separate and independent business did *not* ensure full and equal access to

defendants' goods and services, and we emphatically reject it as compliance with the UCRA.¹²

**C. The UCRA Provides No Exemption for
Disparate Treatment on the Basis of
Sexual Orientation**

Defendants also argue, alternatively, that Miller's conduct is exempt from the UCRA for constitutional and public policy reasons.

Defendants maintain Miller's conduct comes within section 51, subdivision (c), which provides that section 51 "shall not be construed to confer any right or privilege on a person that is conditioned or limited by law" According to defendants, because they maintain that compelling them to provide certain services to same-sex couples would violate their rights under the federal and state Constitutions, the UCRA is not applicable pursuant to section 51, subdivision (c). The First Amendment constitutes an affirmative defense to the UCRA on which defendants carry the burden of proof. (See generally Gaab & Reese, Cal. Practice Guide: Civil Procedure Before Trial, Claims and Defenses (The Rutter Group 2024) ch. 14(III)-C) ¶ 14:840.) Defendants' constitutional defenses must be considered separately; section 51, subdivision (c), does

¹² Defendants assert that an unbounded right to refer customers to other businesses under the UCRA *must* be afforded to those with conflicting religious beliefs to avoid a clash with First Amendment rights. But that begs the primary question of whether a refusal on religious grounds is a constitutionally protected activity that overrides a public accommodations law. That cannot be answered in the abstract, but must be instead considered in the context of the particular constitutional right asserted, subject to the applicable analytical framework. We take up defendants' constitutional defenses *post*.

not operate as an exemption feature for First Amendment defenses. (See *Pines v. Tomson* (1984) 160 Cal.App.3d 370, 387, 206 Cal.Rptr. 866 [whether First Amend. warrants an exclusion from the UCRA addressed separately and not as an exemption].)

Defendants next contend Miller's conduct comes within a public policy exception to the UCRA for distinctions that are nonarbitrary because the distinction made here was based on Miller's sincerely held religious beliefs. Some disparities in treatment have been recognized by decisional authority as reasonable under the UCRA because they are supported by compelling societal interests. (See, e.g., *Koire, supra*, 40 Cal.3d at pp. 36–38, 219 Cal.Rptr. 133, 707 P.2d 195 [observing price discounts for children and elderly are supported by social policy considerations evidenced in legislative enactments that address special needs of these populations]; *Starkman v. Mann Theatres Corp.* (1991) 227 Cal.App.3d 1491, 1499–1500, 278 Cal.Rptr. 543 (*Starkman*) [theater discounts for children and seniors help seniors and children participate in events that might not be affordable otherwise]; *Sargoy v. Resolution Trust Corp.* (1992) 8 Cal.App.4th 1039, 1046, 10 Cal.Rptr.2d 889 (*Sargoy*) [higher deposit interest rates for seniors supported by public policy of assisting senior citizens]; *Sunrise Country Club Assn. v. Proud* (1987) 190 Cal.App.3d 377, 382, 235 Cal.Rptr. 404 (*Proud*) [setting aside 10 swimming pools out of at least 21 for adults only was reasonable distinction based on danger to children in adult areas and adult areas largely populated by retired or semi-retired adults].)

However, the decisional authority defendants point to as recognizing lawful distinctions in treatment under the UCRA relate nearly exclusively to unenumerated characteristics *or*, in a singular case, revolve around a distinction based on disability expressly recognized by the Legislature (*Chabner v. United of Omaha Life Ins. Co.* (9th Cir. 2000) 225 F.3d 1042, 1050 [Ins. Code, § 10144 expressly permits life insurance premium rate differential based on actuarial tables]), none of which include any distinction in treatment based on sexual orientation. Narrow distinctions based on age, for example, have been recognized as lawful where compelling societal interests justify a difference in treatment, which are frequently evidenced by statute. (See *Koire, supra*, 40 Cal.3d at p. 38, 219 Cal.Rptr. 133, 707 P.2d 195 [no strong public policy supported sex-based price discounts similar to those recognized on the basis of age].) Defendants point to no compelling societal interests that support a business establishment making a distinction in service based on sexual orientation. Rather, there is strong public policy favoring the elimination of distinctions based on sexual orientation with the UCRA being one such statute evidencing it. (See, e.g., Gov. Code, § 12920 [barring sexual orientation discrimination in employment]; *id.*, § 12955, subd. (a) [barring sexual orientation discrimination in housing]; *id.*, § 11135, subd. (a) [barring sexual orientation discrimination in programs operated by, or that are receiving financial assistance from, the state].)

Defendants assert that public policy “counsels against categorizing a good faith religious belief held by millions of Americans as invidious discrimination, particularly where, as here, Miller’s policy applies to

all customers regardless of sexual orientation.” But this contention misapprehends the UCRA. First, Miller’s policy, as already explained, does *not* apply equally to all because the policy refuses service based on an “intended purpose” that is inextricably rooted in sexual orientation and refuses certain services for certain people on that basis.

Second, it is the distinction that is legally arbitrary and unreasonable under the UCRA, not Miller’s sincerely held religious beliefs. (*Koire, supra*, 40 Cal.3d at p. 32, 219 Cal.Rptr. 133, 707 P.2d 195 [gender-based pricing distinction itself was unreasonable and arbitrary, not the rational self-interested profit motive spurring its creation]; cf. *Marina Point, supra*, 30 Cal.3d at pp. 740–741, fn. 9, 180 Cal.Rptr. 496, 640 P.2d 115 [disapproving as overbroad the proposition that discriminatory policy is not actionable under the UCRA if it proceeds from a motive of rational self-interest and noting “an entrepreneur may find it economically advantageous to exclude all homosexuals, or alternatively all nonhomosexuals, from his restaurant or hotel, but such a ‘rational’ economic motive would not, of course, validate the practice”].) When public policy objectives are judicially recognized as justifying certain distinctions (almost exclusively in unenumerated protected characteristics, like age), it is the compelling societal interest the distinction itself serves that is evaluated, not the underlying rationale for drawing the distinction.

D. Conclusion

Because we conclude defendants’ design standard regarding wedding cakes is facially discriminatory, the trial court’s reliance on the absence of malice or ill

will in determining the CRD had not proven intentional discrimination was irrelevant and reflected a misapplication of the intentionality requirement. Further, we conclude the UCRA's full and equal access requirement is not satisfied by the referral to a separate business. Finally, there is no compelling societal interest that supports making a distinction based on sexual orientation as reasonable or nonarbitrary under the UCRA. As a result, the trial court's conclusions regarding the UCRA claim cannot be sustained.

In light of this conclusion, we turn next to consider defendants' affirmative free speech and free exercise defenses. Even though the trial court erred in assessing the CRD's UCRA claim, those errors are prejudicial only if defendants' affirmative defenses provide no shelter from the UCRA's application.¹³ (Cal. Const., art. VI, § 13; *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108, 225 Cal.Rptr.3d 504, 405 P.3d 1076 [observing Const. "generally 'prohibits a reviewing court from setting aside a judgment due to trial court error unless it finds the error prejudicial'"].)

II. First Amendment's Free Speech Guarantee

Although finding no violation of the UCRA, the trial court reached defendants' affirmative defenses, including their First Amendment free speech defense under the federal Constitution, rooted in the compelled speech doctrine. The trial court determined that defendants' preparation and sale of wedding

¹³ The trial court did not reach the element of harm, having concluded there was no intentional discrimination or failure to ensure full and equal access under the UCRA, but we note there is evidence to support a finding of harm as a result of the denial.

cakes constitute both “pure speech” and expressive conduct (symbolic speech) protected by the First Amendment, and that forcing defendants to provide *any* preordered wedding cake for a same-sex wedding under the UCRA would compel defendants to speak a message with which they disagree, in violation of the First Amendment. The CRD challenges the trial court’s conclusions.

A. Expression Protected by the First Amendment

The First Amendment to the federal Constitution, which applies to the states through the Fourteenth Amendment, prohibits laws “abridging the freedom of speech.” (U.S. Const., 1st Amend.) While the First Amendment “literally forbids the abridgment only of ‘speech,’” it has long been recognized “that its protection does not end at the spoken or written word.” (*Texas v. Johnson* (1989) 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (*Johnson*).)

Although First Amendment speech protections extend “beyond written or spoken words as mediums of expression” (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995) 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (*Hurley*)), not all expression is treated equally (*Cressman v. Thompson* (10th Cir. 2015) 798 F.3d 938, 951 (*Cressman*); *Anderson v. City of Hermosa Beach* (9th Cir. 2010) 621 F.3d 1051, 1058 (*Anderson*)). “While ‘pure speech’ activities are rigorously protected regardless of meaning, symbolic speech or conduct must be ‘sufficiently imbued with elements of communication[]’ [¶] (*Spence v. Washington* (1974) 418 U.S. [405,] 409, 94 S.Ct. 2727, 41 L.Ed.2d 842)], and is subject to a ‘relaxed constitutional standard[]’

[citations].”¹⁴ (*Cressman*, *supra*, at pp. 951–952; see *Johnson*, *supra*, 491 U.S. at p. 406, 109 S.Ct. 2533 [“The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.”]; *Anderson*, *supra*, at p. 1059, fn.omitted [“Restrictions on protected expressive conduct are analyzed under the four-part test announced in *O’Brien*,¹⁵ a less stringent

¹⁴ Although *recognizing* there is a distinction between what is sometimes labeled *pure speech* and symbolic speech (expressive conduct) can be articulated plainly enough, it is much more difficult to draw clean and clear lines around activities entitled to protection as “pure speech” as separate from expressive conduct sufficiently “imbued with elements of communication” such that it is protected as speech under the First Amendment as separate from conduct, though perhaps expressive, which receives no speech protection at all. (See, e.g., James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind* (2008) 61 Okla. L.Rev. 1, 2–5 (McGoldrick) [noting prefatorily the difficulty of navigating among these distinctions].)

We note that the difference in the treatment of pure speech and symbolic speech is tied to whether the law at issue is content-neutral or content-based and the state interests that are weighed. (See McGoldrick, *supra*, 61 Okla. L.Rev. at p. 25 [positing that “[i]f something is speech, then the level of protection will depend on whether the law is content-based or content-neutral, not the speech itself and not whether it is pure speech or symbolic speech”]; *City of Erie v. Pap’s A.M.* (2000) 529 U.S. 277, 299, 120 S.Ct. 1382, 146 L.Ed.2d 265, *italics added* [“As we have said, *so long as the regulation is unrelated to the suppression of expression*, [t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.”].)

¹⁵ *United States v. O’Brien* (1968) 391 U.S. 367, 376–377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (*O’Brien*).

test than those established for regulations of pure speech.”].)¹⁶

The United States Supreme Court has recognized a range of different forms of entertainment and visual expression as constituting pure speech, including fiction (see *Hurley*, *supra*, 515 U.S. at p. 569, 115 S.Ct. 2338); music without words (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661); theater (*Schacht v. United States* (1970) 398 U.S. 58, 61–63, 90 S.Ct. 1555, 26 L.Ed.2d 44); movies (*Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 501–502, 72 S.Ct. 777, 96 L.Ed. 1098); and “pictures, ... paintings, drawings, and engravings” (*Kaplan v. California* (1973) 413 U.S. 115, 119, 93 S.Ct. 2680, 37 L.Ed.2d 492). (See *303 Creative, LLC v. Elenis* (2023) 600 U.S. 570, 587, 143 S.Ct. 2298, 216 L.Ed.2d 1131 (*303 Creative*); *Cressman*, *supra*, 798 F.3d at p. 952; *Anderson*, *supra*, 621 F.3d at p. 1060.)

The federal circuit Courts of Appeals have additionally recognized tattoos (*Anderson*, *supra*, 621 F.3d at p. 1061); the sale of original artwork (*White v.*

¹⁶ The test articulated in *O'Brien* for symbolic speech is as follows: “This Court has held that when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.... [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” (*O'Brien*, *supra*, 391 U.S. at pp. 376–377, 88 S.Ct. 1673, fns. omitted.)

City of Sparks (9th Cir. 2007) 500 F.3d 953, 955); custom-painted clothing (*Mastrovincenzo v. City of New York* (2d Cir. 2006) 435 F.3d 78, 96–97 (*Mastrovincenzo*); and stained glass windows (*Piarowski v. Illinois Community College* (7th Cir. 1985) 759 F.2d 625, 628) as forms of pure speech (*Cressman, supra*, 798 F.3d at p. 952).

The justification for protecting these different forms of entertainment and visual expression is “simply ... their expressive character, which falls within a spectrum of protected “speech” extending outward from the core of overtly political declarations.” (*Cressman, supra*, 798 F.3d at p. 952, quoting *National Endowment for the Arts v. Finley* (1998) 524 U.S. 569, 602–603, 118 S.Ct. 2168, 141 L.Ed.2d 500 (dis. opn. of Souter, J.) (*Finley*).) The 10th Circuit Court of Appeals has described self-expression as “the animating principle behind pure speech protection” (*Cressman, supra*, at pp. 952–953; see *Brush & Nib Studio, LC v. City of Phoenix* (2019) 247 Ariz. 269, 285, 448 P.3d 890 (*Brush & Nib*) [“words, pictures, paintings, and films qualify as pure speech when they are used by a person as a means of self-expression”]; *White v. City of Sparks, supra*, 500 F.3d at p. 956, fn. omitted [“So long as it is an artist’s self-expression, a painting will be protected under the First Amendment, because it expresses the artist’s perspective.”].)

The high court has also afforded First Amendment protection to expressive conduct that qualifies as symbolic speech. (*Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 304, 104 S.Ct. 3065, 82 L.Ed.2d 221 (*Clark*), citing *Tinker v. Des Moines School Dist.* (1969) 393 U.S. 503, 89 S.Ct. 733, 21

L.Ed.2d 731 (*Tinker*) [black armband worn by students in public school as protest of hostilities in Vietnam]; *Brown v. Louisiana* (1966) 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 [sit-in by Black students in Whites only library to protest segregation]; *Stromberg v. California* (1931) 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 [flying red flag as gesture of support for communism]; *Spence v. Washington* (1974) 418 U.S. 405, 410–411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (*Spence*) [displaying a U.S. flag with a peace symbol attached to it].)

Not all conduct constitutes speech, and the nation’s high court has rejected “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” (*O’Brien, supra*, 391 U.S. at p. 376, 88 S.Ct. 1673; see *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (2006) 547 U.S. 47, 65–66, 126 S.Ct. 1297, 164 L.Ed.2d 156 (*FAIR*).) Thus, the First Amendment extends only to conduct that is “inherently expressive.” (*FAIR, supra*, at p. 66, 126 S.Ct. 1297; *Spence, supra*, 418 U.S. at p. 409, 94 S.Ct. 2727 [to warrant 1st Amend. protection, activity must be “sufficiently imbued with elements of communication”].) To determine whether conduct is sufficiently expressive, it must have been intended to be communicative and, in context, would be reasonably understood by the viewer to be communicative. (*Spence, supra*, at pp. 410–411; *Johnson, supra*, 491 U.S. at p. 404, 109 S.Ct. 2533.)¹⁷

¹⁷ “[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a

B. Compelled Speech Doctrine

The First Amendment’s free speech guarantee “includes both the right to speak freely and the right to refrain from speaking at all.” (*Wooley v. Maynard* (1977) 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (*Wooley*).) This basic precept underpins the compelled speech doctrine which was first articulated in *Board of Education v. Barnette* (1943) 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (*Barnette*). There, Jehovah’s Witnesses sought to enjoin enforcement of compulsory flag salute laws applicable to students because the required salute and pledge of allegiance violated their religious beliefs. (*Id.* at p. 629, 63 S.Ct. 1178.) The high court struck down the law under the First Amendment, holding the government could not compel any individual “by word and sign” (*Barnette, supra*, at p. 633, 63 S.Ct. 1178) “to utter what is not in his mind” (*id.* at p. 634, 63 S.Ct. 1178).

Like uttering the pledge of allegiance in *Barnette*, the government is also prohibited from compelling an individual to *display* a prescribed government message. (*Wooley, supra*, 430 U.S. at p. 717, 97 S.Ct. 1428.) In *Wooley*, New Hampshire vehicle license plates displayed the motto “Live Free or Die,” which George Maynard objected to on religious and political grounds and covered the motto with tape, violating state law. (*Id.* at pp. 707–708, 97 S.Ct. 1428.) After being cited, Maynard sought and received injunctive and declaratory relief against enforcement of the state law. (*Id.* at p. 709, 97 S.Ct. 1428.) On review, the Supreme Court held in Maynard’s favor, explaining

rule that all conduct is presumptively expressive.” (*Clark, supra*, 468 U.S. at p. 293, fn. 5, 104 S.Ct. 3065.)

his claim, like in *Barnette*, forced an individual “to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.” (*Wooley, supra*, at p. 715, 97 S.Ct. 1428.) The court observed the state had required Maynard to use his private property as a “mobile billboard” (*ibid.*) for the state’s ideological message, and the state’s interests did not outweigh an individual’s First Amendment “right to avoid becoming a courier for such message.” (*Wooley, supra*, at p. 717, 97 S.Ct. 1428, fn.omitted.)

Expanding beyond *Barnette* and *Wooley*, the compelled speech doctrine is not limited to situations where an individual must personally speak or display a specific government message—it also limits the government’s ability to compel one speaker to host or accommodate another nongovernment speaker’s message. (*Hurley, supra*, 515 U.S. at p. 580, 115 S.Ct. 2338; see *Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241, 256–257, 94 S.Ct. 2831, 41 L.Ed.2d 730 [Fla. right-of-reply statute violated newspaper editor’s right to determine content of the newspaper]; *Pacific Gas & Elec. Co. v. Public Util. Comm’n* (1986) 475 U.S. 1, 20–21, 106 S.Ct. 903, 89 L.Ed.2d 1 [state agency cannot require utility company to include third party newsletter in its billing envelope].)

For example, in *Hurley*, the organizers of a St. Patrick’s Day parade refused to admit to their parade a group of openly gay, lesbian and bisexual descendants of Irish immigrants (GLIB) who wished to march with their group’s banner stating, “Irish American Gay, Lesbian and Bisexual Group of Boston.” (*Hurley, supra*, 515 U.S. at p. 570, 115 S.Ct. 2338.) The high court determined the parade itself was

inherently expressive activity, as was GLIB's participation. (*Id.* at pp. 568–570, 115 S.Ct. 2338.) Compelling the organizers to host GLIB's message within their own inherently expressive activity “violate[d] the fundamental rule of protection under the First Amendment[] that a speaker has the autonomy to choose the content of his own message.” (*Id.* at p. 573, 115 S.Ct. 2338.) It was of no consequence that the eclectic variety of parade participants meant the parade had no narrow, succinctly articulable message, nor were parade organizers required to generate each featured item of communication within the parade. (*Id.* at pp. 569–570, 115 S.Ct. 2338.)

But, different from *Hurley*, where an activity is *not* inherently expressive, the government may compel nonexpressive conduct even if it imposes an incidental burden on speech. In *FAIR*, law schools began restricting military recruiter's access to students at law school recruiting events in opposition to the government's policy on homosexuals in the military. (*FAIR, supra*, 547 U.S. at p. 51, 126 S.Ct. 1297.) Congress responded by enacting the Solomon Amendment (10 U.S.C. § 983) (Solomon Amendment), which specified that if any part of an institution of higher education denied military recruiters equal access provided to other recruiters, the institution would lose certain federal funds. (*FAIR, supra*, at p. 51, 126 S.Ct. 1297.) An association of law schools and law faculties challenged enforcement of the Solomon Amendment, arguing the law violated their First Amendment freedoms of speech and association by forcing law schools to decide whether to disseminate and accommodate a military recruiter's message or lose federal funding. (*FAIR, supra*, at pp. 52–53, 126 S.Ct. 1297.)

The high court concluded there was no compelled-speech violation because “the schools [were] not speaking when they host[ed] interviews and recruiting receptions,” even though the law school generated emails and notices of the recruiters’ presence on campus. (*FAIR, supra*, 547 U.S. at p. 64, 126 S.Ct. 1297.) As for the expressive nature of the conduct in hosting the military at recruiting events, the court reasoned “[t]he expressive component of a law school’s actions is not created by the conduct itself but by the speech that accompanies it.” (*Id.* at p. 66, 126 S.Ct. 1297.) Prior to the Solomon Amendment, schools had expressed disagreement with the military by requiring recruiters to use undergraduate campuses, but these actions “were expressive only because the law schools accompanied their conduct with speech explaining it.” (*FAIR, supra*, at p. 66, 126 S.Ct. 1297.) “An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school’s interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.” (*Ibid.*) The court viewed the need for explanatory speech as “strong evidence that the conduct at issue here [was] not so inherently expressive that it warrants protection” as symbolic speech. (*Ibid.*) In the court’s view, the only expressive activity required of the law schools was posting and sending notices indicating logistical information about where the interviews would take place, which the court found only incidental to the Solomon Amendment’s regulation of conduct and nothing like the compelled speech in *Barnette* or *Wooley*. (*FAIR, supra*, at pp. 61–62, 126 S.Ct. 1297.)

Where there is speech or expressive conduct, however, the compelled-speech doctrine can preclude the government's enforcement of antidiscrimination laws in places of public accommodation. (*303 Creative, supra*, 600 U.S. at p. 594, 143 S.Ct. 2298.) In *303 Creative*, a graphic designer (Smith) offered website design services through her business, and she planned to create wedding websites, but had religious objections to creating wedding websites for same-sex couples. (*Id.* at pp. 579–580, 143 S.Ct. 2298.) Smith filed a pre-enforcement First Amendment challenge alleging she faced a credible threat that the State of Colorado would enforce its public accommodation law to compel her to create websites celebrating same-sex marriage, which she did not endorse. (*303 Creative, supra*, at p. 580, 143 S.Ct. 2298.)

The pre-enforcement posture of the case meant it was litigated absent any facts about a particular denial of service. Instead, the parties stipulated that, among other things, “Smith’s websites promise to contain ‘images, words, symbols, and other modes of expression’”; “that every website will be her ‘original, customized’ creation”; she “will create these websites to communicate ideas—namely to ‘celebrate and promote the couple’s wedding and unique love story’ and to ‘celebrat[e] and promot[e] what ... Smith understands to be a true marriage.’” (*303 Creative, supra*, 600 U.S. at p. 587, 143 S.Ct. 2298.)

The court agreed that Smith’s websites constituted “‘pure speech’” and indicated the parties’ stipulations drove that conclusion. (*303 Creative, supra*, 600 U.S. at p. 587, 143 S.Ct. 2298 [websites considered pure speech “is a conclusion that flows directly from the parties’ stipulations”]; *id.* at p. 599, 143 S.Ct. 2298

[acknowledging that determining what qualifies as expressive activity protected by the 1st Amend. may raise difficult questions, but Smith’s websites presented no such complication because “[t]he parties have *stipulated* that ... Smith seeks to engage in expressive activity”].)

In turning to examine Colorado’s public accommodations law as applied to Smith, the court construed the law as compelling Smith’s speech because if she offered wedding websites celebrating marriages she endorses, the state intended to force her to create custom websites celebrating marriages she did not. (*303 Creative, supra*, 600 U.S. at p. 588, 143 S.Ct. 2298.) The court viewed Colorado’s interest in applying its public accommodations law to Smith as “excis[ing] certain ideas or viewpoints from the public dialogue” and to “force someone [to] speak *its* preferred message[.]” (*Id.* at pp. 588, 597, 143 S.Ct. 2298.) While the state had a compelling interest in combatting discrimination, the court held the state could not compel speech in a content-based manner to further that interest. (*Id.* at pp. 590–592, 143 S.Ct. 2298.)

As these cases demonstrate, determining whether the government has impermissibly compelled speech begins with a threshold inquiry as to whether there is inherently expressive activity protected by the First Amendment to which the speaker objects. (*Cressman, supra*, 798 F.3d at p. 951 [to “make out a valid compelled-speech claim [or defense], a party must establish (1) speech; (2) to which he objects; [and] that is (3) compelled by some governmental action”].) If there is expression protected by the First Amendment, then a second inquiry examines what the law

regulates and the government's interests in doing so, applying the requisite degree of scrutiny. (See, e.g., *Hurley*, *supra*, 515 U.S. at pp. 580–581, 115 S.Ct. 2338 [no sufficient government interest identified to interfere with speech]; *O'Brien*, *supra*, 391 U.S. at p. 376, 88 S.Ct. 1673 [“when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms”]; *Turner Broadcasting System, Inc. v. FCC* (1994) 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 [“Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the [most exacting] scrutiny.”]; *Reed v. Town of Gilbert* (2015) 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 [“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”].) We turn now to the first inquiry.

C. Analysis

Miller testified she adheres to a religious principle that “God created man and woman in his likeness, and marriage was between a man and a woman.” Miller believes the Bible teaches “Marriage is between a man and a woman and is very, very sacred, and it’s a sacrament. And [Miller] can’t be a part of something that is contrary to God” To Miller, the message of a wedding cake that she means to convey is that “this is a marriage ordained by God between a man and a woman and we are here to celebrate that with you.” In her view, supplying a wedding cake for same-sex

couples sends a message of endorsement for the wedding, and Tastries is part of the “[w]hole thing,” which relates to any dessert product the couple chooses, not just the cake. By providing a cake or other dessert products to a wedding, Miller testified that Tastries is putting a “stamp of approval” on the wedding. Tastries is conveying a message that the wedding should be celebrated, or, for other events, that the person should be celebrated. In Miller’s view, by supplying any type of preordered cake, Tastries is participating in the wedding event.

The trial court determined defendants’ wedding cakes are “pure speech” entitled to First Amendment protection because they are “designed and intended—genuinely and primarily—as an artistic expression of support for a man and a woman uniting in the ‘sacrament’ of marriage, and a collaboration with them in the celebration of their marriage. The wedding cake expresses support for the marriage. The wedding cake is an expression that the union *is* a ‘marriage,’ and *should* be celebrated.”¹⁸ In addition, the trial court concluded “defendants’ participation in the design, creation, delivery and setting up of a wedding cake is *expressive conduct*, conveying a particular message of support for the marriage that is very likely to be understood by those who view it.”

¹⁸ Because the CRD’s complaint sought an order requiring defendants to immediately cease and desist from selling to anyone any item they are unwilling to sell, on an equal basis, to members of any protected group, the trial court considered the expressive nature of defendants’ preordered wedding cakes generally, not just the cake Miller refused to sell to the Rodriguez-Del Rios.

The CRD argues this cannot be true; the wedding cake Miller refused to sell to the Rodriguez-Del Rios here cannot be considered pure speech—it is unlike an original sculpture, painting, verse or music, and lacks any of the hallmarks or characteristics that courts have associated with self-expression. According to the CRD, it was a predesigned—not customized—plain, white cake with three tiers that was sold by Tastries for a variety of different events, not just weddings. It did not inherently convey anything about Miller’s views on marriage; the only way the cake could have conveyed a message was based on the customer’s choice in selecting it for their wedding. Moreover, the CRD argues, Miller’s subjective intent to convey a message of support for heterosexual marriage is insufficient by itself to transform a routine commercial product into a work of self-expression, particularly where the product itself does not independently express that message. Nor was the preparation and delivery of the cake, the CRD argues, protected expressive conduct. The CRD contends Miller could not have intended to send any message about marriage through the design of the cake because the cake was sold for multiple events, not just weddings. Additionally, the CRD argues, no reasonable viewer would understand the cake’s preparation and delivery to a same-sex wedding to convey any message about marriage, especially a message of the baker.

Defendants respond that Miller’s design and creation of a custom wedding cake incorporates elements of pure speech as an original and customized creation, which is a symbol of the creator’s understanding of marriage. According to defendants, wedding cakes inherently convey the meaning that a particular union is a marriage and that it should be

celebrated, which is how the Rodriguez-Del Rios understood it—they ultimately featured a tiered symbolic Styrofoam cake with an edible top layer specifically for the traditional cake cutting ceremony. The preparation and delivery of the cake is also expressive conduct, defendants maintain, because Miller intends that all her cakes convey a message of support for the sacrament of marriage between one man and one woman. And, according to defendants, everyone who sees the cake in context understands it was commissioned to celebrate the new union.

1. Standard of Review

Ordinarily, in reviewing a judgment based upon a statement of decision following a bench trial, Courts of Appeal review questions of law de novo, while findings of fact are reviewed for substantial evidence. (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981, 212 Cal.Rptr.3d 158.) However, the trial court’s determinations as to defendants’ First Amendment defenses are subject to independent review. (*In re George T.* (2004) 33 Cal.4th 620, 632, 16 Cal.Rptr.3d 61, 93 P.3d 1007; accord, *People v. Peterson* (2023) 95 Cal.App.5th 1061, 1066, 314 Cal.Rptr.3d 137.) We defer to the trial court’s credibility determinations, but we must undertake an “independent examination of the whole record” (*Hurley* [, *supra*,] 515 U.S. at pp. 567–568, 115 S.Ct. 2338), including a review of the constitutionally relevant facts “de novo, independently of any previous determinations made by the [trial] court” “to determine whether defendants’ refusal of service was entitled to First Amendment protection. (*In re George T.*, *supra*, at p. 634, 16 Cal.Rptr.3d 61, 93 P.3d 1007; accord, *Veilleux v. National Broadcasting Co.* (1st Cir. 2000) 206 F.3d 92,

106; see *Smith v. Novato Unified School Dist.* (2007) 150 Cal.App.4th 1439, 1453, 59 Cal.Rptr.3d 508.)

2. No Pure Speech

Our initial task is to determine whether defendants were engaged in a purely expressive activity that constitutes speech entitled to full First Amendment protection without resort to the *Spence-Johnson* test applicable to expressive conduct. (*Anderson, supra*, 621 F.3d at p. 1059 [describing analysis to determine whether tattooing is speech protected by the 1st Amend.].) When it comes to expression qualifying as pure speech, “courts, on a case-by-case basis, must determine whether the ‘disseminators of [an item] are genuinely and primarily engaged in ... self-expression.’” (*Cressman, supra*, 798 F.3d at p. 953, quoting *Mastrovincenzo, supra*, 435 F.3d at p. 91.)

Some products and services in the marketplace have been deemed to be pure forms of expression and treated as speech entitled to full First Amendment protection. A tattoo and the process of tattooing, for example, have been held to be forms of pure expression: “Tattoos are generally composed of words, realistic or abstract images, symbols, or a combination of these, all of which are forms of pure expression that are entitled to full First Amendment protection.” (*Anderson, supra*, 621 F.3d at p. 1061.) They express a “countless variety of messages” (*ibid.*), and there is no functional purpose for a tattoo *except* as a mode of expressing *something* by the tattoo designer and the customer.

Similarly, the custom websites Smith wished to create in *303 Creative* were considered pure speech by

the high court, although it did not define the term. (*303 Creative, supra*, 600 U.S. at p. 587, 143 S.Ct. 2298.) The parties stipulated Smith’s custom websites would contain images, words, symbols, and other modes of expression; that each one would be her original, customized creation; and she would create these websites to communicate ideas, specifically to celebrate and promote a couple’s wedding and unique love story and to celebrate and promote what Smith understood to be a true marriage. (*Ibid.*)

The cake at issue here bears no indicia of self-expression similar to tattoos or the custom wedding websites described by stipulation in *303 Creative*. The requested cake had no writing, drawings, images, engravings, symbols or any other modes of expression displayed on it: it was a plain, three-tiered, white cake with “wispy” frosting and some flowers. The cake was considered a custom order because *all* preordered cakes are labeled “custom” by Tastries, regardless of the design of the cake, any consultation process with the customer, or the degree of autonomy or influence the baker has regarding the cake’s aesthetic appearance. Other than flavoring and size, nothing about the predesigned cake was to be customized for the Rodriguez-Del Rios as a couple or for their wedding specifically, setting it worlds apart from the websites in *303 Creative* or tattoos considered in *Anderson*. (*303 Creative, supra*, 600 U.S. at pp. 587–588, 143 S.Ct. 2298 [parties stipulated the websites and graphics are “‘original, customized’ creation[s]” and Smith would “produce a final story for each couple using her own words and her own ‘original artwork’”].) Moreover, unlike the websites considered in *303 Creative*, testimony established this cake design was popularly requested and sold for several different occasions,

including birthdays, baby showers and quinceaneras. Miller similarly testified the cake was suitable for different events beyond weddings. On its own, the cake was a generic, multi-purpose product primarily intended to be eaten.

Defendants argue the expressiveness Miller intends with a wedding cake cannot be severed from its surrounding context, which here was the cake's display as a centerpiece at a same-sex wedding celebration. While the inquiry into what constitutes speech is context-driven (*Cressman, supra*, 798 F.3d at p. 953; *303 Creative, supra*, 600 U.S. at p. 600, fn. 6, 143 S.Ct. 2298), self-expression amounting to pure speech cannot derive its expressive quality solely because it is observed in a specific place—a painting's expressiveness is not contingent on whether it hangs in an art gallery, nor is a symphony's expressiveness contingent on which orchestra performs it (see *Finley, supra*, 524 U.S. at p. 602, 118 S.Ct. 2168 (dis. opn. of Souter, J.) [protection for artistic works turns simply on their expressive nature]). “Pure-speech treatment is only warranted for those [items] whose creation is itself an act of self-expression.” (*Cressman, supra*, at p. 954.)

The act of providing a product to a wedding reception with the intent to send a message does not transform that product into pure speech if the product itself is not the self-expression of the vendor. If this were the case, a host of nonexpressive products or services provided for a same-sex wedding reception could be deemed to convey a message merely because they were provided for the event—e.g., flatware, chairs and linens, etc. Moreover, many standard products provided to a wedding reception are equally

as visible as the cake and used *by the couple* in a symbolic manner—a portable dance floor where the couple has a first dance, the bridal bouquet that is tossed at the reception, the centerpieces for the tables, beautifully plated meals prepared by the caterer, and guest favors left at each place setting. The mere fact these products are prepared for and provided to a same-sex wedding in a routine economic transaction does not transform them into the self-expression of the vendor. (See *Brush & Nib*, *supra*, 247 Ariz. at p. 312, 448 P.3d 890 (dis. opn. of Bales, J. (Ret.)) [“expression of a wedding invitation, as ‘perceived by spectators as part of the whole’ is that of the marrying couple”]; cf. *FAIR*, *supra*, 547 U.S. at p. 65, 126 S.Ct. 1297 [“Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military’s policies.”].)

Defendants maintain the cake itself was a symbol because it was a wedding cake that inherently expressed *the bakery’s* message of celebration and conveyed endorsement of the marriage just as a parade is the inherent expression of its organizers. But this cake was a wedding cake *only* because the Rodriguez-Del Rios were going to use it that way—this cake design was sold for many different events. Moreover, the mere act of preparing and selling merchandise, even a wedding cake, is not the inherent self-expression *of the vendor* just because the vendor has knowledge of how the end user will utilize the product. It is the consumer’s *use* of a multi-purpose cake like this that gives it any expressive meaning at all, not the baker’s beliefs or intent which are not reflected in the cake itself. (Cf. *Moody v. NetChoice, LLC* (2024) 603 U.S. 707, 739, 144 S.Ct. 2383, 2406,

219 L.Ed.2d 1075 [where a purported host of third party speech is not itself engaged in expression, there is little risk of misattribution of the message].) Defendants implicitly acknowledge this through the sale of Tastries’s daily display-case cakes. Tastries does not restrict the sale of those cakes, and a same-sex couple could purchase a Tastries’s daily display-case cake to photograph, cut and serve at their wedding celebration.¹⁹

Here, the finished product could have been deployed for any number of different purposes—the essence of a generic, multi-purpose commercial product that expresses nothing at all until it is used in a particular manner by the customer. If there is any fitting analogy to the parade in *Hurley*, it is the Rodriguez-Del Rios who are most like the parade organizers—it is their parade; defendants are like vendors who refuse to sell the parade organizers blank, colorful vinyl banners because they are a disfavored group. (*Brush & Nib, supra*, 247 Ariz. at p. 312, 448 P.3d 890 (dis. opn. of Bales, J. (Ret.)) [“To the

¹⁹ At oral argument, defendants’ counsel acknowledged cakes purchased out of the daily display case do not constitute protected expression. Yet, the couple would not be permitted under Tastries’s design standards to *preorder* for a specific date the exact same display-case cake for their wedding on the ground it would be a “custom” wedding cake that expresses a prohibited message. It is impossible to reconcile how a *preordered* cake for a same-sex wedding is *necessarily* a symbol amounting to pure speech if the very same cake carried directly from Tastries’s display case to a same-sex wedding celebration is not. We make this comment not because the cake the Rodriguez-Del Rios sought was available from the daily display case, but as an observation the design standards would preclude a same-sex couple from preordering a cake for their wedding from the daily display case.

extent a parade analogy is apt, ... [t]he organizers would be the marrying couple and forcing them to include particular messages in their wedding would be more analogous to *Hurley*.“].)

The trial court focused on what it perceived as the artistic element of Miller’s wedding cakes as a medium for her own self-expression. The United States Supreme Court has been clear that the arts are protected forms of expression under the First Amendment (see, e.g., *Hurley, supra*, 515 U.S. at p. 569, 115 S.Ct. 2338 [remarking that examples of painting, music, and poetry are “unquestionably shielded”]; *White v. City of Sparks, supra*, 500 F.3d at pp. 955–956 [“Supreme Court has been clear that the arts and entertainment constitute protected forms of expression”]), but the fact that frequently produced items of merchandise have an artistic element does not automatically afford them First Amendment protection as speech. Any object has the potential to be art, but “[t]o say that the First Amendment protects the sale or dissemination of all objects ranging from ‘totem poles,’ [citation], to television sets does not take us far in trying to articulate or understand a jurisprudence of ordered liberty; indeed it would entirely drain the First Amendment of meaning.” (*Mastrovincenzo, supra*, 435 F.3d at p. 92, fn. omitted; see *Cressman, supra*, 798 F.3d at pp. 952–953 [“Given the animating principle behind pure-speech protection—viz., safeguarding self expression—it is evident that all images are not categorically pure speech.”].)

If that were the case, a vast array of merchandise with only incidental artistic elements would qualify for First Amendment protection, such as playing cards

with a decorative design or T-shirts emblazoned with stars and stripes, both of which the Second Circuit Court of Appeals has suggested are insufficiently expressive to receive First Amendment protection. (*Mastrovincenzo, supra*, 435 F.3d at pp. 94–95, citing *People v. Saul* (N.Y. Crim.Ct. 2004) 3 Misc.3d 260, 776 N.Y.S.2d 189, 192–193 & *Mastrovincenzo v. City of New York* (S.D.N.Y. 2004) 313 F.Supp.2d 280, 288.)

Cakes of every type are a widely produced consumer product intended for all kinds of purposes; even three-tiered cakes virtually identical to the one the Rodriguez-Del Rios sought from defendants. Being asked to reproduce a facsimile from a popularly ordered predesign, as here, can hardly be deemed an act of self-expression by the baker/decorator. Nothing about the sale of this cake reflected the independent expressive choices of the baker/decorator—it was the Rodriguez-Del Rios who dictated the size, shape, color, flavor and, indeed, the very design of the cake. Even the pattern of the frosting was not Tastries’s elective choice. Much of this is likely true of tattoos, which have been recognized by some courts as pure speech, but there is a significant difference that tilts away from a broad conclusion that all cakes made for a wedding are primarily created as the self-expression of the baker.

Unlike a tattoo (and perhaps other forms of art), cakes uniformly have a nonexpressive functional purpose: they are primarily a dessert meant to be eaten—even wedding cakes. That is why the size of cakes are often ordered based on how many guests a customer anticipates feeding—so much so, Miller’s client packet indicates how many people each cake size feeds. Not coincidentally, Miller’s design standards

require that cakes taste as good as they look, and wedding cake customers are offered a tasting to select from an array of filling, cake and frosting flavors because the cake is meant to be enjoyed as food. Indeed, the Rodriguez-Del Rios rejected a different bakery because its cakes were too sweet for certain of their guests to eat.

To overtake the nonexpressive element of a cake such that its preparation and assembly could be considered an act of self-expression by the baker, the expressive elements would have to be significant and apparent. We can imagine cakes like that. But *this* cake was no different than a multitude of other pre-designed, routinely generated and multi-purpose consumer products with primarily nonexpressive purposes—this one as a dessert to be eaten at a gathering of some sort. In terms of its artistic element, this cake is entirely indistinguishable from a charcuterie board, a fruit bouquet, or a cheese platter—all versatile items used for many different parties or occasions, aesthetically assembled for salability and meant to be consumed as their primary purpose, not as a vehicle for the self-expression of the designer/assembler.

To conclude this cake is primarily an act of artistic self-expression entitled to First Amendment protection is to hold that *any* product artfully designed and prepared to have an aesthetically pleasing appearance—e.g., catering displays, cars, homes, jewelry, quilts, shoes, clothing and handbags to name only a few—is protected speech. Not only would such an expansive conception of artistic self-expression drain the First Amendment of meaning, it would invite broad potential disruption to the stream of

commerce, where the mere act of providing routine, artfully designed consumer products without any indicia or characteristics associated with speech would be transformed into the self-expression of their maker/designer. (See generally *303 Creative, supra*, 600 U.S. at p. 592, 143 S.Ct. 2298 [public accommodation laws cannot be applied to compel speech].)

Although the design and appearance of a vast array of ordinary commercial goods involve elements of creativity and originality that could be subjectively viewed as artistic, drawing the contours of protected speech to include routinely produced, ordinary commercial products as the artistic self-expression of the designer is unworkably overbroad. The trial court’s conclusion that all defendants’ wedding cakes constitute pure speech proves too much. This predesigned, plain white cake without any indicia of a wedding and no writing, images, symbols, engravings, even though aesthetically appealing, did not have any qualities signaling its preparation was primarily a self-expressive act of the baker/decorator.

3. Expressive Conduct

Even if an activity is not protected as pure speech, it may still come within the First Amendment’s protection as symbolic speech. Although pure speech “is entitled to First Amendment protection unless it falls within one of the ‘categories of speech ... fully outside the protection of the First Amendment,’ [citations], *conduct* intending to express an idea is constitutionally protected *only* if it is ‘sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments” (*Anderson, supra*, 621 F.3d at p. 1058, italics

added.) Whether conduct is sufficiently communicative to warrant First Amendment protection was originally considered in *Spence*. There, a college student displayed from the window of his apartment an upside down United States flag with a peace symbol taped to each side. (*Spence, supra*, 418 U.S. at p. 406, 94 S.Ct. 2727.) He was arrested and prosecuted under Washington’s “improper use” of a flag statute. (*Ibid.*) The Supreme Court found the display “was a pointed expression of anguish ... about the then-current domestic and foreign affairs of his government.” (*Id.* at p. 410, 94 S.Ct. 2727.) As the conduct was “inten[d]ed to convey a particularized message,” and because “in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it,” it was conduct protected by the First Amendment. (*Id.* at pp. 410–411, 94 S.Ct. 2727.)

Spence was followed later by *Johnson*, where a demonstrator was prosecuted under a Texas law after he burned an American flag in front of the Dallas City Hall while the Republican National Convention was occurring. (*Johnson, supra*, 491 U.S. at p. 399, 109 S.Ct. 2533.) The flag was burned as part of “a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President.” (*Id.* at p. 406, 109 S.Ct. 2533.) Applying the two factors identified in *Spence*, the court concluded both were present because the “overtly political nature of th[e] conduct was both intentional and overwhelmingly apparent.” (*Ibid.*)¹⁹ Under the

¹⁹ More recently, in *Hurley*, the Supreme Court seemed to suggest the particularized message requirement of the *Spence-Johnson* test is not necessarily a prerequisite to First

Spence-Johnson test, we consider whether preparing and delivering this cake for use at a same-sex wedding reception is conduct that amounted to symbolic speech.

a. Intent to Convey a Particularized Message

We begin with whether defendants intended to convey a particularized message of some sort by preparing and delivering the cake. The trial court determined a “specific message is intended and understood by the presence of defendants’ wedding cakes, and separately, by defendants’ participation in the wedding cake process. The Tastries wedding cake by itself, *and* the people who are observed in the bakery or the wedding venue designing, delivering, setting up, or cutting the wedding cake, are associated with support for the marriage.” The trial court noted the design standards “leave *no* room to doubt that Miller intends a message,” and “*all* of Miller’s wedding cake designs are intended as an expression of support for the sacrament of ‘marriage,’ that is, the marriage of a man and a woman.” Although, the court acknowledged, “[i]t is not a message that everyone may perceive, or accept.”

Amendment protection for symbolic speech in commenting that “a narrow, succinctly articulable message is not a condition of constitutional protection” (*Hurley, supra*, 515 U.S. at p. 569, 115 S.Ct. 2338.) After *Hurley*, however, the Supreme Court cited *Johnson* in support of its conclusion in *FAIR* that law schools’ conduct in refusing to give interview space to military recruiters was not symbolic speech because the law schools’ message was not “overwhelmingly apparent” to those who viewed it. (*FAIR, supra*, 547 U.S. at p. 66, 126 S.Ct. 1297.)

We cannot agree that *all* of defendants' wedding cakes are intended as an expression of support for the sacrament of marriage between one man and one woman. Here, they could not have intended to send that particularized message *through the cake's design* because this predesigned cake was requested and sold for a variety of parties and gatherings; the cake itself communicated nothing about marriage generally, let alone that marriage constitutes a religious sacrament reserved only for couples made up of one man and one woman (hence its popularity for use at other types of events). Miller's personal intent to send such a message is evidenced by Tastries's design standards, but, as the CRD points out, the cake here bore no evidence of that intent; the cake conveyed no particular message about marriage at all, let alone Miller's intended message—implicating the second element discussed below. (See *FAIR*, *supra*, 547 U.S. at p. 66, 126 S.Ct. 1297 ["If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it."]; *O'Brien*, *supra*, 391 U.S. at p. 376, 88 S.Ct. 1673 ["We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in [it] intends thereby to express an idea."].) The cake design itself was not customized for a wedding specifically—aside from the number of people meant to be fed by the cake, defendants did not need to know anything about the *nature* of the event to prepare and assemble the cake.

b. Likelihood Message Would be Understood By Those Who View It

There is also little likelihood a viewer would understand the cake's sale and provision to a same-sex wedding conveyed any message about marriage generally or an endorsement and celebration of same-sex marriage in particular. First, the cake itself conveyed no particularized message about the nature of marriage being between one man and one woman, and virtually no one would have understood that message from viewing the cake, even displayed as a centerpiece at a wedding reception. It was a plain, white, three-tiered cake with flowers that was supplied to different types of events—an ordinary commercial good in every sense; the cake itself conveyed nothing in support or opposition of same-sex marriage or marriage at all. Regardless of whether a viewer saw the cake being prepared at the bakery or displayed at a same-sex wedding reception, such a viewer would be unlikely to understand that message or any message from the cake.²⁰

²⁰ While there was some testimony indicating the employee originally assisting the couple might come to the wedding as a guest and could serve the cake at the reception, the order form reflected a delivery time prior to the event's start time and Eileen testified they never intended for Tastries to be there during the reception or the wedding. We find no authority holding that delivery of a product to a wedding reception site prior to the event, which is all that was requested of Tastries in this case, necessarily constitutes participation in a wedding ceremony. (Cf. *Kaahumanu v. Hawaii* (9th Cir. 2012) 682 F.3d 789, 799 [wedding ceremonies are protected expression under the 1st Amend.])

Second, a viewer is unlikely to understand this cake's sale and delivery for a wedding reception to convey a message of celebration and endorsement of same-sex marriage. Any rational viewer knows that retailers and vendors who provide services and products for wedding receptions are engaged in a for-profit transaction; the viewer would have no reason to assume a vendor was conveying any message at all—especially through a multi-purpose product that bears no indicia it was customized for this specific wedding.²¹ As explained in *FAIR*, the law schools' different treatment of military recruiters did not express a message of disagreement with the military that a viewer would understand. (*FAIR, supra*, 547 U.S. at p. 66, 126 S.Ct. 1297.) The court explained an observer who saw military recruiters interviewing away from law school campuses had no way of knowing whether the law school was expressing disapproval, all the law school rooms were full, or the recruiters decided for their own reasons they would interview away from the law school. (*Ibid.*) Similarly,

²¹ Had the order been cancelled at the last minute, the cake could have been provided without alteration to any number of different gatherings because it was a generic, multi-purpose design that did not signal to a viewer a message of the baker/decorator or that the baker/decorator was even aware of its intended use. Consider the plain, black armbands worn by students in *Tinker* meant to express a message of protest against the hostilities in Vietnam; no viewer would have considered the manufacturer's sale of the armband/material as conveying approval and endorsement of the students' use. (See generally *Tinker, supra*, 393 U.S. at pp. 504, 505, 89 S.Ct. 733.) The creation and sale of a routinely produced, multi-purpose consumer good containing no words or other indicia of expression is simply not understood by the buying and viewing public as the expressive conduct of the manufacturer.

here, a viewer would not know from the cake's appearance at a wedding reception that the baker was expressing a message of celebration and endorsement of the marriage, or merely providing a cake in an arm's-length, commercial transaction, especially when the design of the cake is not customized for a wedding generally or *this* wedding particularly. A reasonable viewer has no way of knowing the reasons supporting defendants' decision to serve or decline any customer, especially a generic product like this one that could have been (and was) used for many different events.

If the mere act of providing and/or delivering a predesigned product for use at a same-sex wedding conveys a message of celebration and endorsement for same-sex marriage, a baker could potentially refuse to sell any goods or any cakes for same-sex weddings as a protected form of expression; but this would be a denial of goods and services that likely goes "beyond any protected rights of a baker who offers goods and services to the general public" (*Masterpiece, supra*, 584 U.S. at p. 632, 138 S.Ct. 1719.) Expanded logically, this reasoning would extend to a whole range of routine products and services provided for a wedding or wedding reception, including those highly visible items like jewelry, makeup and hair design for the wedding party, table centerpieces, stemware and alcohol for a toast, and catering displays. This is tantamount to business establishments being "allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages,' something that would impose a serious stigma on gay persons." (*Id.* at p. 634, 138 S.Ct. 1719.) If mere product provision to a wedding is considered expressive conduct, then *all* wedding vendors could potentially claim their refusal to serve same-sex couples is a form of protected

expression because they disapprove of same-sex marriage, or any *other* type of marriage involving those with protected characteristics they do not wish to serve.

D. Conclusion

Because we conclude the cake defendants refused to provide in this instance was not an expressive activity protected by the First Amendment, defendants' free speech defense fails. A huge number of routinely produced goods in the stream of commerce are designed with attention to aesthetic details that may reflect the designer's sense of color, balance and perspective, and while those elements might be viewed as artistic features, they are primarily applied and intended for broad appeal and profitability—not as a medium for self-expression. While a routinely produced and multi-purpose cake like the one here might be baked and decorated with skill and creativity, we cannot conclude it is inherently expressive.

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

(*FAIR, supra*, 547 U.S. at p. 66, 126 S.Ct. 1297.) Given the circumstances here, a contrary conclusion would support an overly broad view that producing and selling a routine consumer product for an event constitutes the symbolic speech of the vendor whenever a message is intended. Logically, this would apply to sales conduct beyond the scope of weddings and sincerely held Christian beliefs about same-sex marriage. We decline to extend the parameters of protected expression to include such a broad variety of marketplace conduct.

We acknowledge that, in some circumstances, a wedding cake or select services like cake cutting at the wedding celebration may be expressive, and in those cases, First Amendment speech protections may apply.²² Indeed, *303 Creative* permits businesses engaged in pure speech to decline to provide their services for same-sex weddings under defined circumstances. (*303 Creative, supra*, 600 U.S. at p. 596, 143 S.Ct. 2298.) In doing so, however, the high court emphasized that result flowed from the expressiveness of the wedding websites at issue—stipulated to be an expressive activity. (*Id.* at pp. 597, 599, 143 S.Ct. 2298.) The preparation and delivery, prior to an event, of a nondescript, plain white cake with a multi-purpose design is not a protected form of expression, either as pure speech or as expressive conduct. As such, we do not reach the second inquiry, which examines whether the UCRA, as applied to the refusal here, impermissibly compels speech under the requisite standard of scrutiny.

²² In that regard, the scope of any injunctive remedy the CRD may be afforded must be considered accordingly.

III. Free Exercise Clause

Defendant’s free exercise defense is based on both the federal and state Constitutions. Defendants argue Miller’s religious beliefs are protected views, and they prohibit her or her business from providing wedding cakes for same-sex weddings; applying the UCRA to force defendants to sell wedding cakes for same-sex weddings substantially burdens Miller’s free exercise of her beliefs. According to defendants, the UCRA is neither neutral nor generally applicable, and thus its burden on Miller’s religious freedom is subject to review under the strict scrutiny standard that the UCRA cannot survive.

“The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that ‘Congress shall make no law ... prohibiting the free exercise’ of religion.” (*Fulton v. Philadelphia* (2021) 593 U.S. 522, 532, 141 S.Ct. 1868, 210 L.Ed.2d 137 (*Fulton*), quoting U.S. Const., 1st Amend.; accord, *Lukumi, supra*, 508 U.S. at p. 531, 113 S.Ct. 2217.) “The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.” (*Smith, supra*, 494 U.S. at pp. 877, 878–882, 110 S.Ct. 1595.) Nevertheless, *Smith* held that an individual’s religious beliefs do not “excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” (*Id.* at pp. 878–879, 110 S.Ct. 1595.)

Thus, laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the free exercise clause so long as they are neutral and generally applicable; rather, they are subject only to rational basis review. (*Smith, supra*, 494 U.S. at pp.

878–882, 110 S.Ct. 1595; accord, *Lukumi, supra*, 508 U.S. at p. 531, 113 S.Ct. 2217 [“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”].) If a law is *not* neutral and generally applicable, however, it is subject to strict scrutiny and survives only if it advances ““interests of the highest order”” and is “narrowly tailored in pursuit of those interests.” (*Lukumi, supra*, at p. 546, 113 S.Ct. 2217.)

Based on *Smith* and *Lukumi*, our Supreme Court held in *North Coast* that “a religious objector has *no federal constitutional right* to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector’s religious beliefs.” (*North Coast, supra*, 44 Cal.4th at p. 1155, 81 Cal.Rptr.3d 708, 189 P.3d 959.) *North Coast* then applied *Smith*’s test to the UCRA from which the defendant physicians sought a religious exemption. The court held the UCRA is “a “valid and neutral law of general applicability” “because, as relevant to the case before it, the UCRA “requires business establishments to provide ‘full and equal accommodations, advantages, facilities, privileges, or services’ to all persons notwithstanding their sexual orientation.” (*North Coast, supra*, at p. 1156, 81 Cal.Rptr.3d 708, 189 P.3d 959.) Accordingly, the court held, “the First Amendment’s right to the free exercise of religion does not exempt [the] defendant physicians ... from conforming their conduct to the [UCRA]’s antidiscrimination requirements even if compliance poses an incidental conflict with [the] defendants’ religious beliefs.” (*Ibid.*)

Turning to the California Constitution’s free exercise clause (Cal. Const., art. 1, § 4), the court assumed without deciding that strict scrutiny was the applicable standard of review. Under that standard, “a law could not be applied in a manner that substantially burden[s] a religious belief or practice unless the state show[s] that the law represent[s] the least restrictive means of achieving a compelling interest” (*North Coast, supra*, 44 Cal.4th at p. 1158, 81 Cal.Rptr.3d 708, 189 P.3d 959, quoting *Catholic Charities, supra*, 32 Cal.4th at p. 562, 10 Cal.Rptr.3d 283, 85 P.3d 67.) The court concluded that even if compliance with the UCRA’s prohibition against sexual orientation discrimination substantially burdened the defendant physicians’ religious beliefs, that burden was “insufficient to allow them to engage in such discrimination” because the UCRA furthered “California’s compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there [were] no less restrictive means for the state to achieve that goal.” (*North Coast, supra*, at p. 1158, 81 Cal.Rptr.3d 708, 189 P.3d 959.)

A. Federal Constitutional Analysis

The trial court here concluded that, although application of the UCRA substantially burdens Miller’s free exercise of her religion, *North Coast’s* conclusion that the UCRA survives strict scrutiny, even where the prohibition on sexual orientation substantially burdens religious rights, was binding. Relying on more recent United States Supreme Court opinions, defendants argue the UCRA is not a valid and neutral law of general applicability because it provides discretionary exemptions, and it treats

secular activity more favorably than religious activity. (Code Civ. Proc., § 906.)²³

1. Neutrality and General Applicability of the UCRA

Typically, the free exercise analysis begins by evaluating whether the law at issue is neutral and of general applicability. For a law to be generally applicable, it may not selectively “impose burdens only on conduct motivated by religious belief” (See *Lukumi, supra*, 508 U.S. at p. 543, 113 S.Ct. 2217.) A law is not generally applicable (1) where “it ‘invites’ the government to consider the particular reasons for a person’s conduct by providing ‘a mechanism for individualized exemptions’” and (2) where it “prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” (*Fulton, supra*, 593 U.S. at pp. 533, 534, 141 S.Ct. 1868.) A government policy is neutral if it does not “restrict[] practices because of their religious nature” or evince “intoleran[ce] of religious beliefs.” (*Id.* at p. 533, 141 S.Ct. 1868.) The neutrality analysis focuses on the purposes or motivation behind a policy, and requires examination of policymakers’ subjective intent; the general-applicability inquiry, on

²³ Defendants are not an appealing party, but they may raise an issue of error in the context of ascertaining whether the CRD was prejudiced by the trial court’s erroneous conclusions under the UCRA. In relevant part, Code of Civil Procedure section 906 provides as follows: “The respondent, or party in whose favor the judgment was given, may, without appealing from such judgment, request the reviewing court to and it may review ... matters for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which appeal is taken.”

the other hand, “focuses on the objective sweep of a policy: whom it covers, whom it exempts, and how it makes that distinction.” (*Spivack v. City of Philadelphia* (3d Cir. 2024) 109 F.4th 158, 167.)

Relying on *Fulton*, defendants argue the UCRA incorporates discretionary exceptions indicating it is *not* generally applicable. Defendants maintain that because the UCRA “asks courts to consider on a case-by-case basis whether a particular discriminatory act is ‘reasonable,’ it is the antithesis of general applicability” Specifically, defendants point to a variety of cases that recognize certain judicially acknowledged public policy exceptions related to protected characteristics not expressly enumerated in the statute.

Fulton involved foster care agency Catholic Social Services (CSS) to whom Philadelphia had stopped referring children after discovering CSS would not certify same-sex couples to be foster parents due to its religious beliefs about marriage. (*Fulton, supra*, 593 U.S. at pp. 526–527, 141 S.Ct. 1868.) When children could not remain in their homes, the city’s human services department would assume custody of the children; the department would enter into standard annual contracts with private foster care agencies to place some of those children with foster families. (*Id.* at p. 529, 141 S.Ct. 1868.) State-licensed foster agencies like CSS were given authority to certify foster families; when the department would seek to place a child, it would send agencies a request and the agencies would determine whether any of their certified families were available. (*Id.* at p. 530, 141 S.Ct. 1868.) CSS believed that marriage is a sacred bond between a man and a woman, and it understood

the certification of prospective foster families to be an endorsement of their relationship, and, to that end, it would not certify same-sex couples or unmarried couples. (*Ibid.*) The city concluded CSS's refusal to certify same-sex couples violated a nondiscrimination provision in its contract with the city and a separate nondiscrimination provision in a citywide ordinance. (*Id.* at p. 531, 141 S.Ct. 1868.) The city refused to execute a full foster contract with CSS in the future unless the agency agreed to certify same-sex couples. (*Ibid.*)

The high court determined the contract provision was not generally applicable under *Smith* because it incorporated individual exceptions permitting a provider to reject certain prospective or foster parents at the sole discretion of a city official. (*Fulton, supra*, 593 U.S. at p. 535, 141 S.Ct. 1868.) Specifically, the contract stated that a “[p]rovider shall not reject a child or family including, but not limited to, ... prospective foster or adoptive parents, for Services based upon ... their ... sexual orientation ... unless an exception is granted by the Commissioner or the Commissioner’s designee, in his/her sole discretion.” (*Ibid.*) “[T]he inclusion of a formal system of entirely discretionary exemptions in [the contract] render[ed] the contractual nondiscrimination requirement not generally applicable.” (*Id.* at p. 536, 141 S.Ct. 1868.) Further, the city’s nondiscrimination ordinance did not apply to CSS’s certification of a foster parent because CSS did not qualify as a public accommodation under the ordinance. (*Id.* at pp. 539–540, 141 S.Ct. 1868.) Because the contractual nondiscrimination requirement imposed a burden on CSS’s religious exercise and did not qualify as generally applicable, it was subject to the most

rigorous of scrutiny requiring that it advance “interests of the highest order” and is narrowly tailored to achieve those means. (*Id.* at p. 541, 141 S.Ct. 1868.) The question was not whether the city had a compelling interest in enforcing its nondiscrimination policies generally, but whether it had such an interest in denying an exception to CSS. (*Ibid.*) The court concluded the city’s interests in maximizing the number of foster families and minimizing liability were not shown to be put at risk by granting an exception to CSS—excluding CSS would reduce the number of foster families, and the city offered only speculation that it might be sued over CSS’s certification practices. (*Id.* at pp. 541–542, 141 S.Ct. 1868.)

Although clarifying *Smith* regarding what it means for a law or regulation to be “generally applicable” (see *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.* (9th Cir. 2023) 82 F.4th 664, 685), we conclude *Fulton* does not fatally undercut *North Coast*, nor does it provide analogous support for defendants’ assertions regarding the UCRA. First, *Fulton* did not overrule *Smith* and relied on it for the proposition a law is not generally applicable if it invites the government to consider the particular reasons for a person’s conduct by providing a mechanism for individualized exceptions, regardless whether any exceptions have been given. (*Fulton, supra*, 593 U.S. at pp. 534–535, 537, 141 S.Ct. 1868.) Second, *Fulton*’s ruling was framed around the city’s “inclusion of a formal system” of discretionary exceptions. (*Id.* at p. 536, 141 S.Ct. 1868; see *Tingley v. Ferguson* (9th Cir. 2022) 47 F.4th 1055, 1088 [holding a statute generally applicable in part because it lacked any provision providing a formal

discretionary mechanism for individual exceptions].) Unlike the contractual nondiscrimination provision in *Fulton*, the UCRA contains no formal system for discretionary exemptions or any other system for obtaining individualized exemptions.

Defendants contend that, under the UCRA, courts are required to consider the circumstances underlying facially discriminatory policies and determine whether they are reasonable and supported by public policy. As such, defendants argue, discretionary exemptions are built into the statute. As explained *ante* in addressing defendants' public policy argument under the statute, the UCRA prohibits business establishments from discriminating on the basis of expressly articulated protected characteristics, but it has also been interpreted to prohibit discrimination based on categories that are not expressly identified in the statute where the disparate treatment is deemed "arbitrary, invidious or unreasonable" (*Sargoy, supra*, 8 Cal.App.4th at p. 1043, 10 Cal.Rptr.2d 889.) Within these unenumerated categories, California courts have concluded that some distinctions in treatment—particularly those that promote the welfare of children and seniors—are not arbitrary or unreasonable because they are based on public policy objectives, typically explicitly stated by the Legislature in statutory enactments, that are often very different from distinctions made with respect to expressly identified characteristics such as sex. (See *Koire, supra*, 40 Cal.3d at pp. 37–39, 219 Cal.Rptr. 133, 707 P.2d 195.)

For example, age is not an identified characteristic and differential price policies designed to benefit senior citizens and children have been held

permissible. (See, e.g., *Pizarro v. Lamb's Players Theatre* (2006) 135 Cal.App.4th 1171, 1176, 37 Cal.Rptr.3d 859 [discount theater tickets for “baby-boomers” to attend a musical]; *Starkman, supra*, 227 Cal.App.3d at pp. 1498–1499, 278 Cal.Rptr. 543 [discounted theater admissions for children and seniors]; *Sargoy, supra*, 8 Cal.App.4th at pp. 1048–1049, 10 Cal.Rptr.2d 889 [higher interest-earning rates for seniors].) Likewise, a distinction limiting children from swimming in certain pools of a condominium association was supported by safety concerns, among other things, and thus not unreasonable. (*Proud, supra*, 190 Cal.App.3d at p. 382, 235 Cal.Rptr. 404.) Further, age distinctions made by car rental companies have been held nondiscriminatory under the UCRA because the Legislature has regulated vehicle rental agreements to specifically permit such restrictions. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1503–1505, 82 Cal.Rptr.2d 368 (*Lazar*).)

Parental status and motherhood are also unenumerated characteristics, and a tote bag giveaway for women over age 18 years to celebrate Mother’s Day at a baseball game meant as a noncompensatory gift, not a discount on admission, was not unlawful discrimination. (*Cohn v. Corinthian Colleges, Inc.* (2008) 169 Cal.App.4th 523, 528–530, 86 Cal.Rptr.3d 401.) Similarly, the California Supreme Court in *Koebke* examined various public policy considerations to determine whether drawing a distinction based on marital status—then an unenumerated characteristic—was arbitrary or unreasonable. (*Koebke, supra*, 36 Cal.4th at pp. 844–846, 31 Cal.Rptr.3d 565, 115 P.3d 1212.)

This decisional authority represents California courts’ efforts to define the contours of what constitutes unreasonable, arbitrary or invidious discrimination under the UCRA in the context of unenumerated characteristics, and examine where bona fide public policy may justify a distinction. It does not constitute a formalized system of discretionary, individualized exemptions to the UCRA within the contemplation of *Fulton*. (*Emilee Carpenter, LLC v. James* (2d Cir. 2024) 107 F.4th 92, 110 (*Emilee Carpenter*) [challenged laws did not constitute a mechanism for individualized exemptions under *Fulton* because they did not “invite government officials to consider whether an individual’s reasons for requesting an exemption are meritorious”]; see *Canaan Christian Church v. Montgomery County* (4th Cir. 2022) 29 F.4th 182, 203 (conc. opn. of Richardson, J.) (*Canaan Christian Church*) [noting the unconstrained discretion rule as articulated in *Fulton* relates to “unconstrained discretion to make essentially adhoc decisions about what circumstances warrant an exception”].)

Defendants argue the UCRA is not neutral or generally applicable under *Tandon v. Newsom* (2021) 593 U.S. 61, 141 S.Ct. 1294, 209 L.Ed.2d 355 (*Tandon*) because it contains “myriad exceptions” that treat secular activity more favorably than religious activity. They point to “categorical exemptions” for specific housing reservations for senior citizens (§§ 51.2–51.4, 51.10–51.12) and “for all discriminatory distinctions that comply with other laws” (§ 51, subd. (c)).

In *Tandon*, the high court considered an application for injunctive relief pending appeal based on a free exercise challenge to the restriction on the

size of in-home religious gatherings during the Covid-19 pandemic.²⁴ In a per curiam order, the high court observed that “government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.” (*Tandon, supra*, 593 U.S. at p. 62, 141 S.Ct. 1294.) “[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.” (*Ibid.*) In other words, courts are to look to the “asserted interests” of a rule and consider whether exempted secular conduct undermines those asserted interests in a similar way to religious conduct. (*Fulton, supra*, 593 U.S. at p. 534, 141 S.Ct. 1868.) “If the government regulates religious activities while excepting secular activities for which its stated interest equally applies, then it unjustifiably belittles the religious practice.” (*Canaan Christian Church, supra*, 29 F.4th at p. 204 (conc. opn. of Richardson, J.).)

Here, the UCRA does not draw any distinctions between secular and religious activities, and there is no evidence the UCRA was enacted as a means to discriminate against religion. Moreover, defendants’ argument the statutory provisions relating to the preservation of housing for senior citizens (§§ 51.2–51.4, 51.10–51.12) are contradictory secular

²⁴ California had permitted hair salons, retail stores, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring more than three households together under the restrictions, but it had not permitted the same for people who wanted to gather for at-home religious exercise. (*Tandon, supra*, 593 U.S. at p. 63, 141 S.Ct. 1294.)

exemptions under the UCRA, rendering it not generally applicable, is unpersuasive. The UCRA expressly bars sexual orientation discrimination “in all business establishments of every kind whatsoever” (§ 51, subd. (b)), and the UCRA’s “fundamental purpose” in doing so is to “secure to all persons equal access to public accommodations” no matter what their sexual orientation (*Harris, supra*, 52 Cal.3d at p. 1169, 278 Cal.Rptr. 614, 805 P.2d 873). These senior housing sections do not represent a system of exemptions for comparable secular activities that undercuts or contradicts the UCRA’s purpose with respect to ensuring full and equal access irrespective of sexual orientation. (*Emilee Carpenter, supra*, 107 F.4th at p. 111 [regarding New York public accommodation laws, under *Tandon*, “religious conduct that [the plaintiff] seeks to engage in is not ‘comparable’ to any sex-based discrimination justified by bona fide public policy reasons”; “limited public policy exemption for sex discrimination does not ‘undermine[] the government’s asserted interest[]’ in prohibiting sexual orientation discrimination ‘in a similar way’”].) Nor does the UCRA’s statement that its scope is “not [to] be construed to confer any right or privilege on a person that is conditioned or limited by law” operate in such a manner. (§ 51, subd. (c).) The UCRA’s scope provision merely provides guidance as to which law applies in the event of a conflict, and defendants point to no California law that permits disparate treatment on the basis of sexual orientation. (See *Lazar, supra*, 69 Cal.App.4th at p. 1504, 82 Cal.Rptr.2d 368.) Nothing in defendants’ arguments persuades us *North Coast’s* conclusions regarding the UCRA’s general applicability and neutrality have been fatally undermined by *Fulton* or *Tandon*. (*North*

Coast, supra, 44 Cal.4th at p. 1156, 81 Cal.Rptr.3d 708, 189 P.3d 959; see *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 619, 244 Cal.Rptr.3d 177 [“On federal questions, intermediate appellate courts in California must follow the decisions of the California Supreme Court, unless the United States Supreme Court has decided the *same* question differently.”], citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.)

2. The CRD’s Neutrality

Defendants maintain the CRD violated its obligation under the free exercise clause to “proceed in a manner neutral toward and tolerant of [Miller’s] religious beliefs.” (*Masterpiece, supra*, 584 U.S. at p. 638, 138 S.Ct. 1719.) The trial court concluded the CRD’s administrative investigation and prosecution did not amount to hostility: “While [the CRD] may have stepped on the line at times, it did not commit a personal foul sufficient to constitute a [free exercise] defense in this case.” Defendants argue this was error. Defendants assert the CRD has prosecuted the case for six years and has asserted there is no burden on Miller’s religious exercise because she has options other than an outright refusal to make a wedding cake for a same-sex couple, which lacks sensitivity to and neutrality toward Miller’s beliefs. Defendants also contend the CRD has made comments and statements like those the Colorado Civil Rights Commission made in *Masterpiece*, which the high court found hostile to the baker’s religion or religious viewpoint. Finally, defendants contend the CRD has done nothing to address the “rampant, ongoing religious discrimination against Miller.”

In *Masterpiece*, the court concluded that the Colorado Civil Rights Commission, the adjudicatory body deciding the case at the administrative level, made hostile comments that “cast doubt on the fairness and impartiality of the Commission’s adjudication of [the cake baker] Phillips’ case.” (*Masterpiece*, *supra*, 584 U.S. at p. 636, 138 S.Ct. 1719.) During public hearings, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, “implying that religious beliefs and persons are less than fully welcome in Colorado’s business community.” (*Id.* at p. 634, 138 S.Ct. 1719.) Although standing alone, the comments could have been construed to mean that a business cannot refuse to provide service based on sexual orientation, comments made at a separate meeting indicated these original comments were likely meant dismissively, showing a lack of consideration of the baker’s free exercise rights. (*Id.* at p. 635, 138 S.Ct. 1719.) Specifically, at a subsequent public meeting of the commission, a commissioner commented that religion had “been used to justify all kinds of discrimination throughout history,” including slavery and the holocaust, and commented that “it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.” (*Ibid.*) The Supreme Court found this sentiment to be “inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.” (*Id.* at pp. 635–636, 138 S.Ct. 1719.) Taken together, the high court could not “avoid the conclusion that these statements cast doubt on the

fairness and impartiality of the Commission's adjudication of [the baker's] case," leading to an inescapable inference that the baker's defenses were not considered with the neutrality the free exercise clause requires. (*Id.* at pp. 636, 639, 138 S.Ct. 1719.)

The situation and the CRD's litigation statements are distinguishable from *Masterpiece*. The CRD is not an adjudicatory body. Under its statutory mandate as the state's civil rights enforcement agency, the CRD has brought a civil action on behalf of the real parties in interest and the public. (Gov. Code, § 12965, subd. (a)(1).) The CRD's role is not one of neutral decisionmaker, which is fundamentally different from that of the commission in *Masterpiece*. The CRD, as a party to litigation, is entitled to mount a zealous and forceful legal challenge. Most importantly, we find nothing in the CRD's conduct or litigation statements that presented anything amounting to hostility or comparable to that voiced by the commission members in *Masterpiece*.

Defendants' claim that the CRD gravely distorted Miller's sincerely held religious beliefs in public filings, and thus exhibited hostility, is without support. As an adversary in litigation, the CRD has consistently argued Miller's denial of any preordered cake for same-sex weddings constitutes discrimination on the basis of sexual orientation because it creates a distinction in service turning exclusively on the sexual orientation of the end users. That argument does not denigrate Miller's religious beliefs about marriage, question whether those beliefs are sincerely held, or insinuate that Miller's policy is a pretext for underlying malice or ill will toward those of

nonheterosexual orientation.²⁵ We, like the trial court, do not find any conduct by the CRD that rises to

²⁵ Defendants construe statements in the CRD’s filings as targeting Miller personally and her religious beliefs, but the record reflects the CRD took aim at Miller’s *policy and conduct* in refusing any preordered cake for a same-sex wedding and argued it caused disparate treatment of a protected group. The CRD argued that policy harmed the dignity of all Californians because it relegates certain individuals to second-class status based on a protected characteristic. The CRD’s argument is one of the central issues in the case, and these are points of good-faith legal disagreement among lawyers and judges across the country in the context of other public accommodations laws. (See, e.g., *303 Creative, supra*, 600 U.S. at p. 637, 143 S.Ct. 2298 (dis. opn. of Sotomayor, J.) [commenting that the majority’s decision allowing website designer to refuse websites for same-sex weddings gives “new license to discriminate” and the “immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status”]; *Telescope Media Group v. Lucero* (8th Cir. 2019) 936 F.3d 740, 771 (conc. & dis. opn. of Kelly, J.) [while reason for differential treatment in supplying wedding videos to same-sex couples may not be because of prejudice against homosexuals, it does not make intended conduct any less discriminatory under the law]; *Brush & Nib, supra*, 247 Ariz. at p. 316, 448 P.3d 890 (dis. opn. of Bales, J. (Ret.)) [observing that beyond injury to particular customers who are denied goods or services, majority’s approval of policy refusing custom wedding invitations to same-sex couples threatens to create a marketplace in which vendors can openly proclaim their refusal to sell to customers whom they disfavor, a prospect that “diminishes our defining statement that all are created equal”].)

Nor was the CRD acting with hostility against Miller or her religion in relying on race-discrimination decisional authority to argue its case—such precedent is undeniably part of the high court’s constitutional jurisprudence, including in the context of public accommodation laws. It is pertinent to our understanding of the issues, how legal principles have been applied in different factual circumstances that may have important analogous value, and the consequences that flow from their application. (*303 Creative, supra*, 600 U.S. at pp. 619–623, 143 S.Ct. 2298 (dis. opn.

the level of hostility or non-neutrality, particularly in the context of adversarial litigation.

Finally, defendants argue the CRD has demonstrated hostility by treating Miller differently in failing to address “the rampant, ongoing religious discrimination against [her].” Miller asserts the CRD knew that many of her corporate clients had “dropped their contracts [with her] because of her beliefs,” but the CRD did nothing. However, there is no evidence Miller filed an administrative complaint with the CRD that it failed to pursue. (See Gov. Code, § 12963 [investigation prompted by filing a complaint].) Defendants also argue Miller sustained a deluge of harassing phone calls and threats of violence, which defendants claim the CRD did nothing about.²⁶ But

of Sotomayor, J.) [describing and comparing various exemptions sought from public accommodations laws in the “civil rights and women’s liberation eras”].)

²⁶ We decline to address any evidence proffered on appeal that the trial court excluded at trial, including third party social media threats, vandalism, and violent conduct. Defendants make no argument this evidence was improperly excluded at trial, and we have no basis to conclude the trial court abused its discretion in doing so. (See *People v. Ashford University, LLC* (2024) 100 Cal.App.5th 485, 533, fn. 11, 319 Cal.Rptr.3d 132; see also *Glassman v. Safeco Ins. Co. of America* (2023) 90 Cal.App.5th 1281, 1307, 307 Cal.Rptr.3d 863 [documents not presented in the trial proceeding generally must be disregarded as beyond the scope of review].) Defendants’ argument the CRD should have investigated Miller’s lost corporate contracts was not supported by specific evidence presented at the bench trial. Miller’s testimony was limited to the fact she lost corporate clients because of the refusal and the surrounding publicity, but this record contains nothing about those contracts or the circumstances of their nonrenewal. Nor does the record indicate a request or complaint made by Miller to the CRD seeking investigative or resource assistance that the CRD refused to

the CRD is not a criminal law enforcement agency and is without the necessary authority or jurisdiction to criminally prosecute acts of harassment or threats against Miller, her staff or the Rodriguez-Del Rios.²⁷²⁸ Even to the extent the CRD has the ability to provide resources or the authority to bring a civil action under the Ralph Civil Rights Act of 1976 (§ 51.7) for violence or threats of violence based on a protected characteristic, there is no evidence in the record defendants filed any complaint with the CRD, or that they asked the CRD to provide resources or investigate any third party conduct.

3. California's Free Exercise Guarantee

Finally, California's Constitution includes a free exercise guarantee: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." (Cal. Const., art. I, § 4.)

The trial court determined that the application of the UCRA in this case substantially burdens Miller's free exercise of her Christian faith. The trial court also determined the UCRA's application here could not satisfy strict scrutiny because there was a less restrictive means to achieve the state's goal of ensuring full and equal access to goods provided by public facing business establishments irrespective of sexual orientation—a referral to another comparable

provide, including under the Ralph Civil Rights Act of 1976 (§ 51.7).

²⁷ It is disheartening that certain non-party individuals viewed this legal dispute as an excuse to threaten or harass others, including Miller, her staff and the Rodriguez-Del Rios. Such conduct has no place in our society, and we condemn it in the strongest possible terms.

business. Nonetheless, the trial court concluded it was bound by *North Coast*'s conclusion that the UCRA survives strict scrutiny.

Although declining to determine what standard of review would apply to the California's Constitution's guarantee of free exercise of religion, the California Supreme Court concluded in *North Coast* that the UCRA is a valid and neutral law of general applicability. (*North Coast, supra*, 44 Cal.4th at pp. 1156, 1158, 81 Cal.Rptr.3d 708, 189 P.3d 959.) Assuming the UCRA's prohibition against sexual orientation discrimination would substantially burden the defendants' religious beliefs and strict scrutiny applied, our high court concluded California had a compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal. (*North Coast, supra*, at pp. 1158–1159, 81 Cal.Rptr.3d 708, 189 P.3d 959.)

The trial court is correct that *North Coast* is binding, and we are unpersuaded the circumstances here are meaningfully distinguishable such that a different result is warranted. Even if application of the law substantially burdens Miller's religious beliefs and assuming strict scrutiny applies, we disagree that the referral process favored by the trial court and defendants constitutes a less restrictive means of achieving the state's compelling interest in ensuring full and equal access to goods and services irrespective of sexual orientation because it in no way remedies the harms that the UCRA was designed to address. Merely directing customers to a separate and independent business entity which has no objection to serving them is *not* full and equal access—it in no way

guarantees access to the same product or service, at the same cost, under the same conditions. Plus, this referral model does not mitigate the stigmatizing harms inflicted by a referral process—which, here, occurred in front of the couple’s friends and family. It reinforces a caste system where certain individuals are treated as less deserving of products and services on the open market based on protected characteristics. (See *Catholic Charities, supra*, 32 Cal.4th at p. 565, 10 Cal.Rptr.3d 283, 85 P.3d 67 [concluding broader religious exemption from the Women’s Contraception Equity Act (Health & Saf. Code, § 1367.25 & Ins. Code, § 10123.196) was not a less restrictive means to achieve the state’s interest in eliminating gender discrimination because it would increase the number of women affected by discrimination in the provision of health care benefits].) California has a compelling interest in ensuring full and equal access to goods and services irrespective of sexual orientation (see *North Coast, supra*, 44 Cal.4th at p. 1158, 81 Cal.Rptr.3d 708, 189 P.3d 959), and there are no less restrictive means for the state to achieve this goal. The state’s compelling interest would be substantially frustrated and undercut if business establishments, professing deep and sincerely held religious beliefs like those held by defendants, could withhold full and equal access to goods and services from the protected class through a referral exception or a general exception for religious objectors.

B. Conclusion

We are unpersuaded that either *Fulton* or *Tandon* undermines *North Coast*’s conclusion that the UCRA is a neutral and generally applicable law that satisfies rational basis review. Further, we find no sufficient

support for defendants' contention the CRD demonstrated hostility toward Miller's religion in violation of the neutrality that the federal Constitution's First Amendment's free exercise clause requires. Finally, assuming strict scrutiny applies, we find no basis in the circumstances presented to reach a different conclusion from *North Coast* under California's constitutional free exercise guarantee.

DISPOSITION

The court's order is vacated and remanded for further proceedings consistent with this opinion. Costs on appeal are awarded to the CRD.

WE CONCUR:

DETJEN, Acting P. J.

SMITH, J.

101a

Court of Appeal, Fifth Appellate District
Brian Cotta, Clerk/Executive Officer
Electronically FILED on 3/5/2025
by Zenaida De La Fuente, Deputy

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

FIFTH APPELLATE DISTRICT

CIVIL RIGHTS
DEPARTMENT,

Plaintiff and Appellant,

v.

CATHY'S CREATIONS,
INC. et al.,

Defendants and
Respondents;

EILEEN RODRIGUEZ-DEL
RIO et al.,

Real Parties in Interest.

F085800

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

**ORDER DENYING
PETITION FOR
REHEARING AND
MODIFYING
OPINION (NO
CHANGE IN
JUDGMENT)**

THE COURT:

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

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

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

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

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

“Generally, policies that make a facial distinction based on an enumerated protected characteristic have been held to be unlawful as arbitrary, invidious or unreasonable discrimination. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 32-33 (*Koire*) [facially discriminatory pricing policies favoring women unlawful under the UCRA]; see also *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175-176 (*Angelucci*) [pricing policies making facial distinction on the basis of sex violate the UCRA; the plaintiffs sufficiently alleged injury when such a policy was applied to them].) Likewise, policies that make a facial distinction based on an unenumerated characteristic may be found unlawful if the distinction constitutes “arbitrary, invidious or unreasonable discrimination.”⁴ (*Javorsky v. Western Athletic*

⁴ We are not suggesting the lawfulness of a policy drawing a facial distinction based on a protected

Clubs, Inc. (2015) 242 Cal.App.4th 1386, 1398; see *Liapes, supra*, 95 Cal.App.5th at p. 926 [program and algorithm that facially excludes women and older people from receiving ads combined with evidence of disparate impact adequately alleged violation of the UCRA]; *Marina Point, supra*, 30 Cal.3d at p. 745 [exclusion of children from an apartment complex unlawful under the UCRA].) Strong public policy based on a compelling societal interest, typically evidenced by statutory enactments, may support as reasonable (and thus not arbitrary) an otherwise prohibited discriminatory distinction, such as, for example, excluding children from bars. (*Koire, supra*, 40 Cal.3d at p. 31; accord, *Marina Point, supra*, at pp. 741-742.)”

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

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

characteristic is assessed under a different or less stringent standard because it is unenumerated.

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

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

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

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

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

6. On page 58 (in part 11.D. of the Discussion, under the heading Conclusion), a new paragraph is inserted between the first and second paragraphs to read as follows:

“To hold otherwise would expand the concept of speech to encompass routine consumer products bearing no indicia of expression, which would drain the First Amendment of meaning in a manner we find unsupported by our nation’s high court’s jurisprudence. Considered as expressive conduct, the act of preparing and delivering before a wedding celebration this nondescript, multi-purpose cake is unlikely to be understood by a viewer as communicating any message of the baker, let alone a specific message about marriage. And no explanatory conversation about an intended message, such as through sales standards or a conversation prior to sale, can transform such conduct into symbolic speech. (*FAIR, supra*, 547 U.S. at p. 66.) Given the circumstances here, a contrary conclusion would support an overly broad view that producing and selling a routine consumer product for an event constitutes the symbolic speech of the vendor whenever a message is intended. Logically, this would apply to sales conduct beyond the scope of weddings and sincerely held Christian beliefs about same-sex marriage.

We decline to extend the parameters of protected expression to include such a broad variety of marketplace conduct.”

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

This modification does not effect a change in the judgment.

/s/ Meehan
MEEHAN, J.

WE CONCUR:

/s/ Detjen
DETJEN, Acting P.J.

/s/ Smith
SMITH, J.

107a

ELECTRONICALLY FILED
1/5/2023 2:35 PM
Kern County Superior Court
By Veronica Urena, Deputy

* * *

**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

**NOTICE OF
ENTRY OF
JUDGMENT AND
STATEMENT OF
DECISION**

Div.: J
Judge: Hon J. Eric
Bradshaw

Action Filed:
October 17, 2018

**TO: PLAINTIFF AND ITS ATTORNEYS OF
RECORD:**

PLEASE TAKE NOTICE that a Judgment, in the above-referenced matter was entered on December 27, 2022. A conformed copy of said Judgment is attached hereto as Exhibit “A” and a conformed copy of the Statement of Decision, entered on December 27, 2022, is attached hereto as Exhibit “B.”

Dated: January 5, 2023

LiMANDRI & JONNA LLP

By: /s/ Charles S. LiMandri

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 A

FILED
KERN COUNTY SUPERIOR COURT

12/27/2022

BY: Urena, Veronica

DEPUTY

ELECTRONICALLY RECEIVED 11/9/2022 8:58 AM

**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

JUDGMENT

Plaintiff the Department of Fair Employment and Housing, on behalf of the State of California, brought this civil action under Government Code section 12965 against Defendants Cathy's Creations, Inc. dba Tastries and Catharine Miller, alleging a violation of the Unruh Civil Rights Act, Civil Code section 51, as incorporated into the Fair Employment and Housing Act, Government Code section 12948, based on the administrative complaint of Real Parties in Interest Eileen Rodriguez-Del Rio and Mireya Rodriguez-Del Rio.

This action came on regularly for court trial on July 29, 2022, in the Superior Court of Kern County, Division J of Metropolitan Division Justice Building, the Hon. J. Eric Bradshaw presiding; the plaintiff appearing by attorneys Gregory J. Mann, Kendra Tanacea, and Soyeon C. Mesinas, and the defendants appearing by attorney Charles S. LiMandri, Paul M. Jonna, and Jeffrey M. Trissell. The Court's Statement of Decision is attached hereto and incorporated by reference.

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

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 Statement of Decision.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants Cathy's Creations, Inc.

111a

dba Tastries and Catharine Miller are deemed the prevailing party for purposes of the right to recover litigation costs and fees as permitted by law. Therefore, Judgment in favor of Defendants and against Plaintiff shall include costs in the amount of \$_____ and attorneys' fees in the amount of \$_____.

IT IS SO ORDERED.

Dated: Signed 12/27/2022 12:14 PM

JUDGE OF THE SUPERIOR COURT

/s/ Hon. J. Eric Bradshaw

Hon. J. Eric Bradshaw

* * *

EXHIBIT B

FILED
KERN COUNTY SUPERIOR COURT
12/27/2022
BY: Urena, Veronica
DEPUTY

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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.

CASE NO.:
BCV-18-102633

IMAGED FILE

**STATEMENT OF
DECISION**

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

Real Parties in
Interest.

INTRODUCTION

1. Plaintiff Dept. of Fair Employment and Housing (“DFEH”) filed this enforcement action under the Unruh Civil Rights Act on behalf of real parties in interest Eileen Rodriguez-del Rio Unruh Civil Rights Act on behalf of real parties in interest Eileen Rodriguez-del Rio (“Eileen”) and Mireya Rodriguez-del Rio (“Mireya”). Eileen and Mireya have a homosexual sexual orientation, and were married in California in December 2016. The defendants are Catharine Miller (“Miller”) and Cathy’s Creations, Inc. Miller is the sole shareholder of Cathy’s Creations, Inc., which is a small boutique and bakery doing business as “Tastries.”

2. DFEH alleges the defendants discriminated against Eileen and Mireya in 2017 because of their sexual orientation, in violation of the Unruh Civil Rights Act. DFEH failed to prove its claim. The evidence showed that real parties in interest have standing. However, DFEH failed to prove the discriminatory intent required under the Unruh Civil Rights Act. The evidence also affirmatively showed that defendants offered full and equal service to real parties in interest by referring them to a comparable bakery. These issues are dispositive.

3. To complete the trial record, this court has determined the remaining issues raised by the parties, assuming—for the sake of the discussion—DFEH had proven its cause of action. Defendants’ state and federal constitutional defense based on the free exercise of religion fail, based on controlling California authority. DFEH is barred by defendants’ right to Free Speech under the First Amendment of

the U.S. Constitution from enforcing the Unruh Civil Rights Act to compel or prohibit defendants' speech.

FACTUAL BACKGROUND

4. Miller is a married woman of sincere Christian faith. She and her husband of over 40 years met at church, where her husband was formerly a church youth director. Miller was a school teacher for approximately 30 years while she raised a family and also pursued interests in floral arranging, event planning and baking. In 2013, she started "Tastries."

5. The bakery items that Miller sells at Tastries include items that are made for the bakery case, and items that are made to fill custom orders. The case items are not made for a particular purpose, they are replenished frequently as needed, and they are for sale to anyone on a "first-come, first-served" basis. The custom bakery items are ordered in advance and are made for particular events, such as a birthdays, quinceañeras, and weddings.

6. The process of making wedding cakes varies, depending on the design, e.g., number of tiers, type of cake, ingredients, flavors, colors, frosting, decorations and finish. The specific ingredients may change depending on the venue and anticipated environmental conditions for the cake before it is cut and served. Custom orders are often delivered to the venue, and are artistically "constructed" on site. The entire process generally involves three to six people. Miller is personally involved in every production-related aspect of her bakery, and, as it pertains to wedding cakes, she is personally involved in *some* aspect of the design and making of virtually every wedding cake.

7. Approximately 70 percent of all custom orders at Tastries are wedding cakes, ranging from four to twelve deliveries each week depending on the season. In 2017, custom wedding cake orders represented approximately \$10,000-\$12,000, or twenty percent, of Miller's monthly gross revenues at Tastries. In addition to direct revenues, custom wedding orders generate indirect revenues from referrals by guests and vendors at the weddings. Total revenues associated with wedding orders approximate 25-30 percent of Miller's business. Miller developed order forms specifically for custom wedding cake orders.

8. The uncontroverted evidence showed that Miller's sincere faith permeates her life and work, and is "founded on God's word." As it pertains to the present case, Miller testified, "God's word says in Genesis that God created man and woman in his likeness, and marriage was between a man and a woman." Miller testified that the teaching "throughout the Bible" is that, "Marriage is between a man and a woman and is very, very sacred, and it's a sacrament..." As the owner of Tastries, Miller considers herself a "steward" of "the Lord's business he put in [her] hands," and that she "cannot participate in something that would hurt him and not abide by his precepts in the Bible." Much of Tastries décor includes Christian symbols and messages, such as crosses and Bible verses, and it openly displays and sells such items. During design consultations for wedding cakes, Miller discusses the meaning and religious significance of a wedding cake.

9. Over time, Miller has established written design standards for all custom bakery items. The design standards are part of the employee handbook.

The standards are rooted in Miller's Christian beliefs, which are in turn rooted in the Bible, and have evolved in response to Miller's experiences with peoples' custom orders. Some of the requests people have made include orders for "penis cookies," "breast cookies and cakes," marijuana-related items (when marijuana laws changed), and designs with "adult cartoons." The design standards address such requests. Miller created the bakery design standards to conform to her Christian faith in the Bible and what she believes the Bible teaches regarding marriage.

10. There were several versions of the design standards in existence during the relevant time frame in 2017, but those versions vary in only minor detail. All versions quote a Bible verse at the bottom of the page, "Whatever is true, whatever is noble, whatever is right, whatever is pure, whatever is lovely, whatever is admirable—if anything is excellent or praiseworthy—think about such things." The concepts from that quote form the introductory question for all Tastries bakery designs: "Is it lovely, praiseworthy, or of good report?"

11. Two versions of the design standards refer to the custom bakery design being prepared "as a Centerpiece to Your Celebration." Each version refers to "options that we can offer at Tastries," or "our criteria for what we are able to offer." One version includes the statement, "If we are unable to meet your design needs, we can refer you to several other bakers and bakeries in town." Another version asks, "Is the design based on godly themes...?" A number of such themes are listed as part of the question. The design standard also states: "Our cakes are a reflection of our

business and speak volumes when sitting center stage.”

12. In August 2017, the design standards stated, in relevant part:

* * * * *

All custom orders must follow Tastries Design Standards:

- Look as good as it tastes, and taste as good as it looks []
- Beautiful and balanced: size is proportional to design
- Complimentary colors: color palettes are compatible; work with the design
- Appropriate design suited to the celebration theme
- Themes that are positive, meaningful and in line with the purpose
- We prefer to make cakes that would be rated PG or G

Order requests that do not meet Tastries Design Standards and we do not offer:

- Designs promoting marijuana or casual drug use
- Designs featuring alcohol products or drunkenness
- Designs presenting explicit sexual content
- Designs portraying anything offensive, demeaning or violent
- Designs depicting gore, witches, spirits, and satanic or demonic content
- Designs that violate fundamental Christian principals; wedding cakes must not contradict

God's sacrament of marriage between a man
and a woman

* * * * *

13. The list of requests that do not meet the design standards, and that are not offered—designs that “violate fundamental Christian principles,” including wedding cakes that “contradict God’s sacrament of marriage between “a man and a woman”—apply regardless of who makes the request. On one occasion, a man requested a custom seven-tier cake for a wedding anniversary at which he planned to announce to his wife he was divorcing her. Miller declined to make the cake, telling the man that she was “not going to be part of something like that.”

14. Not all of the employees at Tastries agreed with, or abided by, the Tastries design standards in every circumstance. One such former employee testified that Tastries is compelled to make a cake with writing on it that says, “Hail satan,” if requested to do so. On two occasions before the events giving rise to the present case, employees had taken and processed orders that violated the design standards regarding marriage, and they concealed their activities from Miller.

15. For custom order requests that do not meet Tastries design standards, Miller arranged for another local bakery, Gimme Some Sugar, to handle those orders by referral. This has occurred several times. One such referral customer came back to Tastries and reported being “very happy” with the referral, and had Tastries make custom orders for other events. Gimme Some Sugar is not otherwise affiliated with Miller or Tastries. Before going to

Tastries, Eileen and Mireya tried Gimme Some Sugar, but were not satisfied because the cakes were too sweet. They wanted to try something else, and Eileen had seen the Tastries sign while driving by.

16. On August 17, 2017, Eileen and Mireya visited Tastries to buy a custom wedding cake for their upcoming ceremony to repeat marriage vows and celebrate their marriage. They had a pleasant visit with Rosemary, an employee who was familiar with the design standards, and who talked to them about what they wanted. Eileen and Mireya chose a popular design for a wedding cake that was on display—a three-tier white wedding cake with “wavy” frosting, i.e., a “wispy cake,” with flowers on it, but no writing or “cake topper.” Rosemary began filling out the custom order form, asking about flavor, color, number of guests, etc. During the discussion, they discussed having Rosemary attend the ceremony and cut the cake. Rosemary came to understand that the cake was probably for a same-sex wedding. She did not inform Eileen or Mireya about the design standards.

17. During the course of the meeting, Rosemary spoke privately to the employee manager, Natalie. Natalie was one of the employees who had previously processed a custom order that violated the design standards regarding marriage, and she kept that information from Miller. Rosemary informed Natalie that she was being asked to take an order that she believed was for a same-sex wedding celebration. Natalie told Rosemary to give the order form to her when Rosemary was finished, but not tell Miller about it. Rosemary did as Natalie suggested. She scheduled a cake tasting for Eileen and Mireya on August 26, and Mireya bought a tote bag before they left the

bakery. Rosemary said nothing to Eileen and Mireya about the design standards, and she said nothing to Miller about the order.

18. On Saturday, August 26, 2017, Eileen and Mireya arrived at Tastries for the cake tasting with two male friends, and Eileen's mother. Rosemary greeted them, and the sample cakes for tasting were already set out and available, sitting next to the group. Rosemary went to speak privately with Natalie. Natalie told Rosemary to do the tasting, but not tell Miller what was happening. Uncomfortable with that approach, Rosemary told Miller that a group was there for wedding cake tasting, but gave Miller little information. Miller agreed to handle the tasting. She had no knowledge of Eileen's and Mireya's earlier visit to Tastries, or of their sexual orientation, or that Rosemary had already started a custom order form.

19. Miller greeted Eileen's and Mireya's group with a blank form, and began asking standard questions for a wedding cake order, e.g., wedding venue, time of the event, type of cake, etc. Eileen and Mireya assumed they would be finalizing their custom order, and were perplexed by Miller's questions, which they had previously answered for Rosemary. Miller could not understand the apparent confusion.

20. During the course of the conversation, Miller became aware she was being asked to design a wedding cake for a same-sex marriage celebration. After taking a moment to pray, Miller told Eileen and Mireya she could not make the wedding cake, but would refer them to another bakery that had similar recipes, *Gimme Some Sugar*. Miller was asked why she could not make the cake, and was pressed for an answer. Miller told Eileen and Mireya, "I can't be a

part of a same-sex wedding because of my deeply held religious convictions, and I can't hurt my Lord and Savior." Eileen and Mireya never tasted the cakes at Tastries. They declined Miller's offer to refer them to *Gimme Some Sugar*. Someone from the group took the order form clipboard from Miller, and the group left the bakery, upset about the encounter.

21. Within hours of Eileen and Mireya leaving Tastries that day, social media posts appeared, expressing various viewpoints, not all of them friendly. In the hours and days that followed, media appeared. Pornographic emails and messages were sent to Tastries, necessitating a shut-down of the computer. An article was written about Eileen and Mireya that was not true. Property was damaged. Hurtful things were said about Eileen and Mireya, and Miller and Tastries.

22. Eileen and Mireya found another bakery and ordered a cake they believed was "delicious" and "beautiful," similar in appearance to what they intended to order from defendants. On October 7, 2017, they renewed vows in a ceremony and had a reception attended by their guests. During the reception, the cake was placed in a central area of the venue where Eileen and Mireya participated in a cake-cutting ceremony. Flowers had been placed on the cake, and Eileen and Mireya were both happy with it. Approximately two weeks later, Eileen and Mireya filed an administrative complaint with DFEH, alleging discrimination by the defendants.

23. On October 17, 2018, DFEH filed the present enforcement action. DFEH's first amended complaint alleges one cause of action against Miller and Tastries

for discrimination in violation of the Unruh Civil Rights Act.

DISCUSSION

A. DFEH's Cause of Action for a Violation of the Unruh Civil Rights Act.

24. Civil Code § 51, known as the Unruh Civil Rights Act, states in relevant part:

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

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

25. Civil Code § 52 of the Unruh Civil Rights Act states in relevant part:

Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51 ..., is liable for each and every offense for the actual damages, ... up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars (\$4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51

26. The objective of the Unruh Civil Rights Act is to prohibit “unreasonable, arbitrary, or invidious discrimination.” *Sunrise Country Club Assn. v. Proud* (1987) 190 Cal.App.3d 377, 380. Unreasonable, arbitrary, or invidious discrimination is present where the defendant’s policy or action “emphasizes irrelevant differences” or “perpetuate[s] [irrational] stereotypes.” *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 34, 36; see also, *Pizarro v. Lamb’s Players Theatre* (2006) 135 Cal.App.4th 1171, 1176. The Unruh Civil Rights Act applies not merely in situations where businesses exclude individuals altogether, but also where treatment is unequal. *Koire v. Metro Car Wash, supra*, 40 Cal.3d at p. 29.

27. To have “standing” to assert rights under the Unruh Civil Rights Act, a person “cannot sue for discrimination in the abstract,” *White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1025, but must possess “a bona fide intent to sign up for or use [the defendant’s] services.” *Id.* at p. 1032.

28. To prove a violation of the Unruh Civil Rights Act, the plaintiff must “plead and prove intentional discrimination in public accommodations.” *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1175 (superseded by statute on other grounds as stated in *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 664); *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 854. A disparate impact analysis or test does not apply to claims under the Unruh Civil Rights Act. *Koebke, supra*, 36 Cal.4th p. 854. For purposes of the Unruh Civil Rights Act, “sexual orientation” means “heterosexuality, homosexuality, and bisexuality.” Civ. Code § 51(e)(7) [adopting definition in Govt. Code § 12926].

29. The parties in the present case have referred to form jury instructions for claims under the Unruh Civil Rights Act, CACI No. 3060, and BAJI No. 7.92. The Judicial Council's "Directions for Use" for CACI No. 3060 state:

... [E]lement 2 uses the term "substantial motivating reason" to express both intent and causation between the protected classification and the defendant's conduct. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives." (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232; CACI No. 2507, "Substantial Motivating Reason" Explained.) Whether the FEHA standard applies under the Unruh Act has not been addressed by the courts.

... [I]ntentional discrimination is required for violations of the Unruh Act. (See *Harris v. Capital Growth Investors XIV* ["*Harris*"] (1991) 52 Cal.3d 1142, 1149.) The intent requirement is encompassed within the motivating-reason element.

1. Standing

30. The unusual circumstance of another gay couple visiting Tastries to get a wedding cake earlier the *same day* that Eileen and Mireya visited Tastries, and the fact Eileen and Mireya decided against *Gimme Some Sugar* because its cakes were too sweet but decided for Tastries without ever tasting its cakes,

and other circumstances, have raised a question whether real parties in interest intended to use Tastries, or were just “looking for a lawsuit.” The evidence showed that Eileen and Mireya had a bona fide intent to use the defendants’ services. It was not a “shakedown.” Eileen and Mireya have standing.

2. No Intentional Discrimination

31.DFEH failed to prove that defendants intentionally discriminated against Eileen and Mireya because of their sexual orientation. The evidence affirmatively showed that Miller’s *only* intent, her only motivation, was fidelity to her sincere Christian beliefs. Miller’s only motivation in creating and following the design standards, and in declining to involve herself or her business in designing a wedding cake for a marriage at odds with her faith, was to observe and practice her own Christian faith, i.e., to avoid “violat[ing] fundamental Christian principles” or “contradict[ing] God’s sacrament of marriage between a man and a woman.”

32.The evidence affirmatively showed that Miller and Tastries serve, and employ, persons with same-sex orientations. Miller and Tastries serve each person—regardless of sexual orientation—who desires to purchase items in the bakery case. Miller and Tastries serve each person—regardless of sexual orientation—who requests a custom bakery item, the design for which does not violate the design standards.

33.Miller and Tastries do not design and do not offer to *any* person—regardless of sexual orientation—custom bakery items that “violate fundamental Christian principles.” Miller and

Tastries do not design and do not offer to *any* person—regardless of sexual orientation—custom wedding cakes that “contradict God’s sacrament of marriage between a man and a woman.” The evidence showed that Eileen and Mireya requested a wedding cake, the design for which was at odds with the Tastries standards pertaining to “fundamental Christian principles” and “God’s sacrament of marriage between a man and a woman.”

34.DFEH argues that defendants intended to make “a distinction between their gay and straight customers seeking marriage-related preordered baked goods;” that through the design standards, Tastries “willfully denies services to gay couples, thereby making a distinction on account of their sexual orientation;” that it is “undisputed that Miller intended to make a distinction based on ... sexual orientation;” that Eileen and Mireya “encountered Tastries’ exclusionary policy and practice based on who they were—a lesbian couple—which prevented them from obtaining Tastries goods and services;” and that “but for’ gay customers’ sexual orientation, Tastries would sell them products.” DFEH failed to prove any of these assertions.

35.DFEH’s argument seems to take issue with what Miller believes the Bible teaches regarding marriage, even though DFEH concedes she sincerely does believe it.

36.Also, the design standards apply uniformly to all persons, regardless of sexual orientation. The evidence affirmatively showed that at no time was Miller’s conduct a pretext to discriminate or make a distinction based on a person’s sexual orientation. The evidence affirmatively showed that at no time was a

Tastries design standard created, or applied, as a pretext to discriminate or make a distinction based on a person’s sexual orientation. Miller’s only motivation, at all relevant times, was to act in a manner consistent with her sincere Christian beliefs about what the Bible teaches regarding marriage. That motivation was not unreasonable, or arbitrary, nor did it emphasize irrelevant differences or perpetuate stereotypes. DFEH failed to prove the requisite intent.

3. Full and Equal Service

37. The evidence affirmatively showed that Miller immediately referred Eileen and Mireya to another good bakery when she was unable to design the wedding cake, but Eileen and Mireya declined. Both parties cite and discuss *Minton v. Dignity Health* (“*Minton*”) (2019) 39 Cal.App.5th 1155, which quotes *North Coast Women’s Care Medical Group, Inc. v. Superior Court* (“*North Coast*”) (2008) 44 Cal.4th 1145. Both *Minton* and *North Coast* acknowledge that a physician with religious objections to performing certain medical procedures can avoid the conflict by ensuring “full and equal” access to that procedure by a physician who lacks the religious objections. The parties disagree on whether defendants’ referral to an “an unaffiliated bakery” in the present case was “full and equal” access.

38. The Catholic hospital in *Minton* declined—for religious reasons—to allow a medical procedure on a patient that a physician deemed medically necessary, and that the Catholic hospital normally allowed on others at its facility. According to *Minton*, the hospital “initially did not ensure that [the patient] had ‘full and equal’ access to a facility,” and the hospital’s “subsequent reactive offer to arrange treatment

elsewhere was not the implementation of a policy to provide full and equal care to all persons at comparable facilities not subject to the same religious restrictions...” (Emphasis added.) *Id.* pp. 1164-1165.

39. In the present case, Miller’s conduct was materially different than the Catholic hospital in *Minton*, and in fact, Miller did precisely what the *Minton* decision suggests is adequate. Miller’s offer to refer Eileen and Mireya to *Gimme Some Sugar* was almost simultaneous with Miller’s discovery that she was being asked to design a wedding cake at odds with her Christian faith and not offered under the Tastries design standards. Miller arranged, in advance, for *Gimme Some Sugar* to take referrals from Tastries in such circumstances, before Eileen and Mireya ever visited Tastries. Miller “initially” did ensure that Eileen and Mireya had “full and equal” access, and her immediate offer to refer them to a comparable, good bakery was reasonable and timely, and not a “subsequent reactive offer.”

40. DFEH contends that “businesses must provide their full range of goods and services to all customers.” *Minton* does not say that. DFEH argues that *Minton* involved a referral to an “affiliated” hospital in the same “network,” and that defendants in the present case have “no written or oral agreement” with *Gimme Some Sugar* that requires it to “fulfill the order of any gay couple referred by Tastries.” DFEH argues that the referral to a “different bakery, with different ownership, staffed by different bakers and decorators using different recipes and ingredients, and located in a different facility” does not satisfy the “full and equal” access requirement. This court disagrees.

41. The proposed alternative Methodist hospital in *Minton* was “a non-Catholic Dignity Health hospital.” *Id.* at p. 1159. There is nothing in *Minton* to suggest that the two hospitals were anything other than separate and distinct business organizations, e.g., corporations, that were “owned” by a third entity known as “Dignity Health,” i.e., a corporation that owned the shares of two separate corporations. There is nothing in *Minton* to suggest that the two hospitals had anything other than different doctors, nurses and administrative staff, using different equipment and medicines. It is apparent from *Minton* that the two hospitals were in different buildings “nearby,” that a physician’s privileges at one hospital did not automatically translate to privileges at the other, and that a person’s health insurance might apply to one hospital, but not the other.

42. *Minton* does not state the two hospitals would need a “written or oral” agreement for the referral to satisfy the “full and equal” service requirement, as DFEH suggests. The evidence in present case affirmatively showed that Miller had such an “oral agreement” with Stephanie at *Gimme Some Sugar*. No evidence was presented otherwise.

43. DFEH argues that Eileen and Mireya had already tried and rejected *Gimme Some Sugar*. The evidence showed that Miller was never made aware of that fact, or why, as Eileen and Mireya simply declined Miller’s referral offer before walking out.

44. Because DFEH failed to prove the defendants violated the Unruh Civil Rights Act, resolution of this case does not require this court to address defenses and other issues the parties have raised. However, to complete the trial record, those defenses and issues

will be addressed, and this court will assume—for discussion purposes—a violation of the Unruh Civil Rights Act.

B. Free Exercise of Religion

45. The U.S. Supreme Court stated in *Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Comm.* (“*Masterpiece*”) (2018) 138 S.Ct. 1719:

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell v. Hodges* [(2015) 576 U.S. 644], “[t]he 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.” [*Id.* at 679-680.] Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. (Citations.)

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations. *Masterpiece, supra*, at p. 1727.

46. Both the federal and state constitutions protect the free exercise of religion. The First Amendment to the U.S. Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” U.S. Const. 1st Amend. This provision applies to the states because of its incorporation into the Fourteenth Amendment. *Employment Div., Ore. Dept. of Human Res. v. Smith* (“*Smith*”) (1990) 494 U.S. 872, 876-877.

47. Article 1, section 4 of the California Constitution states in relevant part: “Free exercise and enjoyment of religion without discrimination or preference are guaranteed.”

48. With respect to the free exercise of religion, the First Amendment “first and foremost” protects “the right to believe and profess whatever religious doctrine one desires.” *Smith*, at p. 877. “[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Fulton v. City of Philadelphia* (2021) 141 S.Ct. 1868, 1876.

49. The First Amendment’s right to the free exercise of religion “does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Smith, supra*, at p. 879. 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.” *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (“*Lukumi*”) (1993) 508 U.S. 520, 531.

50. In California, the Supreme Court specifically declined to hold that courts should apply strict scrutiny “to neutral, generally applicable laws that incidentally burden religious practice” in cases involving free exercise claims under the state Constitution. *Catholic Charities of Sacramento, Inc. v. Superior Court* (“*Catholic Charities*”) (2004) 32 Cal.4th 527, 566. The California Supreme Court has endorsed the *Smith* rule that a “valid and neutral law of general applicability” is not subject to strict scrutiny. *Id.* at p. 549; see also *North Coast, supra*, 44 Cal.4th 1145, 1155.

51. DFEH argues that the decision in *North Coast* dictates a decision against the defendants in the

present case. Defendants take a contrary view, and articulate a different analytical path. Defendants cite *Montgomery v. Bd. of Retirement* (1973) 33 Cal.App.3d 447, 451 [quoting *People v. Woody* (1964) 61 Cal.2d 716, 719], stating that there is a “two-fold analysis which calls for a determination of, first, whether the application of the statute imposes any burden upon the free exercise of the defendant’s religion, and second, if it does, whether some compelling state interest justifies the infringement.”

52. The evidence in the present case proves clearly and convincingly that application of the anti-discrimination provisions of the Unruh Civil Rights Act, as advanced by DFEH in the present case, *substantially* burdens Miller’s free exercise of her Christian faith and does not survive strict scrutiny, because there is a less restrictive means of achieving the state’s interest.

53. Apart from the punitive fines and other relief DFEH seeks in its operative pleading, DFEH states that it “does not seek an order forcing Tastries to sell preordered wedding cakes in the retail marketplace to all customers, including gay couples.” At the same time, DFEH argues, seemingly inconsistently, that Tastries has three options: (1) sell all its goods and services to all customers; (2) cease offering wedding cakes for sale to anyone; (3) have Miller and employees sharing her religious objections to same-sex marriage “step aside ... and allow her willing employees to manage the process.”

54. The evidence affirmatively showed that DFEH’s proposed “options” would substantially burden defendants’ free exercise of religious faith under the circumstances, as their blunt force rigidity

lacks any sensitivity to the rational, reasonable, sincere religious beliefs the DFEH *says* it acknowledges.

55.DFEH's "option" of defendants selling all goods to all customers, i.e., the option for defendants to ignore sincere religious convictions, is sophistry. Apart from the fact Miller generally *does* sell all goods to all customers, including those who are gay, this case presents a focused scenario. Miller's sincere Christian faith is simply buried and paved over by DFEH's first option.

56.DFEH's second option, defendants not selling wedding cakes at all, would have a devastating effect on Miller's business—loss of approximately 25-30 percent in gross revenues—and could potentially put her out of business. Apart from the financial impact, Miller's ability to practice her faith by supporting and participating in marriage ceremony preparations that align with her Christian views would be stifled. Miller's participation in the wedding cake part of her business, with her time, talent, and resources, is inextricably linked to her sincere Christian beliefs about what the Bible teaches regarding the marriage of a man and a woman as a sacrament. She created design standards consistent with her sincere beliefs. DFEH stated several times during the trial of this case it did not dispute the sincerity of Miller's Christian beliefs.

57.DFEH's third "option," that Miller "step aside ... and allow her willing employees to manage the process," is no more viable than the first two. Miller's Tastries is a small business. The evidence affirmatively showed that Miller is involved in some aspect of every wedding cake's design and creation,

and they are being made almost all the time. Presumably, under this “option,” DFEH would *not* ask Miller to instruct her employees to keep their activities a secret from her. It seems self-evident that a policy of encouraging employees to hide their work-related activities from their employer would be problematic, as is more than amply demonstrated by the evidence in this case. Would DFEH ask Miller to step outside? When? How long? DFEH does not explain what happens if there are no “willing employees.”

58. Although the third “option” has a *theoretical* advantage of avoiding the financial impact of the second option, the evidence affirmatively showed it would not work that way in reality, and that option does not address the other substantial burdens. Miller does not live her Christian life only at church. The evidence showed that she does not artificially separate her faith from her work, and weddings are a large part of her life. She believes whole-heartedly in what a marriage between a man and a woman represents. Miller cannot turn a blind eye to what is happening in her bakery, and it would be unreasonable to compel her to do so.

59. Under the circumstances of this case and the analysis advocated by defendants, the *substantial* burden the state seeks to impose on defendants’ free exercise of religion, by application of the Unruh Civil Rights Act, is not justified by the state’s legitimate interest in preventing discrimination where, as here, the evidence affirmatively demonstrates there is a less restrictive means to achieve the state’s objective. As discussed *supra*, the evidence affirmatively showed that Miller arranged to refer wedding cakes to

another good bakery when the designs requested at Tastries were at odds with defendants' Christian beliefs and design standards. That accommodation was, and is, reasonable under the circumstances, and fulfills the requirement of "full and equal service." Miller offered that accommodation to Eileen and Mireya.

60.DFEH contends that defendants' analytical approach—applying strict scrutiny—is incorrect and that defendants' constitutional free exercise claims under both the federal and state Constitutions must be rejected. Notwithstanding this court's determinations above under the strict scrutiny analysis advocated by defendants, DFEH correctly argues that the holding in *North Coast* controls the decision in the present case as it pertains to the defense based on free exercise of religion, and that *North Coast* held the Unruh Civil Rights Act survives strict scrutiny.

61.*North Coast* summarizes the U.S. Supreme Court's Free-Exercise analytical approaches in *Sherbert v. Verner* ("*Sherbert*") (1963) 374 U.S. 398 [Seventh-day Adventist denied unemployment benefits because eligibility requirements required work on Saturdays, contrary to applicant's religion], and *Wisconsin v. Yoder* ("*Yoder*") (1972) 406 U.S. 205, [state law compelling school attendance for children ages 7-16 contrary to Amish religious objection to education beyond eighth grade]. *North Coast* acknowledges that both *Sherbert* and *Yoder* determined the First Amendment Free Exercise Clause required a "compelling" governmental interest to justify the burden on religion. *North Coast* then

notes the change in the high court's analysis in 1990, in *Smith*:

[T]he high court repudiated the compelling state interest test it had used in [*Sherbert*] and in [*Yoder*]. Instead, it announced that the First Amendment's right to the free exercise of religion "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law prescribes (or proscribes) conduct that his religion prescribes (or proscribes).'

" [*Smith*, supra, at p. 879.] Three years later, the court reiterated that holding in [*Lukumi*], stating that "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." *North Coast*, supra, p. 1155.

62. *North Coast* applied the *Smith* test, and found:

California's Unruh Civil Rights Act, from which defendant physicians seek religious exemption, is "a valid and neutral law of general applicability." (Citation.) As relevant in this case, it requires business establishments to provide "full and equal accommodations, advantages, facilities, privileges, or services" to all persons notwithstanding their sexual orientation. (Civ. Code, § 51, subds. (a) & (b).) Accordingly, the First Amendment's right to the free exercise of religion does not exempt defendant physicians here from conforming

their conduct to the [Unruh Civil Rights] Act's antidiscrimination requirements even if compliance poses an incidental conflict with defendants' religious beliefs. (Citations.) *North Coast*, *supra*, at p. 1156.

63. The analysis in *North Coast* was repeated in *Catholic Charities*, where the *Smith* rule was applied, and the court stated that a "valid and neutral law of general applicability" is not subject to strict scrutiny. *Id.* at pp. 548-549. The Supreme Court of California also stated in *Catholic Charities* that it was not holding that courts should apply strict scrutiny "to neutral, generally applicable laws that incidentally burden religious practice" (emphasis added) in cases involving free exercise claims under the state Constitution, which the court specifically left open for another day. *Id.* at p. 566.

64. As stated *supra*, the present case involves a substantial burden where there are less restrictive means of achieving the state's legitimate interest. The evidence affirmatively showed that this case does not involve merely an "incidental burden" on the Miller's practice and observance of her sincere Christian beliefs.

65. Nevertheless, DFEH correctly argues in the present case that *North Coast* controls the legal analysis, and *North Coast* does not allow for anything other than a rejection of defendants' defenses based on the right to free exercise of religion under the federal and state Constitutions. It appears the analysis can go no further, notwithstanding the substantial burden on the free exercise of defendants' religion.

66. Defendants argue that the Unruh Civil Rights Act is not “generally applicable” because it allows for “exemptions.” Defendants argue that the Unruh Civil Rights Act only prohibits “arbitrary” discrimination, rendering it a “‘good cause’ system of individualized exemptions that triggers strict scrutiny.” It is true that this court has determined, as a factual matter, that defendants’ religious beliefs, motivations and actions were not “arbitrary.” But that term is a qualitative description of the intent required to violate the Unruh Civil Rights Act, not a categorical exemption.

67. Defendants argue that, because the Unruh Civil Rights Act may not be “construed to confer any right or privilege on a person that is conditioned or limited by law,” the Unruh Civil Rights Act must give way to other laws and is therefore not generally applicable. Defendants cite a number of such laws in their trial brief. This court must agree with DFEH that the Supreme Court has determined the Unruh Civil Rights Act *is* a neutral, generally applicable law, that survives strict scrutiny.

68. Defendants argue that DFEH’s administrative investigation and prosecution have not been neutral, and that there has been disparate treatment and hostility. The evidence showed that DFEH was at times insensitive to Miller’s sincere Christian beliefs. It has also been difficult to grasp what DFEH means to convey when it claims not to doubt the sincerity of Miller’s beliefs. DFEH apparently did not understand those beliefs, leading to irrelevant discovery that can reasonably be interpreted as a lack of respect for Miller’s beliefs. Still, litigation—by its nature—requires inquiry, analysis and argument, which are

not always well received. Miller did not indict her opposition when given the opportunity to do so while testifying at trial. It is an adversarial process. While DFEH may have stepped on the line at times, it did not commit a personal foul sufficient to constitute a defense in this case.

C. Free Speech

69. The First Amendment to the U.S. Constitution states that “Congress shall make no law ... abridging the freedom of speech....” U.S. Const. 1st Amend. This provision applies to the states because of its incorporation into the Fourteenth Amendment. *Smith, supra*, 494 U.S. 872, 876-877.

70. The right of freedom of thought protected by the First Amendment includes both the right to speak freely and the right to refrain from speaking at all. *Wooley v. Maynard* (1977) 430 U.S. 705, 714. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 U.S. 557, 573-574, the U.S. Supreme Court stated:

“Since *all* speech inherently involves choices of what to say and what to leave unsaid,” (citation) (emphasis in original), one important manifestation of the principle of free speech is that one who chooses to speak may also decide “what not to say,” (citation). Although the State may at times “prescribe what shall be orthodox in commercial advertising” ... it may not compel affirmance of a belief with which the speaker disagrees. (citation). Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to

expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid... Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful. (Citations) (Emphasis added.)

71. Defendants in the present case contend that the wedding cake Eileen and Mireya sought was itself artistic expression protected under the First Amendment as both "pure speech" and "expressive conduct." Defendants contend that, because of the broad injunctive relief DFEH seeks in this enforcement action, the Free Speech analysis must expand beyond *just* the wedding cake. This court agrees.

72. The Constitution looks beyond written or spoken words as mediums of expression, and the cases have recognized that the First Amendment shields acts such as saluting a flag (and refusing to do so), wearing an armband to protest a war, displaying a red flag, and even marching, walking or parading in uniforms displaying the swastika. (*Id.* at p. 569.) A narrow, succinctly articulable message is not a condition of constitutional protection. (*Ibid.*)

73. "In order to compel the exercise or suppression of speech, the government measure must punish, or threaten to punish, protected speech by governmental action that is 'regulatory, prescriptive, or compulsory

in nature.” *Cressman v. Thompson* (“*Cressman*”) (10th Cir. 2015) 798 F.3d 938, 951. In order to make out a valid compelled-speech defense, a party must establish (1) speech, (2) that is compelled by governmental action, and (3) to which the speaker objects. *Ibid.* If the three elements are satisfied, strict scrutiny is triggered. See *Pacific Gas and Elec. Co. v. Public Utilities Comm. of California* (1986) 475 U.S. 1, 19-20 (“*PG&E*”); *Taking Offense v. State* (2021) 66 Cal.App.5th 696.

74. The concept of pure speech includes fiction, music without words, dance, theater, movies, pictures, paintings, drawings, sound recordings, engravings, art, tattoos, the sale of original artwork, custom-painted clothing, and stained-glass windows, among others. See e.g., *Cressman*, at p. 952; *Kaplan v. California* (1973) 413 U.S. 115, 119; *Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metro Government* (W.D. Ky. 2020) 479 F.Supp.3d 543, 548; *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 246; *National Endowment for the Arts v. Finley* (1998) 524 U.S. 569, 580.

75. The justification for protecting these various media is “simply ... their expressive character, which falls within a spectrum of protected ‘speech’ extending outward from the core of overtly political declarations.” See *Cressman*, at p. 952 [quoting *Nat’l Endowment for the Arts v. Finley* (1998) 524 U.S. 569, 602-603.] All images are not categorically pure speech. Instead, courts, on a case-by-case basis, must determine whether the “disseminators of [an image] are genuinely and primarily engaged in ... self-expression.” (Emphasis added.) *Cressman*, at p. 953

[quoting *Mastrovincenzo v. City of N.Y.* (2d Cir. 2006) 435 F.3d 78, 91].

76. In addition to “pure speech,” the First Amendment protects “conduct” that is “sufficiently imbued with elements of communication.” *Texas v. Johnson* (“*Johnson*”) (1989) 491 U.S. 397, 404. Such conduct is protected speech if: (1) there is “an intent to convey a particularized message,” and (2) “the likelihood is great that the message will be understood by those who view it.” *Anderson v. City of Hermosa Beach* (9th Cir. 2010) 621 F.3d 1051, 1058. This test only applies to expressive conduct, not pure speech. (*Id.* at p. 1060.) Examples include burning a flag, *Johnson*, at. p. 411, burning a draft card, *U.S. v. O’Brien* (1968) 391 U.S. 367, 370, and wearing a black armband, *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 505-506 [wearing armband in silent protest of war “closely akin to ‘pure speech.’”].

77. The evidence affirmatively showed that defendants’ wedding cakes are pure speech, designed and intended—genuinely and primarily—as an artistic expression of support for a man and a woman uniting in the “sacrament” of marriage, and a collaboration with them in the celebration of their marriage. The wedding cake expresses support for the marriage. The wedding cake is an expression that the union *is* a “marriage,” and should be celebrated.

78. In addition, the evidence affirmatively showed that defendants’ participation in the design, creation, delivery and setting up of a wedding cake is *expressive conduct*, conveying a particular message of support for the marriage that is very likely to be understood by those who view it.

79. The Tastries wedding cake designs range from simple to elaborate, but all are labor-intensive, artistic and require skill to create, generally involving three to six people. The *visual* design standards require wedding cakes that are “beautiful and balanced,” “proportional to design,” with “complimentary colors,” “colors palettes [that] are compatible” and that “work with [the] design.”

80. Apart from the visual, the evidence showed that a simple, specific message is intended and understood by the presence of defendants’ wedding cakes, and separately, by defendants’ participation in the wedding cake process. The Tastries wedding cake by itself, *and* the people who are observed in the bakery or the wedding venue designing, delivering, setting up, or cutting the wedding cake, are associated with support for the marriage. That is precisely how Miller and Tastries view it, and intend it.

81. The design standards on which DFEH so heavily relies as evidence of Miller’s intent, leave *no* room to doubt that Miller intends a message, which DFEH fails to acknowledge or misunderstands. The evidence shows that *all* of Miller’s wedding cake designs are intended as an expression of support for the sacrament of “marriage,” that is, the marriage of a man and a woman. It is not a message that everyone may perceive, or accept.

82. *All* of Miller’s designs are specifically intended to *answer* the question at the top of the design standard page: “Is it lovely, praiseworthy, or of good report?” Miller’s standard is derived from a Bible verse quoted at the bottom of the design standards: “Whatever is true, whatever is noble, whatever is right, whatever is pure, whatever is lovely, whatever

is admirable—if anything is excellent or praiseworthy—think about such things.” The designs must be “Creative, Uplifting, Inspirational and Affirming.” Notably, Miller’s design standard also states, “Our cakes are a reflection of our business and speak volumes when sitting center stage.”

83. What DFEH dismissively characterizes as a “blank cake” and “baked goods,” Miller and Tastries intend as a creation that “*speaks*” a “meaningful,” “positive,” “affirming” message of support for a marriage. She does not want to speak a different message. Yet that is precisely what DFEH wants her to do.

84. It can hardly be questioned that openly participating, or an unwillingness to participate, in a same-sex wedding ceremony conveys a social/political message as well:

- For or Against?
- Enlightened or Old-school?
- Red or Blue?
- Accepting or Judgmental?

None of these monikers may be true, but a message is nevertheless “heard” by a watching public.

85. For defendants, the wedding cake is intended as a “Centerpiece” to the celebration, “suited to the celebration *theme*,” with a design “*theme*” that must be “*positive, meaningful* and in line with the *purpose*.” The wedding cake has a purpose.

86. Symbols and acts associated with weddings become focal points of interest, e.g., walking down the aisle, recital of vows in front of “witnesses,” being introduced “for the first time,” the toast, throwing

rice, driving away. A just-married couple cutting wedding cake, and being photographed doing so, is traditionally one of the last acts before a newly-married couple “begins life together,” and some people stay only as long as “the cake-cutting.” A multi-tiered white wedding cake is iconic. Eileen and Mireya understood all of this.

87. The evidence shows that Eileen and Mireya desired to *do*, and to *be seen doing*, what “to-be-married” and “just-married” people generally do. It was important them. They were already married before they heard of Tastries. They planned to marry in 2017, but decided to marry in December 2016 out of concern for the future of same-sex weddings after the election. They *never* let go of the idea of a wedding with lots of guests. They planned it. Their “to-do” list included buying a wedding cake. They selected a three-tier white wedding cake. They visited Tastries with friends and Eileen’s mother. After exchanging vows, their cake was moved to a central area of the wedding venue, in full view of guests, as Eileen and Mireya participated in a traditional ceremony cutting their wedding cake together.

88. From Miller’s standpoint, a wedding cake offered for any purpose *other* than the union of a man and a woman, e.g., wedding of a man and a parrot, a man and multiple wives, a man getting divorced, could *never* be “praiseworthy” or “of good report.” Nor would such purposes align with Miller’s Christian beliefs. Miller’s concern was “hurt[ing] [her] Lord and Savior” by being “part” of a same-sex wedding. There is a very high likelihood that a person who designs, makes and delivers a wedding cake to a same-sex

wedding ceremony will be understood as conveying a message of support for that event.

89. Compelled expressive conduct is subject to strict scrutiny (as opposed to intermediate scrutiny) if the compulsion is content or viewpoint—based. A regulation is content-based if it “applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed V. Town of Gilbert, AZ* (“*Reed*”) (2015) 576 U.S. 155, 163-165; see *Telescope Media Group v. Lucero* (8th Cir. 2019) 936 F.3d 740, 753 [law regulated based on content by treating wedding videographers’ “choice to talk about one topic—opposite-sex marriages—as a trigger for compelling them to talk about a topic they would rather avoid—same-sex marriages”].) The phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny. (*Reed, supra*, pp. 163-164.)

90. Applying the foregoing legal principles, DFEH’s enforcement of the Unruh Civil Rights Act under the circumstances of the present case compels expressive conduct based on content, or viewpoint.

91. DFEH seeks to compel defendants to celebrate same-sex weddings, which changes the content of defendants’ desired expressive conduct. DFEH also seeks to require defendants to create wedding cakes celebrating same-sex weddings because they design

and create wedding cakes for traditional, opposite-sex weddings. It is only because Miller and Tastries design wedding cakes celebrating marriage between a man and a woman that DFEH seeks to compel the defendants to convey a different message celebrating same-sex marriage. DFEH's enforcement action would also restrict access to the marketplace based on "viewpoint," i.e., defendants make cakes celebrating weddings, the law does not require defendants to make cakes for every occasion, just cakes for the celebration of same-sex weddings. Defendants disagree with that viewpoint.

92. Defendants' pure and expressive speech is entitled to protection under the First Amendment. Application and enforcement of the Unruh Civil Rights Act under the circumstances presented is not justified by a compelling governmental interest. DFEH's enforcement action seeks to compel Miller and Tastries to express support for same-sex marriage, or be silent. No compelling state interest justifies such a result under strict scrutiny.

DISPOSITION

93. Judgment for the defendants. Plaintiff shall take nothing by way of its first amended complaint against the defendants.

94. Defendants are ordered to prepare a proposed judgment.

95. Costs of suit and attorneys' fees may be claimed and will be awarded in accordance with applicable statutes and rules of court.

149a

IT IS SO ORDERED.

Dated: Signed 12/27/2022 12:13 PM

JUDGE OF THE SUPERIOR COURT

/s/ Hon. J. Eric Bradshaw

Hon. J. Eric Bradshaw

Filed 9/9/20

**CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

DEPARTMENT OF FAIR
EMPLOYMENT AND
HOUSING,

Petitioner,

v.

THE SUPERIOR COURT
OF KERN COUNTY,

Respondent;

CATHY'S CREATIONS,
INC., et al.,

Real Parties in
Interest.

F078245

(Super. Ct. No.
BCV-17-102855)

OPINION

ORIGINAL PROCEEDINGS; in mandate.
David R. Lampe, Judge.

Xavier Becerra, Attorney General, Michael L.
Newman, Assistant Attorney General, Satoshi
Yanai, Cherokee DM Melton and Katherine Lehe,
Deputy Attorneys General, for Petitioner.

No appearance for Respondent.

Freedom of Conscience Defense Fund, Charles S. LiMandri, Paul M. Jonna, and Jeffrey M. Trissell for Real Parties in Interest.

-ooOoo-

INTRODUCTION

This writ presents a question whether the trial court improperly construed the effect of an entry of judgment in an action filed by the Department of Fair Employment and Housing (DFEH) under Government Code section 12974.¹

Section 12974 permits the DFEH, during the course of its investigation of an administrative complaint, to seek a limited court order for provisional relief only, much like the provisional relief that may be sought under Code of Civil Procedure section 527. Indeed, any order for provisional relief granted under section 12974 is to be “issued in accordance with Section 527 of the Code of Civil Procedure.” (§ 12974.) To determine whether such provisional relief should issue, courts consider the likelihood the plaintiff will prevail on the merits at trial, and the comparative interim harm the parties are likely to suffer if the relief is either denied or granted. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69–70.) The provisional relief granted under section 12974 is of limited duration, lasting only until final disposition of the administrative complaint. After

¹ All further statutory references are to the Government Code, unless otherwise indicated.

completing its investigation of the complaint, the DFEH may elect to file suit under section 12965 for permanent relief on the claims stemming from the administrative complaint.

In this case, the underlying section 12974 civil action was initiated by the DFEH in December 2017 by a petition seeking provisional relief to temporarily enjoin Tastries and Catharine Miller from refusing to sell wedding cakes to same-sex couples.² The petition for relief was based on an administrative complaint filed with the DFEH by Eileen and Mireya Rodriquez-Del Rio, who alleged Tastries had refused to sell them a wedding cake based on their sexual orientation. Tastries maintained it could not be compelled to create and design custom wedding cakes for same-sex weddings under

California's public accommodation law, the Unruh Civil Rights Act,³ because compelling such conduct would violate both the free exercise clause and the free speech clause of the First Amendment.

Tastries opposed the DFEH's requests for a temporary restraining order and a preliminary injunction, and both forms of provisional relief were denied by the court. By order in February

² Catharine Miller owns and operates Tastries through a company called Cathy's Creations, Inc. (collectively referred to as Tastries).

³ Civil Code section 51 (UCRA).

2018, the court denied the DFEH's preliminary injunction request based upon Tastries's purported UCRA violation, finding Catharine Miller had an absolute right to refuse to create and design wedding cakes for same-sex couples, which violated her sincerely held religious beliefs.

Thereafter, the DFEH agreed to entry of judgment in the section 12974 action. When the DFEH continued its investigation of the administrative complaint following the court's denial of provisional relief and its entry of judgment, Tastries filed a motion to enforce the judgment arguing the DFEH was precluded from continuing its investigation as the UCRA claim had been finally adjudicated, and judgment had been entered. The court agreed and, in September 2018, ordered that any further investigation by the DFEH be tailored "to the ascertainment and discovery of facts reasonably and rationally calculated to serve as the basis for an argument for modification of the judgment." The trial court also ordered that if the DFEH's investigation caused it to believe further enforcement was necessary, "then any such further proceeding should be brought before this court in the nature of action or petition for modification of the court's original judgment."

The DFEH then filed a petition with this court seeking the issuance of a writ of mandate directing the superior court to set aside and vacate its September 2018 order and enter a new and

different order denying in full Tastries's motion to enforce the judgment.

The DFEH asserts the trial court's order violated the separation of powers doctrine by proscribing the scope of the DFEH's statutorily required investigation of the administrative complaint, and improperly precluded the DFEH from filing a section 12965 civil action if the DFEH determined it necessary. The DFEH contends the trial court's view of its preliminary injunction order and the nature of the section 12974 action were erroneous, and the judgment in that action cannot preclude the DFEH from performing its statutory duties.

We agree with the DFEH, and its writ petition shall be granted. In considering the effect of its judgment, the trial court improperly construed its decision on the preliminary injunction request to be a final adjudication of the merits of the underlying administrative complaint. The court had neither jurisdiction under section 12974 nor any inherent authority to undertake a merits-based final determination of the issues in the context of deciding a preliminary injunction request. By erroneously construing its preliminary injunction order as a final adjudication of the merits, the trial court violated the separation of powers doctrine in limiting the scope of the DFEH's investigation and barring the DFEH from filing suit under section 12965.

Our decision to grant the DFEH's writ petition is focused narrowly on procedural grounds. We do not reach the merits of any constitutional question raised in the section 12974 action, which should have been considered only for the purpose of deciding whether provisional relief was warranted. Any merits-based determinations of the ultimate rights of the parties are to be made by the trial court in the first instance in the section 12965 action that is now pending before it.

FACTUAL SUMMARY

I. Facts Alleged in the DFEH's Section 12974 Petition for Provisional Relief

Eileen and Mireya Rodriguez-Del Rio married in December 2016 and had planned to exchange public vows and host a traditional wedding reception in October 2017. In planning for the reception, the couple wished to order a wedding cake. In August 2017, after unsuccessful tastings at other bakeries, the couple visited Tastries to sample wedding cakes. They met with a Tastries employee named Rosemary, who provided them information about Tastries cakes. The couple selected a "simple cake design based on a cake they saw on display at the bakery, and booked a cake tasting" for the following week where they planned to complete the order and pay for the cake.

A week later, the couple arrived at Tastries along with Eileen's mother, Mireya's man of honor

and his partner. They greeted Rosemary who apologized to Mireya and informed her that Rosemary's boss was taking over their order. Catharine Miller (Miller), Tastries's owner, asked them what they were looking for and Eileen explained they had already provided their details to Rosemary, and they were there for a tasting and to place an order for their wedding cake. Miller discussed pricing, and told the couple she would provide their order to a competitor bakery (Gimme Some Sugar) because Miller did not condone same-sex marriage. Miller explained to them she regularly refers wedding cake orders for same-sex couples to a competitor baker because she does not condone same-sex marriage. The couple, and the three others with them, left the bakery.

In October 2017, the Rodriguez-Del Rio couple filed a complaint with the DFEH alleging Tastries had violated the UCRA by refusing to provide full and equal services to the couple based solely on their sexual orientation. The DFEH began an independent investigation of the complaint and served discovery requests upon Tastries, along with a copy of the couple's complaint. Based on its preliminary investigation, which included interviewing the complainants and a former Tastries employee, and obtaining a statement from Eileen's mother, the DFEH asserted Tastries has refused to provide full service to same-sex couples since at least 2015. In its petition for provisional relief under section 12974, the DFEH noted it required additional time to complete

further discovery, obtain Tastries's response to the complaint's allegations, and conclude its investigation.

II. Procedural Background

On December 13, 2017, while the DFEH's administrative investigation was proceeding, the DFEH filed a petition for provisional relief in the form of a temporary restraining order (TRO) and requested the issuance of an order to show cause regarding the entry of a preliminary injunction under section 12974. The request for a TRO was heard the next day on December 14, 2017, and was denied due to an insufficient exigency; but an order to show cause was issued as to why the DFEH's request for a preliminary injunction should not be granted.

On January 10, 2018, Tastries filed a demurrer to the petition, which the DFEH opposed. Tastries's demurrer and the DFEH's request for a preliminary injunction were heard together on February 2, 2018. Following the hearing, the court overruled Tastries's demurrer, denied the DFEH's request for a preliminary injunction, and ordered Tastries to file an answer within 20 days. In denying the DFEH's request for a preliminary injunction, the court concluded Miller's refusal to design and create the cake was protected by the First Amendment's free speech clause, and the DFEH had failed to establish the state had a sufficiently compelling countervailing interest to justify the intrusion into a protected right.

On February 9, 2018, Tastries filed an anti-SLAPP (strategic lawsuit against public participation) motion pursuant to Code of Civil Procedure section 425.16, which the DFEH opposed and argued, in part, the motion was moot because the relief sought in the DFEH's petition had already been denied.

Tastries's anti-SLAPP motion was heard on April 13, 2018, at which time the trial court also issued an order to show cause why judgment should not be entered. On May 1, 2018, the court issued a minute order denying Tastries's anti-SLAPP motion and stated that it was not fully satisfied with the alternative forms of judgment drafted by the parties.

The court entered its own judgment in favor of Tastries; the notice of entry of that judgment was served on May 9, 2018. The DFEH did not file a notice of appeal from the May 1, 2018, judgment.

Meanwhile, on April 30, 2018, the DFEH appealed the order denying its petition for a preliminary injunction, but the appeal was abandoned on June 13, 2018. Tastries filed a motion for attorneys' fees under Code of Civil Procedure section 1021.5 as the prevailing party on the DFEH's preliminary injunction request.

On July 6, 2018, the court issued an order denying Tastries's motion for attorneys' fees, which Tastries appealed. On July 19, 2018, pursuant to section 12963.1, the DFEH served subpoenas for sworn investigative interviews and

production of documents on several witnesses, including Miller. Tastries refused to produce Miller or the other witnesses under its control.

On July 24, 2018, Tastries filed a motion to enforce the judgment, seeking an order that the DFEH cease its administrative investigation into whether Tastries violated the UCRA during the encounters with the Rodriguez-Del Rio couple on August 26, 2017. Tastries argued that because the DFEH had failed to appeal the order denying the application for preliminary injunction, res judicata and/or collateral estoppel barred the DFEH from completing its investigation or initiating a new civil action under section 12965.

On September 13, 2018, the court granted the motion in part. The court determined it had continuing equitable jurisdiction to enforce its decree and to ensure that the rights of the parties were maintained according to the court's judgment. The court further reasoned that because it had issued a final, merits-based decision and judgment on the preliminary injunction request, any further action by the DFEH would be limited and subject to the court's continuing jurisdiction. The court concluded the scope of the DFEH's continuing investigation must be tailored to the ascertainment of facts meant to support a motion to modify the judgment, and the court barred the DFEH from filing an action for permanent relief under section 12965.

On October 16, 2018, the DFEH filed with our court a petition for writ of mandate. The DFEH asserts the trial court's September 13, 2018, order purported to limit the DFEH's statutory authority to execute its mandate to investigate and prosecute discriminatory practices that violate the Fair Employment and Housing Act (FEHA) was in excess of its jurisdiction, violates the separation of powers doctrine, and contravenes

FEHA's clear and remedial purposes. The DFEH sought an immediate stay of the enforcement of the September 13, 2018, order pending the final disposition of the DFEH's writ petition.

On October 17, 2018, another panel of this court ordered a stay of the trial court's September 13, 2018, order pending resolution of the DFEH's writ petition. We later issued an order to show cause why the DFEH's writ petition should not be granted and ordered Tastries to file a return brief and the DFEH to file a reply brief responding to Tastries's return.

After we stayed enforcement of the trial court's September 2018 order, the DFEH filed a new action in Kern Superior Court, case No. BCV-18-102633, against Tastries under section 12965 for violation of the UCRA in refusing to sell the Rodriguez-Del Rio couple a wedding cake in August 2017. An amended complaint was filed by the DFEH in that action in November 2018, and

Tastries filed an anti-SLAPP motion to strike the amended complaint, which the trial court denied.

During the briefing of this writ, Tastries filed a motion that we take additional evidence in consideration of the DFEH's writ petition pursuant to Code of Civil Procedure section 909, which the DFEH opposes. Tastries seeks admission of documents filed in the second action, including (1) the first amended complaint; (2) Tastries's antiSLAPP motion and supporting papers; (3) the DFEH's opposition to the anti-SLAPP motion to strike, along with supporting papers; and (4) Tastries's reply brief and supporting documents, including evidentiary objections. Tastries endeavors to establish that the DFEH's briefing in the second action "establishes conclusively that its continued investigation has revealed no new evidence which should change the legal result here."

The DFEH requests we take judicial notice of the existence of the trial court's order denying Tastries's anti-SLAPP motion filed in the second action. Tastries asserts the parties' papers regarding the anti-SLAPP motion in the second action establish the second action is not based on new or different facts that will make any difference to the trial court's original constitutional free-speech analysis. Tastries argues the anti-SLAPP briefing in the second action demonstrates the alleged factual disputes on which the DFEH relies to argue the trial court

improperly entered its original judgment in the first action are not actually relevant factual disputes; and the DFEH is seeking to relitigate the merits of the trial court's original legal conclusions.

The DFEH opposes Tastries's motion to take additional evidence asserting it is tantamount to asking this court to make factual determinations regarding whether there are relevant and material factual disputes that could result in a different outcome on the trial court's constitutional free-speech analysis in rejecting the DFEH's request for a preliminary injunction. The DFEH maintains it is for the jury in the second action to decide the facts.

The DFEH's request for judicial notice is unopposed, and the trial court's order is subject to judicial notice under Evidence Code sections 452, subdivision (d), and 459.

We grant the DFEH's request as to the existence of the trial court's March 2019 order on Tastries's anti-SLAPP motion to strike as well as the words contained in that document, but not the truth of any disputed or disputable facts therein. We consider Tastries's motion to take additional evidence in context below.

DISCUSSION

I. Legal Framework

A. Antidiscrimination Provisions Enforced Under the FEHA

The UCRA guarantees every person in California “full and equal” access to “all business establishments of every kind whatsoever[]” and imposes a duty on business establishments to serve all persons without arbitrary discrimination. (Civ. Code, § 51, subd. (b).) The UCRA declares that all persons within the state are free and equal and, regardless of their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status, they are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. (*Ibid.*)

The FEHA is a comprehensive statutory scheme designed to combat discrimination and is intended to “protect and safeguard the right and opportunity of all persons” to be free from discrimination. (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 485.) The FEHA’s remedial scheme is carried out in part by the DFEH, which is vested with authority to enforce state civil rights laws as “an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state.” (§ 12920.)

The UCRA is expressly incorporated into the FEHA through section 12948, which provides that “[i]t is an unlawful practice under” the FEHA “for a person to deny or to aid, incite, or conspire in the denial of the rights created by” the UCRA. Section 12930, subdivision (f)(2), authorizes the DFEH to “receive, investigate, conciliate, mediate and prosecute complaints alleging a violation of” the UCRA. Thus, any individual aggrieved by an alleged unlawful practice under the UCRA may institute a lawsuit against the alleged wrongdoer, or the aggrieved individual may file a verified complaint with the DFEH pursuant to section 12948. (Civ. Code, § 52, subd. (f).)

When a complaint has been filed with the DFEH alleging facts sufficient to state a violation of the UCRA, the DFEH is required to “make prompt investigation” (§ 12963), and to gather all relevant evidence necessary to determine whether an unlawful practice has occurred (Cal. Code Regs., tit. 2, § 10026, subd. (d)). Within the scope of its administrative investigation, the DFEH may issue subpoenas for records or for the appearance and testimony of individuals at a deposition. (§ 12963.1.) FEHA vests jurisdiction with the superior courts to compel compliance with the DFEH’s investigative efforts upon petition by the DFEH. (§ 12963.5.)

During its preliminary investigation, if the DFEH concludes that “prompt judicial action is necessary,” the director or authorized

representative “may bring a civil action for appropriate temporary or preliminary relief pending final disposition of such complaint.” (§ 12974.) Any temporary restraining order or other order granting preliminary or temporary relief is to be issued in accordance with Code of Civil Procedure section 527, and may be brought in any county in which actions may be brought under subdivision (b) of section 12965. (§ 12974.)

If the DFEH determines the administrative complaint is valid, the DFEH is mandated to “immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation, and persuasion.” (§ 12963.7, subd. (a).) If alternative dispute resolution methods fail, “or in advance thereof if circumstances warrant,” the DFEH’s director may, in the director’s discretion, “bring a civil action in the name of the [DFEH] on behalf of the person claiming to be aggrieved.” (§ 12965, subd. (a).)

Section 12965 contains a mandatory dispute resolution requirement: prior to bringing a civil action under this section, the DFEH “shall require all parties to participate in mandatory dispute resolution in [the DFEH’s] internal dispute resolution division ... in an effort to resolve the dispute without litigation.” (*Ibid.*; see Cal. Code Regs., tit. 2, § 10031, subd. (b) [civil action after complete investigation may only be filed if department has required mandatory dispute resolution].)

If an action is filed under section 12965, it is to be brought in any county in which the unlawful employment practices are maintained and administered, or in the county in which the person claiming to be aggrieved would have had access to public accommodation but for the alleged unlawful practice. (*Ibid.*) The action under section 12965 generally must be filed within one year after the filing of the administrative complaint. (§ 12965, subd. (a).)⁴ Wide relief is available under section 12965 and may include any relief available to a private plaintiff or to a class. (§ 12965, subds. (a), (c).) The DFEH acts as a public prosecutor when it pursues civil litigation under the FEHA (*State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.3d 422, 444), and it may seek remedies to “‘vindicate’ what it considers to be in ‘the public interest in preventing ... discrimination’” (*Dep’t of Fair Employment & Hous. v. Law Sch. Admission Council, Inc.* (2013) 941 F.Supp.2d 1159, 1172).

B. History and Overview of Section 12974

The DFEH is authorized to file suit to eliminate unlawful practices under the FEHA “in the name of the department on behalf of the person claiming to be aggrieved” under section 12965, subdivision

⁴ There are circumstances that may toll the time period in which to file a civil action under section 12965, such as where an action for compliance with administrative discovery requests was filed. (§ 12963.5, subd. (f).)

(a).⁵ There are two conditions precedent to filing a civil action under section 12965: (1) the DFEH must investigate the administrative complaint (§ 12963) and (2) the DFEH “shall require all parties to participate in mandatory dispute resolution in the department’s internal dispute resolution division free of charge to the parties in an effort to resolve the dispute without litigation[]” (§ 12965, subd. (a)).

Section 12974, on the other hand, provides that “[w]hensoever a[n administrative] complaint is filed with the department and the department concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purpose of this part, the director or his authorized representative may bring a civil action for appropriate temporary or preliminary relief pending final disposition of such complaint.” By its plain terms, section 12974 is expressly limited to an award of temporary or preliminary relief; it may be instituted on a preliminary investigation—not necessarily a completed one—and there is no mention of prior dispute resolution.

A better understanding of section 12974 may be gleaned from the context in which it was originally enacted. In 1980, the Legislature combined the Fair Employment Practice Act (Lab.

⁵ Actions may be filed by the DFEH on behalf and as representative of a group or class under section 12961. (§ 12965, subd. (a).)

Code, former § 1410 et seq.; Stats. 1980, ch. 992, § 11, p. 3166) and the Rumford Fair Housing Act (Health & Saf. Code, former § 35700 et seq; Stats. 1980, ch. 992, § 8, p. 3166.), and the two were recodified as the FEHA (Stats. 1980, ch. 992, § 4, p. 3140 et seq.). The FEHA created two administrative bodies: the DFEH (*id.*, p. 3140), whose function it was to investigate, conciliate, and seek redress of claimed discrimination (*id.*, p. 3145), and the Fair Employment and Housing Commission (FEHC), which performed adjudicatory and rulemaking functions (*id.*, pp. 3141, 3147–3148).

Under the statutory scheme, an aggrieved person could file a complaint with the DFEH (Stats. 1980, ch. 992, § 4, p. 3155), which the DFEH was to promptly investigate (*id.*, p. 3156). If the DFEH deemed the complaint valid, it was to seek to resolve the matter, in confidence, by conference, conciliation, and persuasion (*ibid.*). If that failed, or circumstances rendered those resolution attempts inappropriate, the DFEH was permitted to issue an accusation against the alleged wrongdoer to be heard and decided by the FEHC (*id.*, pp. 3156–3158). The DFEH was to act as prosecutor on the accusation and argue the complainant's case before the FEHC. (*Id.*, pp. 3157–3158); *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1383–1384.) The FEHC was then to decide the matter and issue written findings after hearing proceedings conducted pursuant to former part 1,

title 2, division 3, section 12970, subdivision (a) of the Government Code. (Stats. 1980, ch. 992, § 4, p. 3158.)

In the alternative to issuing an accusation and prosecuting the administrative complaint before the FEHC, the DFEH could elect to issue a notice to the complainants of the right to file a civil suit on their own. (Stats. 1980, ch. 992, § 4, p. 3157.) The DFEH itself was not authorized to initiate a civil action for any permanent relief on behalf of any complainant to redress unlawful conduct. The DFEH was granted authority, however, to seek court orders during the pendency of the administrative proceedings to aid in its investigations, enforce settlements, and carry out the purposes of the FEHA. Section 12974, also originally enacted in 1980, was one of these provisions.

Section 12974 provided the DFEH with the power to bring a “civil action for appropriate temporary or preliminary relief pending final disposition” of the complaint filed with the DFEH. (Stats. 1980, ch. 992, § 4, p. 3159.) This permitted the DFEH to seek a judicial temporary or preliminary injunction order for the pendency of the administrative complaint and its adjudication by the FEHC. In practical terms, section 12974 was created as a procedural vehicle to obtain a judicial order it deemed necessary to carry out the purposes of the FEHA during the pendency of the DFEH’s

investigation and the FEHC's administrative adjudication, which was provisional relief the FEHC itself did not have the power to order.⁶

In 2012, the Legislature significantly amended the FEHA and ended the FEHC's administrative adjudication of complaints. (Stats. 2012, ch. 46, § 53.) In lieu of administrative adjudication, the FEHA's amended provisions allowed the DFEH to file a civil action on behalf of the complainant under section 12965, on behalf of a group or class under section 12961, or to issue a right-to-sue notice (§ 12965, subd. (b)). The 2012 amendments to the FEHA left section 12974 intact, amending the section only to add a unilateral attorneys' fee provision in favor of the DFEH where a temporary or preliminary injunction sought under section 12974 was granted by a court. (§ 12974; see Stats. 2012, ch. 46, § 53.)

⁶ Also in 1980, a similar housing provision was codified at former section 12983. (Stats. 1980, ch. 992, § 4, p. 3161.) It allowed the DFEH, upon determining that probable cause existed for believing the allegations in an administrative complaint were true and constituted a violation of the FEHA, to bring "an action" in superior court to enjoin the owner of the property from taking further action until the department had completed its investigation and made its determination. (Stats. 1980, ch. 992, § 4, p. 3161.) As with section 12974, section 12983 was amended in 2012 to add only a unilateral attorneys' fees and costs provision when the DFEH is the prevailing parties for the purpose of granting provisional relief under this section. (See Stats. 2012, ch. 46, § 53.)

II. The Judgment May Not be Enforced As Ordered

A. The DFEH's Assent to Entry of Judgment Has No Estoppel Effect

1. Parties' Arguments

After the trial court denied the DFEH's request for a preliminary injunction, it issued an order to show cause as to why judgment should not be entered, and set a hearing. The DFEH did not file a brief, but agreed that judgment should be entered. The parties could not agree on the form of judgment, so they each filed proposed judgments.

The court rejected both proposed orders and issued its own order of judgment. Tastries argues that by silently acquiescing to the entry of judgment, the DFEH implicitly agreed that the dispositive issue of constitutional law—Tastries's affirmative defense—had been adjudicated. As the DFEH abandoned its appeal of the preliminary injunction order, it lost any ability to change the entry of the judgment. According to Tastries, it was only in response to the motion to enforce the judgment that the DFEH raised any of the arguments asserted in its writ petition. Tastries maintains this was simply too late: the DFEH should have raised its objections to the judgment at the time entry of judgment was expressly contemplated by the court and the parties. The DFEH contends it has always made clear its position that a section 12974 action

is not a means to adjudicate the merits of claims stemming from the administrative complaint, but it was not until the court issued its September 2018 order on the motion to enforce the judgment that the court attempted to limit the DFEH's statutory authority to investigate and prosecute alleged discriminatory practices under section 12965.

According to the DFEH, the court had never before indicated it would restrict the DFEH's administrative investigation or limit the DFEH to filing an action or petition for modification, instead of allowing a civil action under section 12965.

Tastries filed a sur-reply brief disputing that the trial court gave no indication it considered the matter finally decided at the preliminary injunction stage.⁷ Tastries points to the case management conference hearing held in March 2018 where the trial court warned the DFEH it was unsure what the res judicata effect of its order would be, at least as to certain aspects of its decision.

2. Background

From the outset, the parties disputed the character of the civil action brought by the DFEH under section 12974. At the initial hearing on the DFEH's request for a temporary restraining order,

⁷ Tastries's motion to file an informal sur-reply brief is granted.

Tastries argued there was no complaint filed on which the request for any type of temporary relief could rest—section 12974 authorizes a “civil action,” and a civil action necessitates a complaint. The trial court observed the DFEH’s petition seemed to be the functional equivalent of a complaint, and ordered that it be served with a summons to ensure jurisdiction had been properly conferred on the court. Subsequently, Tastries filed a demurrer to the petition arguing there was no statutory basis for the petition; because section 12974 authorizes a “civil action,” it must be initiated by a complaint. If the petition were deemed a complaint, Tastries argued it was fatally uncertain. The DFEH argued a civil action seeking provisional relief did not need to be initiated by a complaint, and the petition was unambiguous about the nature of the unlawful conduct alleged in the underlying administrative complaint. In its reply brief, Tastries noted that the DFEH would “run afoul of the successive civil actions prohibition by asking this Court to adjudicate an adversarial dispute over a temporary injunction and then, later, filing another civil action asking another Court to adjudicate an adversarial dispute over a permanent injunction.... If the DFEH wants to adversarially prosecute [Tastries], it must let this Court govern that prosecution, and it gets only one civil action.”

At the February 2018 hearing on Tastries’s demurrer and the DFEH’s request for a

preliminary injunction, the DFEH's counsel argued that section 12974 allows the DFEH "to file an action, which can be initiated by a petition only for temporary relief by way of injunction pending the final disposition of the administrative complaint." The DFEH's counsel further argued that the DFEH was presented with difficulty in considering the section 12974 petition a civil complaint equivalent to an action under section 12965 because the DFEH was only in the preliminary investigation stages. Counsel argued a suit under section 12965 requires mediation before it could be filed, and so if section 12974 were considered a civil action on the underlying discrimination claim, then there was a question whether the DFEH could dispense with the mandatory mediation requirement.

Following the hearing, the demurrer was overruled and the motion for a preliminary injunction was denied; the DFEH was instructed to file a proposed order on the denial of its preliminary injunction request. The DFEH submitted a proposed order, but the trial court struck the following proposed language: "The DFEH brought this civil action pursuant to ... section 12974, which authorizes 'a civil action for appropriate temporary or preliminary relief pending a final disposition of [a] complaint [filed with the DFEH.]' Because this Order denies the DFEH temporary or preliminary relief pending the DFEH's final disposition of the underlying administrative complaint, no relief remains

available to the DFEH in this ... section 12974 action.”

At a March 2018 case management conference, the parties discussed the language stricken from the DFEH’s proposed order. The court explained the following:

“I was aware of the issue, so to speak, when the order was presented to me, the DFEH and the State taking the position that the case was essentially over and the defendant objecting to that. I signed the order and struck the language proposed by the State. I did that simply because I believed that the issue that was being presented to me was not—I had not adjudicated it. In other words, it was not an issue that had been in my mind or in the Court’s mind in rendering its ruling; and, therefore, I took no action with respect to it. That was essentially without prejudice.

“But I thought it worthwhile to hold a case management conference because of the State’s position and also because I think we all recognize that it’s a somewhat unusual action, based as it is on a provision of the Government Code, the State having taken the position that since the statute—since the object of the

statute is provisional relief, since provisional relief was denied, that the case is over; but it is an action, and my—I want to be very clear on what I’m saying here.

“I have not—I have an open mind on all this, but I think you should be aware of the Court’s state of mind as to why I struck the language. If the action—if essentially the plenary—the plenary trial is for provisional relief, then it seems to me that perhaps the trial has been had, in which case I suppose the disposition would be judgment for the defendant, but then the defendant may have certain rights here that arise by virtue of the action.”

The DFEH’s counsel indicated to the trial court that, “[I]t sounds like you understand our position, [Y]our Honor, and it’s just the language of the statute says what it is. It’s temporary or preliminary relief pending final disposition of the administrative complaint. You’ve denied temporary preliminary relief; so we just feel that this civil action has come to an end, and we go back to finish the investigation of the administrative complaints, and we’ll make a determination in the

future of whether or not we'll file a civil complaint.

“And at that point, if we did, that would be a traditional civil complaint and just go forward how cases do; but at this point there is nothing left here to do because there's nothing—no other remedy for us to seek under the statute.”

The trial court responded that it was not sure what the res judicata effect would be “if it is a final disposition and if trial has been had and judgment should be rendered in favor of the defendant”

Tastries' counsel then argued as follows, in relevant part:

“What we're concerned about is in light of the fact that the Court has addressed the case on the merits, it really is ripe for a final judgment and not for the type of procedural posture that they're suggesting, that having basically lost on the merits, on the constitutional issues, that now they get to go back and finish their investigation and decide whether they're going to file yet another complaint against my client and have a second bite at the apple.

“We think the way this case has been presented—and we did think it

was kind of a rush to judgment. If they didn't think they had finished their investigation, why were they seeking this type of drastic relief, but they did. And we had a full airing of the issues, and it resulted in a very detailed decision."

At the end of the hearing, counsel for the DFEH noted that it "still feel[s] like we're in limbo. I mean, I'm not sure procedurally what we need to do to put the issue before you so we can get kind of finality on this part—this civil action."

After an order to show cause why a judgment should not be entered, the parties filed proposed judgments, but the language proposed highlighted the different view each took of the nature of the underlying action and the effect of the court's order denying the preliminary injunction. Tastries proposed language that judgment be entered because the DFEH "cannot succeed as a matter of law on a claim for violation of the Unruh Civil Rights Act, Civil Code section 51." The DFEH requested entry of a judgment that was much more limited: "On ... the [DFEH's] ... section 12974 civil action: [¶] IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of ... Cathy's Creations, Inc. dba Tastries and Catharine Miller, each party to bear its own costs and attorney's fees."

The court issued a minute order indicating as follows:

“The parties agree that judgment should be entered in this matter. The action was a unique matter brought pursuant to ... section 12974. While that section provides that the DFEH may bring an ‘action,’ the ‘plenary’ relief provided in the ‘action’ is only provisional. This is unlike a typical request for preliminary injunction which may proceed to plenary trial even upon denial of provisional relief. It therefore appears that judgment should be entered. However, the court is not fully satisfied with the alternative forms of judgment crafted respectively by each of the parties. The court will prepare its own form of judgment.”

The trial court then entered a judgment that provided, in relevant part:

“On ... the [DFEH’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 ... Cathy’s Creations, Inc., dba Tastries and Catharine Miller, and against ... the [DFEH] for the reasons stated in the attached Order.

“IT IS FURTHER ORDERED, ADJUDGED AND DECREED that ... 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.”

3. Analysis

The extensive discussions about the character of the action prior to entry of judgment indicate that, while both parties believed judgment was appropriate, they had very different conceptions of the nature of the action the DFEH had filed and the effect of a judgment on the administrative investigation and any subsequent civil action under section 12965. Nothing in the preliminary injunction order or the judgment entered expressly resolved this dispute or precluded the DFEH from completing its investigation of the underlying complaint or from filing a separate action under section 12965.

It was not until the trial court determined the *effect* of the preliminary injunction order and the judgment thereon in ruling on Tastries's motion to enforce the judgment that it became clear the trial court viewed section 12974 as the functional equivalent of a civil action under section 12965, and that it viewed the preliminary injunction order and judgment thereon as an adjudication of the merits of the underlying discrimination allegations.

In its writ petition, the DFEH is not concerned *that* judgment was entered in the section 12974 case—the DFEH agreed to the entry of judgment. The DFEH objects to how the trial court construed the effect of that judgment in its subsequent ruling on the motion to enforce the judgment. Until the order on the motion to enforce the judgment, the DFEH was without indication the trial court would construe the preliminary injunction order and judgment in the expansive manner it did. Thus, the DFEH's agreement to the entry of judgment does not estop it from arguing the trial court erroneously construed the effect of the judgment in ruling on the motion to enforce the judgment.

We turn, therefore, to consider the DFEH's contention the trial court erroneously construed the effect of the preliminary injunction order and subsequent entry of judgment and therefore violated the separation of powers doctrine by

improperly limiting the DFEH from performing its statutorily mandated duties.

B. The Preliminary Injunction Order and Judgment Thereon Was Not a Final, Merits Adjudication of the Rights of the Parties

The parties dispute the effect of the preliminary injunction order and the judgment thereon and whether, in its order on the motion to enforce the judgment, the trial court properly conscribed the scope of the DFEH's investigation and its ability to file a civil action for permanent relief under section 12965. We review the trial court's legal conclusions about the effect of its judgment under the de novo standard of review. (*Tom v. City and County of San Francisco* (2004) 120 Cal.App.4th 674, 678–679.) We also review de novo the trial court's interpretation of section 12974. (*Ghirardo v. Antonoli* (1994) 8 Cal.4th 791, 800; *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1183.)

For the reasons discussed below, the preliminary injunction order was not a merits-based adjudication of the administrative complaint allegations or Tastries's defense, nor could it be when the DFEH had not yet concluded its investigation, or had an opportunity to file a fully pleaded complaint seeking any permanent relief. Added to that, the constitutional issue the trial court purported to finally decide is a matter

of unsettled law which the United States Supreme Court has noted may turn on factual details, about which the DFEH had not yet had a full and fair opportunity to plead. (See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) ___ U.S. ___, ___ [138 S.Ct. 1719, 1723] (*Masterpiece*).) The trial court had neither jurisdiction under section 12974 nor any inherent authority under these circumstances to finally decide the rights of the parties in the context of denying a request for a preliminary injunction.

1. Background

In the order on the motion to enforce, the court ruled as follows in relevant part:

“In its opposition to the current motion, the DFEH refers to its [section] 12974 action as a ‘preliminary injunction action’ and that the court denied a ‘motion for preliminary injunction.’ As the DFEH envisions it, it perceives the adjudication as ‘preliminary,’ and that it is further entitled to litigate ‘unsettled constitutional questions at issue,’ and to ‘fully litigate them on the merits in a civil action for permanent relief’ under section 12965.

“The court does not view the matter as so limited.

“The court did not deny a ‘motion for preliminary injunction.’ As stated, the court ordered, adjudged, and decreed that judgment was rendered and entered in favor of [Tastries] for the reasons stated, that is, that [Tastries] held a fundamental constitutional right under the First Amendment to engage in the conduct which was the subject matter of the complaint. In other words, [Tastries] admitted to the business practice complained of which this court recognized would be a discriminatory practice under the [UCRA] absent constitutional protection. As such, the court’s determination was plenary in nature, based upon the defense at issue—a constitutional right.

“The fact that section 12974 and section 12965 both refer to a ‘civil action’ does not necessarily mean that the statutory scheme envisions two civil actions, particularly when both would be subject to the same rules of venue. A common sense interpretation of these code sections under these circumstances is that one civil action is involved, and that section 12974 authorizes a filing earlier than contemplated by section

12965 where ‘prompt judicial action is necessary.’

“Even if the current action filed by [the] DFEH were to be considered a petition for preliminary injunction, it does not mean that the court is without authority or jurisdiction to render a plenary decision. Here, the parties did not undertake to litigate the matter presented to the court solely as a matter for preliminary determination. Instead, both sides discussed the constitutionality of [Tastries’s] conduct in a plenary manner. When the parties choose to present a constitutional question upon uncontroverted facts to the court, the court is empowered to treat the matter as a plenary question. (See *Eckl v. Davis* (1975) 51 Cal.App.3d 831, 835.)

“Further, the issue of whether to issue an injunction was ancillary to the basic question of law presented. Injunction is not a cause of action—it is a remedy. The court undeniably held both subject matter and personal jurisdiction. [Tastries] admitted the conduct. The sole question presented was a question of law—whether or not [Tastries was] entitled by

constitutional right to engage in the conduct. For this reason, there was a satisfactory showing to submit the cause upon the merits for plenary relief. No purpose would be served by further trial to delay determination of the fundamental constitutional question.”

The court acknowledged its judgment was “not a prohibitory injunction against the DFEH from fulfilling its statutory duties[,]” and that it was “necessarily founded upon the facts presented.” While the court stated the DFEH could proceed with its investigation, the court ruled “the scope of the DFEH investigation must be directed at the factual underpinnings of the court’s judgment, and must be rationally and reasonably related to a basis for presenting evidence for modification of the court’s judgment.” Further, the court stated that if the DFEH concluded further enforcement action were necessary under section 12965, “the DFEH should file the appropriate pleading asserting its claim with this court.”

The DFEH argues this order erroneously interpreted section 12974 and improperly construed the order on the preliminary injunction and judgment thereon as a merits-based adjudication of the underlying administrative complaint allegations. The DFEH interprets section 12974 as a statutory tool the department may use as an aid to its administrative

investigations and to carry out the purposes of the FEHA, but that seeking provisional relief under section 12974 does not place the allegations of the underlying administrative complaint before the court for a merits-based adjudication. This is so, the DFEH argues, because the provisional relief under section 12974 is authorized before the DFEH has completed its investigation and before dispute resolution has been undertaken—which is required for the DFEH to file a civil action for permanent relief on behalf of the complainant under section 12965.

According to Tastries, section 12974 permits the filing of a “civil action,” and a civil action is initiated by a complaint, not a petition. The DFEH’s petition was deemed the equivalent of a complaint, and it stated an UCRA claim. The claim was placed before the court on the DFEH’s request for a preliminary injunction, it presented a pure issue of law on an undisputed factual record, the court made a merits-based decision that the claim could not succeed as a matter of law, and the DFEH agreed to the entry of judgment thereafter.

Tastries also contends that regardless of how the trial court construed sections 12974 and 12965, the court was empowered to render a merits-based decision on the preliminary injunction because it involved a singular issue of law which was decided without resort to extrinsic or additional evidence as none of the facts were

disputed. Tastries maintains courts always have the power to dismiss an action to save protracted litigation when the issue is one of law (citing *Mast, Foos & Co. v. Stover Mfg. Co.* (1900) 177 U.S. 485, 494–495; *Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 357 (*Camp*)); that if a trial court intends a final adjudication of the issues involved, a preliminary injunction decision will amount to a decision on the merits (*Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 612 (*Bomberger*); and that other courts confronting issues similar to those involved here have deemed them ripe for early adjudication (citing *303 Creative LLC v. Elenis* (10th Cir. 2018) 746 Fed. Appx. 709, 710).

The DFEH responds that Tastries overstates the law allowing courts to render merits-based determinations on motions for preliminary injunctions, and argues the cases Tastries relies upon are distinguishable or inapplicable. The DFEH maintains it never stipulated to a merits-based adjudication of the allegations in the administrative complaint as set forth in the petition—it sought only a provisional remedy. The DFEH argues it consistently made clear its position that a section 12974 action was one for provisional relief only, that the administrative investigation was ongoing, and that the DFEH would determine in the future whether a civil action for permanent relief would be filed. According to the DFEH, there was no stipulation or other showing that would allow the superior

court to determine the ultimate rights of the parties in response to the

DFEH's request for a preliminary injunction. The DFEH asserts no preclusive effect arises from the court's preliminary injunction order as it was not merits-based or sufficiently final.

2. No Jurisdiction Under Section 12974 to Adjudicate Merits of Potential Claims Arising out of Administrative Complaint

As already noted, section 12974 states in relevant part that, “[w]henever a complaint is filed with the department and the department concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this part, the director or his authorized representative may bring a civil action for appropriate temporary or preliminary relief pending final disposition of such complaint. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with Section 527 of the Code of Civil Procedure....”

In construing a statute, the task of the court is to determine and give effect to the Legislature's intent. (*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1095.) Courts look first to the words of the statute, giving the language its usual, ordinary meaning (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1055), and construing the words in context “in light of the

nature and obvious purpose of the statute where they appear[]” (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 354). Potentially conflicting statutes must be harmonized whenever possible. (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1086.)

“If there is no ambiguity in the language, we presume the Legislature meant what it said, and the plain meaning of the statute governs.” (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000 (*Hunt*).) “Furthermore, we consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.” (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.) Our central task is ascertainment of the legislative intent, including consideration of “the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.” (*Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 814.)

Section 12974 authorizes the DFEH to seek only provisional relief, which includes a preliminary injunction. In the usual context, a preliminary injunction is a provisional remedy meant to prevent harm or preserve the status quo pending a trial on the merits. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.) Typically, it is not, in itself, a cause of action (*MaJor v.*

Miraverde Homeowners Assn. (1992) 7 Cal.App.4th 618, 623); thus, ordinarily, a preliminary injunction may be sought only when the underlying cause of action on which the provisional remedy rests is presented for decision through the pleadings (*Moreno Mut. Irr. Co. v. Beaumont Irr. Dist.* (1949) 94 Cal.App.2d 766, 778 [“A preliminary injunction is warranted only if there is on file a complaint which states a sufficient cause of action for injunctive relief of the character embraced in the preliminary injunction.”]); see generally Moore & Thomas, Cal. Civ. Practice (2020) Procedure, § 16:119).

Yet the provisional relief the DFEH is authorized to seek under section 12974 arises in a different procedural context from preliminary injunctive relief sought in other statutory or common-law actions. Neither the statute’s use of the term “civil action” nor its reference to Code of Civil Procedure section 527, which is a procedural statute for seeking preliminary relief, can be reasonably construed to mean the case-initiating document in a section 12974 action must be a complaint, and that this complaint must necessarily plead all claims and forms of relief sought on the allegations of the underlying administrative complaint.

By its plain language, section 12974 is designed to allow the DFEH a temporary tool to carry out its duties and fulfill the purposes of the FEHA—no permanent relief is available under section

12974, and it may be initiated on the basis of a “preliminary investigation.” It is also notable the provisional relief under section 12974 is not filed by the DFEH “on behalf of the person claiming to be aggrieved[]” or “on behalf and as representative of such a group or class[]” as the class/group and individual actions under sections 12961 and 12965 indicate. The absence of this language reinforces that the statute is meant as an aid to the DFEH’s obligations to carry out the FEHA’s provisions, and not as a means to adjudicate the merits of the potential claims arising from the administrative complaint.

In historical context, this becomes even more clear. In 1980, when the statute was enacted, the DFEH was not authorized to file civil actions on behalf of complainants in superior court to adjudicate the merits of the administrative complaint. While section 12974 allowed the DFEH to seek provisional relief in a “civil action,” that could not have conferred jurisdiction on the trial court to adjudicate the merits of claims arising from the underlying administrative complaint. Adjudication of the underlying administrative complaint, as formulated by the DFEH in an accusation, was a power reserved to the FEHC in the first instance.

When the FEHA was amended in 2012, and the DFEH was authorized to bring civil actions on behalf of complainants rather than prosecute them before the FEHC, nothing in the substantive

structure of section 12974 was amended. Eliminating the FEHC's adjudication role in 2012 did not magically confer broader jurisdiction on the trial courts to adjudicate claims arising out of an administrative complaint under section 12974. The Legislature authorized the DFEH to file civil actions for permanent relief on claims arising from the underlying administrative complaints under sections 12961 and 12965—it did not do so under section 12974, despite its use of the words “civil action” which have been contained in the statute since its enactment. (Stats. 1980, ch. 992, § 4, p. 3159.)

As the DFEH points out, the operation of section 12974 as an aid to the DFEH's obligation to carry out the purposes of the FEHA—and not as a civil action for meritsbased adjudication of claims arising from the underlying administrative complaint—is not unique. Federal agencies are endowed with similar statutory tools to carry out the purposes of the federal acts under which they operate. For example, federal law allows the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB) to seek temporary or preliminary relief in federal court while administrative proceedings (agency investigation and/or adjudication) occur within the agency. Under Title 42 of the United States Code, section 2000e-5, subdivision (f)(2), the EEOC may bring an action solely for temporary or preliminary relief pending final disposition of an underlying administrative

charge whenever it concludes on the basis of preliminary investigation that prompt judicial action is necessary to carry out the purposes of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.).

Similarly, the National Labor Relations Act (29 U.S.C. § 151 et seq.) mandates the NLRB to seek preliminary injunctive relief in federal court, pending final administrative adjudication by the NLRB, whenever the agency has reasonable cause to believe that certain unfair labor practices have occurred. (29 U.S.C. § 160, subd. (l).) When it was initially enacted, section 12974 served a nearly identical purpose to these two federal statutory provisions: to allow the DFEH to bring an action for temporary or preliminary relief, if necessary to carry out the purposes of the FEHA, pending the final disposition of the administrative complaint filed with the DFEH and adjudicated by the FEHC.

Tastries argues that because adjudication of the administrative complaint no longer occurs at the agency level before the FEHC, there is no reason why a trial court could not reach the merits of the claims arising from the administrative complaint as the court has jurisdiction to adjudicate those claims under section 12965. Beyond that section 12974 is a civil action expressly limited to provisional relief, and the language of the statute does not encompass such an adjudication by the trial court, there is a good

reason why section 12974 does not operate this way: a merits adjudication of the claims arising from the underlying administrative complaint under section 12974 would create statutory conflicts with other provisions of the FEHA and the DFEH's obligations thereunder.

As already noted, before the DFEH initiates a civil action "on behalf of the person claiming to be aggrieved[.]" the DFEH is obligated to require all the parties to participate in mandatory dispute resolution in the department's internal dispute resolution division free of charge, in an effort to resolve the dispute without litigation. (§ 12965, subd. (a).)

Section 12974 permits the DFEH to initiate a civil action "on the basis of a preliminary investigation" of the underlying complaint, without any reference to dispute resolution.

Interpreting section 12974 as authorizing a court to reach the merits of claims arising from the underlying administrative complaint would conflict with the DFEH's obligation to require the parties to participate in dispute resolution before suit is initiated, and would render that portion of section 12965 nugatory. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.*, *supra*, 43 Cal.3d at pp. 1386–1387 [meaning of statute must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible].)

Such an interpretation would also conflict with the DFEH's statutory obligation to conduct its investigation and collect all the evidence it deems necessary to make a final decision whether to file a civil action under section 12965 or to issue a right-to-sue notice to the complainant. If the DFEH is necessarily placing the administrative complaint before the trial court for potential adjudication by filing a section 12974 action for provisional relief, the DFEH loses its ability to fully conduct its investigation, make an administrative determination about whether to initiate suit or issue a right-to-sue notice, and conduct mandatory dispute resolution before instituting a claim for permanent relief under section 12965.

Not only would this create conflicts within the statutory scheme, but it would render section 12974 essentially useless to the DFEH. (See generally *Williams v. Superior Court* (1993) 5 Cal.4th 337, 354 ["A court should not lightly adopt an interpretation of statutory language that renders the language useless in many of the cases it was intended to govern."].) If the DFEH has completed its investigation, made a decision on the administrative complaint, and conducted mandatory dispute resolution, it can always seek provisional relief in the context of a section 12965 action. However, if the DFEH is not yet ready to file a section 12965 action, but provisional relief is deemed by the DFEH to be immediately necessary, the DFEH will have no option—it will

be forced to place the administrative complaint before the trial court without completing its investigation. The DFEH's investigation allows the department to fully plead all facts necessary to support its claims and make all relevant legal arguments about viability of the claims. Cutting short that investigation, the DFEH is precluded from fully pleading its case, which is an untenable result.

We cannot construe section 12974 to operate in a manner that conflicts with the DFEH's statutory obligations, interferes with its investigatory and administrative duties, and renders useless a statutorily granted provisional remedy meant to assist the department in carrying out the purposes of the FEHA. (See *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 ["An interpretation that renders related provisions nugatory must be avoided [citation]"].)

Tastries devotes a good amount of its briefing to providing background on the nature of a civil action under the Code of Civil Procedure, the one-judgment rule, and the rule against claim splitting.⁸ Tastries argues the 2012 amendments

⁸ The one-judgment rule has been articulated as "a general rule there can be only one final judgment in a single action." (*Nicholson v. Henderson* (1944) 25 Cal.2d 375, 378.) "The primary right theory is a theory of code pleading that has long been followed in California. It provides that a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding

to the FEHA required that certain actions be brought in court by civil action, rather than by accusation by the department. Thus, quoting from Tastries's brief, the DFEH is now "required to file lawsuits; and if it files a lawsuit, the trial court is fully within its rights to adjudicate it."

We understand Tastries's argument to be that because section 12974 refers to a "civil action," when the DFEH initiated a lawsuit under that section, it placed the merits of claims arising out of the underlying administrative complaint, which the parties all agreed included an UCRA claim, before the trial court for decision. According to Tastries, the UCRA claim was decided on its merits as a matter of law, and any further litigation of the same claim under section 12965 violates both the one-judgment rule and the rule against claim splitting.

We disagree. Section 12974 is not reasonably susceptible to an interpretation it is the functional equivalent of a civil action under section 12965 action because section 12974 refers to a "civil action," nor did that reference expand

'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.] A pleading that states the violation of one primary right in two causes of action contravenes the rule against 'splitting' a cause of action." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.)

the trial court's jurisdiction to decide the merits of the underlying administrative complaint.

A civil action is designated so because of the form of relief sought, not based on the label the case-initiating document is given. (Compare Code Civ. Proc., § 22 ["An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."] with Code Civ. Proc., § 23 [a "special proceeding" is "[e]very other remedy"].) Tastris points out the only pleading recognized in a civil action is a "complaint." (Code Civ. Proc., § 422.10.) But, even so, the requirement of a "complaint" does not automatically mean section 12974 requires all claims arising from the underlying administrative complaint be placed before the court for adjudication on the merits. A "complaint" requires a statement of facts constituting the cause of action, and a demand for relief. (Code Civ. Proc., § 425.10, subd. (a)(1)–(2).) The facts constituting a cause of action under section 12974 will *relate* to allegedly unlawful practices under the FEHA in order to establish that provisional relief is "necessary [for the DFEH] to carry out the purposes" of the FEHA, but that does not mean the FEHA claims arising out of that conduct are before the court for meritsbased adjudication.

For example, Code of Civil Procedure section 527.6, permitting temporary restraining orders for harassment, is a statute located in part 2, title 7, chapter 3 of the Code of Civil Procedure, which concerns civil actions. Although the request for such a temporary restraining order is initiated by “petition” (Code Civ. Proc., § 527.6, subd. (d)), the statute expressly refers to petition proceedings under this statute as “actions” (*id.*, subd. (x)(1)). Similar to section 12974, the petitions for temporary restraining orders under Code of Civil Procedure section 527.6 are to be issued in accordance with Code of Civil Procedure section 527, subdivision (d), but no complaint is required nor does it place all claims arising from the underlying conduct before the court for adjudication.

A person may seek a temporary restraining order for harassment under Code of Civil Procedure section 527.6, subdivision (b) by alleging “a course of conduct,” a “credible threat of violence,” or “harassment” as defined by the statute. Those allegations may constitute completed unlawful civil or criminal acts, such as trespassing or assault; but, while those allegations may be necessary to establish the need for a restraining order, the court does not have jurisdiction to adjudicate those potential civil or criminal causes of action. The statute is designed to prevent threatened injury, it is not intended to punish the restrained party for past acts. (See

Scripts Health v. Marin (1999) 72 Cal.App.4th 324, 332.)

In sum, the plain language of section 12974 is not susceptible to an interpretation that it authorizes a civil action for merits-based adjudication of claims arising from the underlying administrative complaint the DFEH is in the process of investigating. But even if there were an ambiguity in the statute in that regard, we cannot conclude the Legislature intended such a meaning. If statutory language is susceptible to more than one reasonable interpretation, courts must “select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute” and “avoid an interpretation that would lead to absurd consequences.” (*Merced Irrigation Dist. v. Superior Court* (2017) 7 Cal.App.5th 916, 925.)

All that was discussed above supports the Legislature’s intent that a civil action under section 12974 authorizes the DFEH to obtain provisional relief during the pendency of the administrative complaint, but not an intent to authorize a civil action for merits-based adjudication of the potential claims arising from the underlying administrative complaint. As a result, a judgment issued on a section 12974 civil action for provisional relief merely signals the end of that action—it is not a final judgment on the potential claims arising from the administrative

complaint whose merits are evaluated for the limited purposes of deciding entitlement to provisional relief.

3. No Inherent Authority to Reach the Merits Under *Camp*

Tastries argues that no matter what the distinction between civil actions under sections 12974 and 12965, the trial court had inherent authority to reach the merits of the administrative complaint allegations set forth in the petition under the circumstances presented here. Specifically, Tastries contends a trial court may reach the merits of an underlying dispute in the context of a preliminary injunction hearing based on a stipulation of the parties or on a showing where it appeared at the hearing the question before the court was solely one of law, that could be resolved without extrinsic or additional evidence, and that no purpose would be served by a trial in the future.

Tastries notes the principle that adjudication of a preliminary injunction can reach the underlying merits of a claim is also widely developed in case law discussing collateral estoppel or issue preclusion. In that context, Tastries contends, courts frequently hold that the preliminary injunction order was sufficiently final and on the merits as to have preclusive effect.

In considering whether preliminary relief should be ordered, courts traditionally consider two interrelated factors: “The first is the

likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued.” (*IT Corp. v. County of Imperial*, *supra*, 35 Cal.3d at pp. 69–70.)

As a general rule, the granting or denying of a preliminary injunction does not amount to an adjudication of the ultimate rights of the parties. (*Continental Baking Co. v. Katz*, *supra*, 68 Cal.2d at p. 528.) In fact, a court is typically “without jurisdiction to determine the merits upon the hearing of a motion for a temporary injunction and the orders purporting to do so are void.” (*Anderson v. Joseph* (1956) 146 Cal.App.2d 450, 454 (*Anderson*); see *Hunt*, *supra*, 21 Cal.4th at p. 999 [“In determining the propriety of preliminary relief, neither the trial court nor an appellate court may undertake a final adjudication of the lawsuit.”].)

An order on a preliminary injunction is an interim order which “reflects nothing more than the superior court’s evaluation of the controversy on the record before it *at the time* of its ruling; it is not an adjudication of the ultimate merits of the dispute.” (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.) Moreover, the interim order on a preliminary injunction request normally has no res judicata effect: “[A] request for temporary equitable relief pending the determination of a

case on its merits is an entreaty to the court to exercise its discretion and a ruling thereon is not a determination of the merits of the case. [Citation.] Such a pretrial ruling may not be given issue-preclusive effect with respect to the merits of the action.” (*Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1300.)

This framework is subject to a limited exception when there is a stipulation of the parties, or some other satisfactory showing, which warrants submitting the case on the merits at the preliminary injunction stage. (*Camp, supra*, 123 Cal.App.3d at pp. 357– 358; see *Anderson, supra*, 146 Cal.App.2d at p. 454; *Paul v. Allied Dairymen, Inc.* (1962) 209 Cal.App.2d 112, 122.) In *Camp*, the court determined a preliminary injunction motion warranted a merits-based decision because the issue presented was one of law, it was resolved without extrinsic or additional evidence, and there was no purpose served by a trial on the action. (*Camp, supra*, at p. 358.)

Here, in weighing the DFEH’s likelihood of success on the merits of an UCRA claim as alleged in the petition, the trial court concluded Miller’s baking of a wedding cake constituted expressive conduct which fell within the ambit of protected speech under the First Amendment. The court reasoned, in part, as follows:

“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 [Tastries] 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 court went on to explain, in part, as follows:

“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 Rio[] 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, and with which Miller disagrees.”

The court concluded that the DFEH could not succeed on an UCRA claim “on the facts presented as a matter of law.” But, in the court’s subsequent order on the motion to enforce the judgment, it is clear the court viewed this as a final, merits-decision about the viability of any UCRA claim stemming from the underlying administrative complaint. In that order, the court explained that it had decided the “merits of the constitutional defense[]” at the preliminary injunction stage based on the facts presented, but it “was a plenary judgment, not a preliminary one[,]” and the judgment was “final” because it had not been appealed.

The DFEH argues the free speech issue presented in the section 12974 action was not a pure question of law, and asserts the court couched its ruling in terms of the “facts presented[]” and relied on Tastries’s untested factual assertions whether or not Tastries’s cakes were pre-made or custom-designed by Miller. The DFEH maintains it is a mixed question of law and

fact whether the cakes Tastries refuses to sell to same-sex couples can be considered “custom cakes” such that they constitute artistic expression. Since the preliminary injunction was decided, the DFEH resumed its investigation and has developed additional facts that it contends establish the cake requested was not “custom” and, therefore, did not constitute expressive conduct protected by the First Amendment. Tastries argues it is purely a question of law whether the Unruh Civil Rights Act may override Miller’s First Amendment free speech rights in this context. Tastries states the court found factually that Tastries creates specially designed custom cakes, including wedding cakes; Miller does not deny that she refused to design and create a custom wedding cake for the Rodriguez-Del Rio couple. Legally, the court found that a wedding cake is not just a cake, but an artistic expression by the person making it, and that it traditionally serves as a centerpiece in the celebration of a marriage. The court concluded that the DFEH could not compel Miller to allow her artistic expression in celebration of marriage to be co-opted to promote the message desired by same-sex marital partners, with which Miller disagrees. Tastries argues any factual dispute about the degree of customization of the wedding cake is immaterial to the free speech expressive conduct analysis, so nothing new discovered by the DFEH in its continued investigation since the preliminary injunction stage makes any

difference. The preliminary injunction order was a final, merits-based decision that the DFEH's UCRA claim was not viable in the face of Miller's constitutional free speech affirmative defense.

For all the reasons discussed above about the nature of section 12974, the court could not decide the merits of the potential claim stemming from the underlying administrative complaint—it simply was not before the court for a merits-based adjudication, and the court had no jurisdiction to decide the matter. But, even if the court's preliminary injunction order had not been rendered in the context of section 12974, it would still not qualify as a merits-based adjudication of the viability of the DFEH's UCRA claim under the exception articulated in *Camp*.

It matters little that the trial court believed its determination of the viability of the DFEH's UCRA claim was "plenary" or a final decision as indicated by the trial court in its order on the motion to enforce the judgment. In *Bomberger v. McKelvey*, the court stated that "unless it appears that the court intended a final adjudication of the issues involved," a preliminary injunction order does not function as a decision on the ultimate rights of the parties. (*Bomberger, supra*, 35 Cal.2d at p. 612.) But, as explained in *State Bd. of Barber Examiners v. Star*, "[i]nsofar as th[is] statement from *Bomberger* implies the intent of the court may be controlling, it is dictum and we find no case

using that as a criteria for giving ultimate effect to a preliminary injunction.” (*State Bd. of Barber Examiners v. Star* (1970) 8 Cal.App.3d 736, 739 (*Star*).) The court reasoned that “[t]o allow the court, on its own, to determine whether its ruling at the preliminary hearing should finally determine the rights of the parties would be to deny both parties their right to a hearing, to present evidence and to cross-examine witnesses.” (*Ibid.*) The trial court’s intention to treat a matter as finally decided at the preliminary injunction stage does not necessarily make it so, especially when that intention is made clear to the parties only *after* the adjudication of the preliminary injunction and the entry of judgment, as was the case here.

Nor does the presence of a constitutional question automatically render a matter ripe for a merits-based determination of the parties’ rights. (*Star, supra*, 8 Cal.App.3d at pp. 739–740 [mere presence of a constitutional issue did not mean preliminary order could be given ultimate effect].) While issues of law may sometimes be ripe for meritsbased, final adjudication at the preliminary injunction stage, as was the situation in *Camp*, the case before us bears little resemblance to the procedural posture of *Camp* or the type of legal issue presented to that court.

From the nature of the statute under which provisional relief was sought and from the DFEH’s express statements, it was clear the DFEH’s

investigation of the underlying administrative complaint was ongoing and incomplete. Thus, the petition seeking provisional relief did not necessarily contain all the factual allegations the DFEH would make when it determined to file a section 12965 civil action on behalf of the complainants after completing its investigation. Nothing in the procedural posture of *Camp* was similar. *Camp* involved the more typical scenario where injunctive relief is sought as a remedy provided for under part two of the Code of Civil Procedure along with ripe and fully pleaded claims for permanent relief. (*Camp, supra*, 123 Cal.App.3d at pp. 355–356.) As we explained above, a civil action under section 12974 does not place any claim for permanent relief before the trial court for a merits adjudication. Moreover, the sole issue of law disputed in *Camp* is nothing like the legal issue presented here. In *Camp*, the parties’ dispute revolved around whether a county’s general plan validly complied with the requirements of section 65302 in effect in 1978.⁹

⁹ The case arose from three separate superior court cases filed in 1978 contending the county’s general plan was invalid because some of its elements did not meet the requirements of the Government Code. (*Camp, supra*, 123 Cal.App.3d at p. 340.) The first case seeking preliminary and permanent injunctive relief was heard and decided by a judge who rejected the contention, determined the plan complied with the Government Code, and

Resolution “required the trial court to receive the plan into evidence, to examine and interpret it in light of the requirements of the statute, and to decide a question of law without resort to extrinsic evidence.” (*Camp, supra*, 123 Cal.App.3d at p. 357.) Under these particular circumstances, it was allowable for the hearing on the preliminary injunction to serve as the trial of the claims pending before the court.

Here, the legal issue decided was whether baking a wedding cake constitutes expressive conduct entitled to free speech protection under the First Amendment, and whether the baker could rightfully be compelled under the UCRA to communicate a message that violated the baker’s sincerely held religious beliefs. The trial court’s determination that baking a wedding cake constituted expressive conduct was made with reference to the extrinsic facts known to the

entered a judgment that deemed the plan valid and denied relief. (*Id.* at pp. 341–343.)

The other two cases were heard and decided by a different judge, “who reached diametrically opposite conclusions and entered judgments to the effect that the plan was invalid.” (*Camp, supra*, 123 Cal.App.3d at p. 341.) The validity of the general plan was presented in the second and third cases at a preliminary injunction hearing; preliminary injunctive relief was granted; and permanent injunctive relief was subsequently ordered without a trial on the basis of the preliminary injunction hearing. On appeal, the county argued the permanent relief sought in the second and third cases was granted in the context of a preliminary injunction hearing, which the county maintained exceeded the court’s jurisdiction. (*Id.* at pp. 343–347.)

parties at the time of the preliminary injunction, and it rested, at least in part, on an accepted factual premise that Miller was asked in this instance to use her talents to design and create a custom wedding cake that she had not yet conceived. But the DFEH had not yet completed its investigation about the degree to which Miller actually designed or created a custom cake, among other issues. Tastries argues no facts about how Miller designed or created the wedding cake is relevant; the key factual issues were undisputed and the matter presented was one of law only.

Whether or not any additional facts discovered by the DFEH during its administrative investigation are relevant to deciding this complex constitutional question, it cannot be decided before the DFEH has completed its investigation, fully and formally pleaded its claims for permanent relief on behalf of the complainants, and thus has an opportunity to present every legal argument it wishes to advance about the viability of its claim supported by whatever factual allegations it deems relevant. This need is particularly acute here because, even post-*Masterpiece, supra*, ___ U.S. at p. ___ [138 S.Ct. 1719] (which had not been decided prior to the preliminary injunction order in this case), the First Amendment jurisprudence in this area remains unsettled, and it is not a foregone legal proposition that factual disputes about the customization of the wedding cake are immaterial—*i.e.*, that any type of wedding cake,

baked under any scenario, is expressive conduct for purposes of the First Amendment.

The First Amendment, which applies to the states through the Fourteenth Amendment, provides that “Congress shall make no law ... abridging the freedom of speech” (U.S. Const., 1st Amend.) The freedom of speech includes the “right to refrain from speaking” and prohibits the government from telling people what they must say. (*Wooley v. Maynard* (1977) 430 U.S. 705, 714.) This compelled speech doctrine was developed in *Board of Education v. Barnette* (1943) 319 U.S. 624 (*Barnette*), and it has been applied to prohibit the government from requiring that an individual “speak the government’s message,” and to preclude the government from requiring an individual “to host or accommodate another speaker’s message” (*Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (2006) 547 U.S. 47, 62, 63).

Though “[t]he First Amendment literally forbids the abridgement only of ‘speech,’” the United States Supreme Court has “long recognized that its protection does not end at the spoken or written word.” (*Texas v. Johnson* (1989) 491 U.S. 397, 404 (*Johnson*)). “In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [the United States Supreme Court] ha[s] asked whether ‘[a]n intent to convey a particularized message was present,

and [whether] the likelihood was great that the message would be understood by those who viewed it.” (*Ibid.*)

As explained in *Johnson*, the expressive nature of the following have all been recognized: students’ wearing of black armbands to protest American military involvement in Vietnam (*Tinker v. Des Moines Independent Community School. Dist.* (1969) 393 U.S. 503, 504–505); sit-in by Blacks in a “whites only” area to protest segregation (*Brown v. Louisiana* (1966) 383 U.S. 131, 133, 141–142); wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam (*Schacht v. United States* (1970) 398 U.S. 58, 60); and picketing about a wide variety of causes (see, e.g., *United States v. Grace* (1983) 461 U.S. 171, 176). (*Johnson, supra*, 491 U.S. at p. 404.)

The United States Supreme Court has also recognized “the communicative nature of conduct related to flags.” (*Johnson, supra*, 491 U.S. at p. 405, citing *Spence v. Washington* (1974) 418 U.S. 405, 409–410; see *Barnette, supra*, 319 U.S. at p. 632; *Stromberg v. California* (1931) 283 U.S. 359, 368–369; *Smith v. Goguen* (1974) 415 U.S. 566, 588.) *Johnson* explained, however, that the court has “not automatically concluded ... that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the

context in which it occurred.” (*Johnson, supra*, at p. 405.)¹⁰

Our nation’s high court has not held whether or under what circumstances baking a wedding cake is expressive conduct under the First Amendment. The issue whether a baker’s refusal to design and create a wedding cake for a same-sex couple comes within the protections of the First Amendment was presented to the high court in *Masterpiece, supra*, ___ U.S. ___ [138 S.Ct. 1719], but the court did not decide the baker’s free-speech claim—the case was decided under the First Amendment’s free exercise clause. Yet, in noting the baker’s free speech claim, the court nevertheless signaled that the factual context could be dispositive of the analysis, recognizing that “[o]ne of the difficulties in this case is that the

¹⁰ When the government regulates expressive conduct, it must have sufficient justification for doing so and any such regulation or law is subject to varying degrees of scrutiny. Under the more lenient standard, “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” (*United States v. O’Brien* (1968) 391 U.S. 367, 376.) This test applies if the government would have punished the conduct regardless of the content of its expressive component. (*Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 293.) However, where the message is restricted (or compelled) because of its content, “the most exacting scrutiny[]” applies: that the “regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”

(*Boos. v. Barry* (1988) 485 U.S. 312, 321, quoting *Perry Ed. Assn. v. Perry Local Educators’ Assn.* (1983) 460 U.S. 37, 45.)

parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.” (*Masterpiece, supra*, at p. ____ [138 S.Ct. 1719, 1723].)

In his concurring opinion in *Masterpiece*, which Justice Gorsuch joined, Justice Thomas considered the free speech issue. Justice Thomas concluded a baker's creation and design of custom wedding cakes was expressive conduct, but did so in reference to the facts. While the parties disputed whether the baker had refused to create a custom wedding cake or whether he had refused to sell the same-sex couple *any* wedding cake (including a premade one), Justice Thomas concluded the Colorado Court of Appeals had resolved this factual dispute in the baker's favor by describing the baker's conduct as a refusal to “design and create a cake to celebrate [a] same-sex wedding.” (*Masterpiece, supra*, ____ U.S. at p. ____ [138 S.Ct. 1719, 1740] (conc. opn. of Thomas, J.).) Justice Thomas explained how Phillip's use of his artistic talents was expressive and intended to send a message:

“The conduct that the Colorado Court of Appeals ascribed to Phillips

[the baker]—creating and designing custom wedding cakes—is expressive. Phillips considers himself an artist. The logo for Masterpiece Cakeshop is an artist's paint palette with a paintbrush and baker's whisk. Behind the counter Phillips has a picture that depicts him as an artist painting on a canvas. Phillips takes exceptional care with each cake that he creates— sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding.... [¶] Phillips is an active participant in the wedding celebration. He sits down with each couple for a consultation before he creates their custom wedding cake. He discusses their preferences, their personalities, and the details of their wedding to ensure that each cake reflects the couple who ordered it. In addition to creating and delivering the cake—a focal point of the wedding celebration—Phillips sometimes stays and interacts with the guests at the wedding. And the guests often recognize his creations and seek his bakery out afterward. Phillips also sees the inherent symbolism in

wedding cakes. To him, a wedding cake inherently communicates that ‘a wedding has occurred, a marriage has begun, and the couple should be celebrated.’” (*Masterpiece, supra*, ___ U.S. at p. ___ [138 S.Ct. 1719, 1742–1743] (conc. opn. of Thomas, J.).)

Justice Thomas then discussed how wedding cakes communicate this message to others and concluded that the baker’s “creation of custom wedding cakes is expressive.” (*Masterpiece, supra*, ___ U.S. at p. ___ [138 S.Ct. 1719, 1743, conc. opn. of Thomas, J.]).¹¹ Even assuming a majority of the court would agree with Justice Thomas, perhaps this analysis would be affected if the cake requested was not specially designed for the event, but a *stock* cake selected from a lineup of preexisting designs, bearing no particular indicia of a wedding, suitable for any number of occasions, and made repeatedly for any customer who orders it. Costco sells cakes like that, and so does nearly every large grocery store across California. Does it matter if the situation here more closely resembles the order of a grocery store cake or is

¹¹ The concurrence did not address whether Colorado’s public accommodation law requiring the baker to sell custom wedding cakes to same-sex couples survives strict scrutiny— the standard Justice Thomas believed applicable in that case—but noted what Justice Thomas viewed as weaknesses in the asserted justifications for Colorado’s law.

more akin to the cakes originally designed and created by Phillips, the baker in *Masterpiece*?

Maybe Tastries is right, and it makes no difference at all. But that is not the point. The issue is that the DFEH must be permitted an opportunity to complete its investigation and fully and formally plead its claims to support whatever legal arguments it wishes to make *before* any merits-based decision is reached, especially on an issue where the contours of the legal analysis, and what facts are material to it, are uncertain and unsettled. Anything short of that and the DFEH is deprived of its opportunity to be heard.

When the trial court decided the free-speech issue at the preliminary injunction stage, the court necessarily relied on the factual context as it was known to and presented by the parties at that point, which was before the DFEH finished its investigation and filed a civil action seeking permanent relief. In ruling on Tastries's anti-SLAPP motion in the subsequent section 12965 action, the court recognized its preliminary injunction order was premised on the facts that existed at that time:

“As discussed above, the court's ruling on the merits of [Tastries's] Free Speech defense was based on a preliminary record. The court agreed that the Government Code contemplated further investigation by the [DFEH] and the potential for

further court proceedings upon ‘final disposition’ of its internal review, whether through a motion for modification of judgment or the new complaint.”

The trial court further noted that,

“The [DFEH] now argues that the facts developed from its continuing investigation show (1) the Rodriguez-Del Rio[] [couple] sought to purchase a cake that, while labeled as ‘custom,’ was equivalent to a premade, or store-bought display cake, (2) [Tastries] nevertheless refused to sell to them, and (3) [Tastries] had a policy of refusing to supply wedding cakes for same-sex couples regardless of whether or not those cakes were custom, such that Rodriguez-Del Rio[] would not have been able to purchase *any* wedding cake from [Tastries]. In other words, the [DFEH] argues that [Tastries’s] actions amounted to a complete denial of goods or services.”

The court concluded the DFEH had “supplied sufficient admissible evidence in this respect to substantiate a *prima facie* case if accepted as true (leaving aside conflicting evidence proffered by [Tastries] and making no determination on the merits).”

We highlight this portion of the trial court's order denying Tastries's anti-SLAPP motion to strike the section 12965 complaint to show how the DFEH's further investigation has enabled it to fully plead its case and make arguments it was unable to make or support at the preliminary injunction stage. Whether those arguments are meritorious, we take no position.

Because the free speech analysis may depend upon the resolution of disputed factual issues, this case simply does not fit the exception articulated by *Camp*. Not only was the free speech issue not necessarily a pure question of law referencing no extrinsic facts, but the matter was not yet fully investigated or pleaded. The trial court's preliminary injunction decision was not a final, merits-based adjudication of the viability of the DFEH's potential future UCRA claim to be pleaded under section 12965.

We decline Tastries's invitation to decide the merits of the DFEH's subsequent section 12965 action currently pending, which Tastries claims is merely an improper relitigation of the UCRA claim already decided in the section 12974 action. Under Code of Civil Procedure section 909, Tastries urges us to deny the writ petition and end the subsequent case conclusively by admitting additional evidence of the pleadings and all documents related to the anti-SLAPP motion filed in the subsequent section 12965 action. Tastries argues this evidence conclusively establishes that

the DFEH's continued investigation revealed no new evidence, which should change the legal result in the subsequent action, and the subsequent action is legally precluded.

This we cannot do. Tastries's argument is premised on the notion the section 12974 action resulted in a merits-based determination on the DFEH's claim which was not appealed, and to which the DFEH assented to the entry of judgment; thus, that decision is final. We have explained at length above why that is not so. We deny Tastries's motion to admit additional evidence—we are not deciding the merits of any claims asserted in the DFEH's section 12965 action, which has yet to be decided by the trial court in the first instance.

C. Violation of Separation of Powers Doctrine

The DFEH argues that by prohibiting the DFEH from executing its statutory mandate, the trial court's order on the motion to enforce the judgment violated the separation of powers doctrine. Specifically, in its order on the motion to enforce the judgment, the trial court concluded that, while it was required to permit the DFEH to continue its investigation pursuant to statute, "that investigation is undoubtedly proscribed by some degree by the court's judgment. The court having rendered its judgment, the investigation must be tailored to the ascertainment and discovery of facts reasonably and rationally

calculated to serve as the basis for an argument for modification of the judgment.”

The court also ruled that to the extent the DFEH’s investigation caused it to conclude that further enforcement was necessary, which cannot be informally resolved by the alternative dispute resolution required under section 12965, “any such further proceeding should be brought before this court in the nature of action or petition for modification of the court’s original judgment.”

The separation of powers principle is embodied in the California Constitution, which provides as follows in article III, section 3: “The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.” “The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch.” (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 662.) Although the doctrine is not intended to prohibit one branch from taking action that might affect those of another branch, the doctrine is violated when the actions of one branch “defeat or materially impair the inherent functions of another branch.” (*Ibid.*) For example, intrusions by the judiciary into the executive branch’s realm of parole matters may violate the separation of powers doctrine. (See *Hornung v. Superior Court* (2000) 81 Cal.App.4th 1095, 1099 [court order

allowing inmate to question commissioners regarding their parole-related decision process violated separation of powers].)

The trial court's order on the motion to enforce the judgment violates the separation of powers doctrine because it precludes the DFEH from completing its statutory mandate to investigate an administrative complaint under section 12963, and from filing a section 12965 civil action for permanent relief if it determines a suit is warranted after mandatory dispute resolution has been undertaken. The trial court's conclusion that section 12974 serves as the functional equivalent of a section 12965 civil action was incorrect, and the court could not properly restrict the DFEH from filing a new civil action under section 12965 or completing its investigation of the administrative complaint. (*California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294, 311 [separation of powers doctrine precludes judiciary from assuming superintendence over the law enforcement activities of the executive branch except in extraordinary circumstances].)

D. Procedural Concerns

We note, finally, the trial court's concerns about judicial economy and forum shopping that may arise if section 12974 is not considered the functional equivalent of a civil action under section 12965. These issues are important to us,

too, but we think ameliorating factors overcome any efficiency or abuse concerns in this context.

The trial court observed in its order on the motion to enforce the judgment that it was not proper for the parties to submit the matter to the court's jurisdiction without objection, "take the court's temperature,' and then act as if the court's judgment has not been made." The trial court found this tantamount to forum shopping. In its order on Tastries's anti-SLAPP motion in the DFEH's subsequent section 12965 action, the court noted that concluding section 12974 was the functional equivalent of a civil action under section 12965 "was necessary to avoid the absurd potential for nullification of the court's prior ruling as to the applicable legal standard were a new complaint assigned to a different judge."

Our interpretation of section 12974 does not foreclose the possibility that an issue decided in that context could be given issue-preclusive effect in a subsequent section 12965 civil action arising from the same administrative complaint. A different trial judge handling the matter in subsequent litigation is well positioned to determine the preclusive effect of the first judge's ruling.

We believe trial judges skillfully navigate this situation frequently, in many contexts. For example, where a demurrer to a claim is sustained without leave to amend, that decision is not subject to reconsideration in summary judgment

proceedings merely because a different judge is hearing the matter.¹² And, in that vein, the second judge at summary judgment may apply the law to the remaining claims in a manner that would have resulted in their dismissal at the demurrer stage had the first judge interpreted the law in that manner. (*Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199, 205 [“To hold that a trial court is prevented in a motion for summary judgment or adjudication from revisiting issues of law raised on demurrer is to condemn the parties to trial even where the trial court’s decision on demurrer was patently wrong.”].)

We also find the risk of forum shopping and the potential for waste of judicial resources to be minimal because the venue provision for sections 12974 and 12965 is the same, and the California Rules of Court, as well as most courts’ local rules, permit related cases filed in one superior court to be assigned to a single judge or department. (Cal. Rules of Court, rule 3.300.) This case bears that out—the subsequent section 12965 action was assigned to the same trial judge as the section 12974 action.

¹² There is a method to seek reconsideration of such orders, but mere assignment to a different judge is not a basis for reconsideration. (Code Civ. Proc., § 1008.)

E. Conclusion

The trial court's interpretation of a section 12974 civil action as the equivalent of a section 12965 action was incorrect, and its order on the preliminary injunction requested under section 12974 was not a merits-based determination of the merits of the DFEH's UCRA claim to be presented in a civil action under section 12965. Moreover, regardless of the procedural context of the preliminary injunction request, the trial court's decision on it could not constitute a merits-based adjudication of the UCRA claim: the court's order related to an issue of law that was decided with reference to extrinsic factual evidence that had not been fully investigated at the administrative level or fully pleaded in a claim for permanent relief. Finally, the court's incorrect construction of its preliminary injunction order as a final, merits-based determination of the DFEH's UCRA claim in its order on the motion to enforce the judgment led the court to circumscribe the DFEH's statutory duties in a manner that violated the separation of powers doctrine. For these reasons, the trial court's September 13, 2018, order must be vacated.

DISPOSITION

The petition for writ of mandate is granted. Let a writ issue directing the superior court to vacate its order dated September 13, 2018, and enter a new and different order denying in full Tastries's motion to enforce the judgment. The

228a

DFEH shall recover its costs. (Cal. Rules of Court,
rule 8.493(a)(1)(A).)

MEEHAN, J.

WE CONCUR:

DETJEN, Acting P.J.

SMITH, J.

229a

**Superior Court of California
County of Kern
Bakersfield Department 11**

Date: 09/13/2018
BCV-17-102855

DEPARTMENT OF FAIR EMPLOYMENT AND
HOUSING VS. CATHY'S CREATIONS, INC.

Courtroom Staff

Honorable: David R. Lampe
Clerk: Veronica D. Lancaster

**NATURE OF PROCEEDINGS: RULING ON
DEFENDANTS' MOTION TO ENFORCE
JUDGMENT; HERETOFORE SUBMITTED
ON SEPTEMBER 5, 2018**

RULING:

The court grants the motion in part and denies the motion in part as herein stated.

Summary of Ruling

Perhaps not surprisingly, this action has returned to this court for further consideration in the form of this motion following this court's final judgment dated May 1, 2018, from which no appeal has been taken.

This motion requires that the court consider the nature of the action leading to judgment, the effect of that judgment on the subsequent conduct of the parties, and the continuing jurisdiction of the court after judgment, now and in the future.

The DFEH filed the underlying civil action pursuant to Government Code section 12974, thereby invoking the equitable jurisdiction of the court. Although the object of such an action from the DFEH's perspective is provisional relief, this case is unique in that the Defendants fundamentally did not dispute the underlying conduct (that is, discrimination based upon sexual orientation), but instead asserted prevailing First Amendment rights as a defense. Neither side objected to the jurisdiction of the court.

The court acquired personal and subject matter jurisdiction of the cause. The case proceeded upon the merits of the constitutional defense.

This court ultimately decided the issue in favor of the Defendants based upon the facts presented for the reasons stated in the court's judgment. This was a plenary judgment, not a preliminary one. This judgment is final, not being appealed.

The Defendants are procedurally correct to bring this motion to enforce. The court's final judgment was one in equity, determining the corresponding rights and duties of the parties. As a decree in equity, the court has continuing equitable jurisdiction to enforce its decree and to ensure that the rights of the parties are maintained according to the court's judgment. This is not a matter of res judicata, because there is no second proceeding. This is a matter of the court's original jurisdiction.

Although the court's judgment was plenary and final, this does not mean that the DFEH is foreclosed from appropriate investigation pursuant to Government Code section 12963, et seq. Under principles of comity

and the doctrine of Separation of Powers, it is incumbent upon this court to respect the right of the DFEH to perform its statutory executive investigatory function. The nature of an equitable decree is that it is necessarily based upon the facts which are known or knowable at the time it is rendered. The DFEH is not foreclosed from reasonably investigating the factual underpinnings of this court's adjudication, provided that the investigation proceeds in a lawful and legitimate manner. As stated in the Conclusion to this ruling, to the extent that this motion asks this court to enjoin any further investigation by DFEH into the circumstances of the complaint of the Real Parties in Interest, the motion will be denied.

However, just as this court must respect the DFEH's executive authority, the DFEH, and the Defendants for that matter, must respect this court's judicial authority. This court has rendered a plenary judgment addressing the constitutional rights of the Defendants. Neither side may submit the matter to the court's jurisdiction without objection, "take the court's temperature," and then act as if the court's judgment has not been made. To do so would defeat the very nature of continuing equitable jurisdiction. Certainly, it would be unseemly and in derogation of the court's jurisdiction for any party to "forum shop."¹

Further, although the court must and does permit the DFEH's investigation pursuant to statute, that investigation is undoubtedly proscribed to some

¹ The court only takes jurisdiction of the cause before it and matters necessarily incident thereto. The court does not presume jurisdiction over any other causes of action based upon different primary rights, or over different parties.

degree by the court's judgment. The court having rendered its judgment, the investigation must be tailored to the ascertainment and discovery of facts reasonably and rationally calculated to serve as the basis for an argument for modification of the judgment. It would be naive for the court to expect that controversy will not arise during discovery of the scope of the DFEH's investigation.

Therefore, as stated in the Conclusion to this ruling, the court will grant the motion in the following particulars. First, to the extent that the DFEH deems it necessary to petition to compel compliance with any of its administrative discovery pursuant to section 12963.5, or if the Defendants deem it necessary to seek any protective order from such discovery, any such filings shall be made with this court. Further, to the extent that the DFEH's investigation causes it to conclude that further enforcement is necessary which cannot be informally resolved pursuant to section 12965, then any such further proceeding should be brought before this court in the nature of action or petition for modification of the court's original judgment. This limited grant of the motion perhaps has little practical significance, because, as conceded by counsel for the DFEH, venue of further proceedings under section 12963.5 and 12965 is with this court in any case.

Brief Procedural History

On December 14, 2017, the DFEH commenced this civil action pursuant to Government Code section 12974. On that date, the Court denied the DFEH's request for a temporary restraining order, and set an order to show cause hearing for February 2, 2018. At

that time, the Court determined that the nature of the proceeding was an “action” and that “the Petition is the complaining document in the action, which is equivalent to the Complaint.” As a result, Defendants ultimately answered.

On February 5, 2018, the Court issued its ruling describing the proceeding as an action by the DFEH for enforcement of the Unruh Civil Rights Act. For the reasons stated in the ruling, the court determined that the state could not succeed on the facts presented as a matter of law. That ruling was subsequently attached to the Court’s final order (dated March 2, 2018) on the DFEH’s petition. Following a Case Management Conference on March 16, 2018, the parties submitted alternative proposed judgments to the court.

On May 1, 2018, the Court entered a minute order in which it stated that “the court is not fully satisfied with the alternative forms of judgment crafted respectively by each of the parties. The court will prepare its own form of judgment.” The Court entered its own judgment, which stated in significant part:

“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."

Notice of Entry of that judgment was served on May 9, 2018.

On July 9, 2018, the time for the DFEH to file an appeal from the final judgment ran, with the DFEH filing no such notice of appeal.²

Nature of the Court's Judgment

The DFEH's action was brought under Government Code section 12974 which provides: "[w]henever a complaint is filed with the department and the department concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this part, the director or his authorized representative may bring a civil action for appropriate temporary or preliminary relief pending final disposition of such complaint."

In its opposition to the current motion, the DFEH refers to its 12974 action as a "preliminary injunction action" and that the court denied a "motion for preliminary injunction." As the DFEH envisions it, it perceives the adjudication as "preliminary," and that it is further entitled to litigate "unsettled constitutional questions at issue," and to "fully

² The DFEH abandoned a previous appeal taken on April 30, 2018 from the court's earlier March 2, 2018 order.

litigate them on the merits in a civil action for permanent relief” under section 12965.

The court does not view the matter as so limited.

The court did not deny a “motion for preliminary injunction.” As stated, the court ordered, adjudged, and decreed that judgment was rendered and entered in favor of the Defendants for the reasons stated, that is, that the Defendants held a fundamental constitutional right under the First Amendment to engage in the conduct which was the subject matter of the complaint. In other words, the Defendants admitted to the business practice complained of which this court recognized would be a discriminatory practice under the Unruh Act absent constitutional protection. As such, the court’s determination was plenary in nature, based upon the defense at issue—a constitutional right.

The fact that section 12974 and section 12965 both refer to a “civil action” does not necessarily mean that the statutory scheme envisions two civil actions, particularly when both would be subject to the same rules of venue. A common sense interpretation of these code sections under these circumstances is that one civil action is involved, and that section 12974 authorizes a filing earlier than contemplated by section 12965 where “prompt judicial action is necessary.”

Even if the current action filed by DFEH were to be considered a petition for preliminary injunction, it does not mean that the court is without authority or jurisdiction to render a plenary decision. Here, the parties did not undertake to litigate the matter

presented to the court solely as a matter for preliminary determination. Instead, both sides discussed the constitutionality of the Defendants' conduct in a plenary manner. When the parties choose to present a constitutional question upon uncontroverted facts to the court, the court is empowered to treat the matter as a plenary question. (See *Eckl v. Davis* (1975) 51 Cal. App. 3d 831, 835.)

Further, the issue of whether to issue an injunction was ancillary to the basic question of law presented. Injunction is not a cause of action—it is a remedy. The court undeniably held both subject matter and personal jurisdiction. The Defendants admitted the conduct. The sole question presented was a question of law—whether or not the Defendants were entitled by constitutional right to engage in the conduct. For this reason, there was a satisfactory showing to submit the cause upon the merits for plenary relief. No purpose would be served by further trial to delay determination of the fundamental constitutional question. (See *Camp v. Bd. of Supervisors* (1981) 123 Cal. App. 3d 334, 357-58.)

The Court's Continuing Jurisdiction

The fact that the court has issued a plenary judgment does not necessarily mean that the case is “over.” The action by the DFEH was equitable in nature. The court's decree was made in an exercise of its equitable jurisdiction. The court's equitable jurisdiction continues.

Ordinarily, a trial court's jurisdiction over the parties and the subject matter continues until a final judgment is entered. (*Diamond Heights Village Assn.*,

Inc. v. Financial Freedom Senior Funding Corp. (2011) 196 Cal.App.4th 290, 305.) However, a court retains jurisdiction to “compel obedience to its judgments, orders, and process.” (Code Civ. Proc., § 128, subd. (a)(4).) In cases involving equitable claims and relief, such jurisdiction is broad. “The jurisdiction of a court of equity to enforce its decrees is coextensive with its jurisdiction to determine the rights of the parties, and it has power to enforce its decrees as a necessary incident to its jurisdiction. Except where the decree is self-executing, jurisdiction of the cause continues for this purpose, or leave may be expressly reserved to reinstate the cause for the purpose of enforcing the decree, or to make such further orders as may be necessary. [Citations.] A court of equity can mold its decrees to suit the exigencies of the case. [Citation.] Where equity has acquired jurisdiction for one purpose, it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the causes of action alleged. [Citations.] Where a court has taken jurisdiction of a suit in equity it may determine all legal as well as equitable issues in order to completely dispose of the matters in controversy. [Citations.]” (*Day v. Sharp* (1975) 50 Cal.App.3d 904, 912-913, quoting *Klinker v. Klinker* (1955) 132 Cal.App.2d 687, 694; accord, *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1161.)

The power to retain and exercise post judgment jurisdiction by a court in equity in order to interpret the judgment and determine unresolved issues and future problems is well settled. (See, e.g., *Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1044-1045; *Day v. Sharp*, *supra*, 50

Cal.App.3d at pp. 911-913; *Rynsbarger v. Dairymen's Fertilizer Co-op., Inc.* (1968) 266 Cal.App.2d 269, 278-279; *Ecker Bros. v. Jones* (1960) 186 Cal.App.2d 775, 787; see also *Roden v. AmerisourceBergen Corp.* (2005) 130 Cal.App.4th 211.) Indeed, even in the absence of an express reservation of jurisdiction, “[a]n equity court has inherent power to make its decree effective by additional orders affecting the details of performance....” (*Barnes v. Chamberlain* (1983) 147 Cal.App.3d 762, 767; accord, *Palmco Corp. v. Superior Court* (1993) 16 Cal.App.4th 221, 225.)

The post judgment exercise of jurisdiction in equity cases is supported by policies favoring judicial economy and finality; by resolving issues that remain after judgment is entered, the court is able “to do full and final justice between [the parties] without the necessity of filing a new action.” (*Day v. Sharp*, supra, 50 Cal.App.3d at p. 912; see also *Pailhe v. Pailhe* (1952) 113 Cal.App.2d 53, 64 [in exercising its equitable powers, the court can, “In one action, grant all the relief to which the parties are entitled, although at law such a result might strictly require several actions.’ ”].)

That this court has continuing equitable jurisdiction is inherent in the very purpose of equity. “Equity or chancery law has its origin in the necessity for exceptions to the application of rules of law in those cases where the law, by reason of its universality, would create injustice in the affairs of men.” (*Estate of Lankershim* (1936) 6 Cal.2d 568, 572-573.) The object of equity is to do right and justice. Courts of equity will mold and adjust their decrees so as to award substantial justice according to the requirements of the varying complications that may be presented to

them for adjudication. (*Times—Mirror Co. v. Superior Court* (1935) 3 Cal.2d 309, 331, 44 P.2d 547; See *Hirshfield v. Schwartz* (2001) 91 Cal. App. 4th 749, 770-71.)

In the present case, the court must ensure that its judgment is respected by the parties. No one can come to court, invoke its jurisdiction, acquire the court's judgment upon the matter, and then ignore the court's decree. The court must act to preserve its jurisdiction. To fail to do so would be contrary to the rule of law inherent in a constitutional republic.

The Court's Deference to the Statutory Authority of the DFEH

However, although the court has continuing jurisdiction in the matter, this does not mean that its judgment forecloses the DFEH from its statutory obligations.

The DFEH has the authority and duty to investigate, conciliate, mediate, and prosecute complaints alleging violations of the Unruh Act. (Govt. Code, §12930 (f)(2).) After the filing of any complaint alleging facts sufficient to constitute a violation of the FEHA, the department is required to make a prompt investigation. (*Id.* § 12963.) If the department determines after investigation that the complaint is valid, the department is required to immediately endeavor to eliminate the unlawful employment practice or civil rights violation complained of by mediation efforts. (*Id.* §§ 12963.7(a) and 12965 (a).) Under Government Code section 12965, after investigation, the DFEH may bring a civil action on behalf of the aggrieved person if its efforts to

eliminate the unlawful practice without litigation fail. (*Id.* § 12965(a) and (c).)

The court does and will not enjoin the DFEH from its statutory and investigatory duties as discussed above. The court's judgment is in no way intended to prohibit or superintend the DFEH's performance of its executive function except as authorized by law. To do otherwise would be to ignore comity and violate the doctrine of separation of powers. This court's retention of equitable jurisdiction while deferring to the executory function of the DFEH strikes an appropriate balance between the constitutional judicial authority of this court, and the executive authority by law of the DFEH. (See *California Corr. Peace Officers Assn. v. State of California* (2000) 82 Cal. App. 4th 294, 311-12.)

The court's judgment in this case was not a prohibitory injunction against the DFEH from fulfilling its statutory duties. The judgment of this court was necessarily founded upon the facts presented. To the extent that Defendants interpret the court's judgment as precluding any further actions by the DFEH upon the complaint of the Real Parties in Interest, the Defendants must be mindful that a court exercising equitable jurisdiction may always modify or dissolve a decree having prohibitory effect. While the general rule is that a court's final judgment may not be impeached collaterally, the rule does not apply to any prohibitory decree in equity. "This is so because the decree, although purporting on its face to be permanent, is in essence of an executory or continuing nature, creating no right but merely assuming to protect a right from unlawful and injurious interference. Such a decree, it has uniformly

been held, is always subject, upon a proper showing, to modification or dissolution by the court which rendered it. The court's power in this respect is an inherent one. Its action is determined by the facts and circumstances of each particular case, with a view to administering justice between the litigants, and it has the power to modify or vacate its decree when the ends of justice will be thereby served." (*Sontag Chain Stores Co. v. Superior Court in & for Los Angeles Cty.* (1941) 18 Cal. 2d 92, 94-95; see also *Inmates of Sybil Brand Inst. for Women v. Cty. of Los Angeles* (1982) 130 Cal. App. 3d 89, 111-12.)

The Scope of Further Proceedings

Except as to issue this ruling, there is nothing more at this time before the court. The court retains jurisdiction. The DFEH may proceed with its investigation.

The statutory scheme envisions that the court may become further involved during the course of the DFEH's investigation, and thereafter.

To the extent that the Defendants claim grounds to resist the specific discovery sought by the DFEH during its investigation, Government Code section 12963.5 provides the method for this court to review and scrutinize the discovery process. That section provides that the court "shall have jurisdiction to compel the attendance and testimony of witnesses, the production of books, records, documents, and physical materials, and the answering of interrogatories. If an individual or organization fails to comply with a subpoena, interrogatory, request for production, or examination under oath by refusing to

respond fully or objecting thereto, or by obstructing any proceeding before the department, the department may file with a superior court a petition for an order compelling compliance.”

It seems clear that the scope of the DFEH investigation must be directed at the factual underpinnings of the court’s judgment, and must be rationally and reasonably related to a basis for presenting evidence for modification of the court’s judgment.

Furthermore, should the DFEH conclude that further enforcement action is necessary pursuant to Government Code section 12965, the DFEH should file the appropriate pleading asserting its claims with this court.

By retaining jurisdiction in this matter, the court is doing little or no more than the statutory investigatory and enforcement scheme already provides, since the venue of further proceedings is with this Superior Court in any case. Section 12965 provides that any enforcement action “shall be brought in any county in which unlawful practices are alleged to have been committed, in the county in which records relevant to the alleged unlawful practices are maintained and administered, or in the county in which the person claiming to be aggrieved would have worked or would have had access to public accommodation, but for the alleged unlawful practices,” which under all these circumstances is Kern County. Government Code section 12963.5 provides that any petition for enforcement should be brought “in any county in which the department¹ s

investigation or inquiry takes place,” which for all practical purpose in this case is also Kern County.

Conclusion

The court must strike the appropriate balance between its own jurisdiction and authority and that of the DFEH under the circumstances presented. Therefore, for the reasons stated herein the court rules as follows:

1. The court grants the motion to enforce to the extent that the court retains jurisdiction of the premises of the action and related matters and specifically retains jurisdiction of any further proceedings under Government Code sections 12963.5 and 12965; and
2. Except as stated above, the motion is denied.

Under the circumstances of the time limits imposed by statute with respect to discovery and further proceedings, the minute order of the court shall be the order of the court.

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

* * *

244a

TO BE FILED IN THE SUPERIOR COURT
APP-005

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 200578 NAME: Gregory J. Mann FIRM NAME: Department of Fair Employment and Housing STREET ADDRESS: 320 West 4th Street, Suite 1000 CITY: Los Angeles STATE: CA ZIP CODE: 90013 TELEPHONE NO.: REDACTED FAX NO.: 888.382.5293 E-MAIL ADDRESS: REDACTEDREDACTED ATTORNEY FOR (name): Department of Fair Employment and Housing
SUPERIOR COURT OF CALIFORNIA, COUNTY OF KERN STREET ADDRESS: 1415 Truxton Ave. MAILING ADDRESS: CITY AND ZIP CODE: Bakersfield, CA 93301-4698 BRANCH NAME: Metropolitan Division Justice Building
PLAINTIFF/PETITIONER: Department of Fair Employment and Housing DEFENDANT/RESPONDENT: Cathy's Creations, Inc., et al.
COURT OF APPEAL CASE NUMBER: F077495
SUPERIOR COURT CASE NUMBER: BCV-17- 102855

ABANDONMENT OF APPEAL
(UNLIMITED CIVIL CASE)

The undersigned appellant hereby abandons the appeal filed on *(date)*: Apr 30, 2018 in the above-entitled action.

Given the preliminary nature of the remedy sought by the civil action pursuant to Government Code section 12974, the Department of Fair Employment and Housing hereby abandons this appeal to complete the investigation of the administrative complaint and potentially file a civil complaint.

Date: June 13, 2018

Gregory J. Mann

TYPE OR PRINT NAME

/g/ Gregory J. Mann

(SIGNATURE OF APPELLANT OR ATTORNEY)

NOTE: File this form in the superior court if the record has not yet been filed in the Court of Appeal. If the record has already been filed in the Court of Appeal, you cannot use this form; you must file a request for dismissal in the Court of Appeal. You can use form APP-007 to file a request for dismissal in the Court of Appeal. A copy of this form must also be served on the other party or parties to this appeal, and proof of service filed with this form. You may use an applicable Judicial Council form (such as APP-009 or APP-009E) for the proof of service. When this document has been completed and a copy served, the original may then be filed with the court with proof of service.

* * *

246a

**Superior Court of California
County of Kern
Bakersfield Department 11**

Date: 05/01/2018
BCV-17-102855

DEPARTMENT OF FAIR EMPLOYMENT AND
HOUSING VS. CATHY'S CREATIONS, INC.

Courtroom Staff

Honorable: David R. Lampe
Clerk: Veronica D. Lancaster

NATURE OF PROCEEDINGS: RULING

Rulings on Matters Submitted April 13, 2018

MOTION:

Court's Order to Show Cause as to Why Judgment
Should not be Entered.

RULING:

The parties agree that judgment should be entered in this matter. The action was a unique matter brought pursuant to Government Code section 12974. While that section provides that the DFEH may bring an "action," the "plenary" relief provided in the "action" is only provisional. This is unlike a typical request for preliminary injunction which may proceed to plenary trial even upon denial of provisional relief. It therefore appears that judgment should be entered. However, the court is not fully satisfied with the alternative forms of judgment crafted respectively by each of the

247a

parties. The court will prepare its own form of judgment.

* * *

248a

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF KERN
May 01, 2018
Terry McNally, Clerk
By: /s/ [Initials], Deputy

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

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

Plaintiffs,

v.

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.

CASE NO.:
BCV-17-102855

JUDGMENT

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.

250a

DATED: May 1, 2018

/s/ David R. Lampe

DAVID R. LAMPE

JUDGE OF THE SUPERIOR COURT

* * *

251a

APP-002

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 200578 NAME: Gregory J. Mann, Senior Staff Counsel (200578) FIRM NAME: Department of Fair Employment and Housing STREET ADDRESS: 320 W. 4th Street, 10th Floor, Suite 1000 CITY: Los Angeles STATE: CA ZIP CODE: 90013 TELEPHONE NO.: REDACTED FAX NO.: 1-888-382-5293 E-MAIL ADDRESS: REDACTEDREDACTED ATTORNEY FOR (<i>name</i>): Department of Fair Employment and Housing
SUPERIOR COURT OF CALIFORNIA, COUNTY OF KERN STREET ADDRESS: 1415 Truxtun Ave. MAILING ADDRESS: CITY AND ZIP CODE: Bakersfield, CA 93301-4698 BRANCH NAME: Metropolitan Division Justice Building
PLAINTIFF/PETITIONER: Department of Fair Employment and Housing DEFENDANT/RESPONDENT: Cathy' Creations, Inc. d/b/a Tastries, a California Corporation, et al.
CASE NUMBER: BCV-17-102855
☒ NOTICE OF APPEAL ☐ CROSS APPEAL (UNLIMITED CIVIL CASE)

Notice: Please read *Information on Appeal Procedures for Unlimited Civil Cases* (Judicial Council form APP-001) before completing this form. This form must be filed in the superior court, not in the Court of Appeal. A copy of this form must also be served on the other party or parties to this appeal. You may use an applicable Judicial Council form (such as APP-009 or APP-009E) for the proof of service. When this document has been completed and a copy served, the original may then be filed with the court with proof of service.

1. NOTICE IS HEREBY GIVEN that (name):
Appeals from the following judgment or order in this case, which was entered on (*date*): March 2, 2018
 - ☐ Judgment after jury trial
 - ☐ Judgment after court trial
 - ☐ Default judgment
 - ☐ Judgment after an order granting a summary judgment motion
 - ☐ Judgment of dismissal under Code of Civil Procedure, §§ 581d, 583.250, 583.360, or 583.430
 - ☐ Judgment of dismissal after an order sustaining a demurrer
 - ☐ An order after judgment under Code of Civil Procedure § 904.1(a)(2)
 - ☒ An order or judgment under Code of Civil Procedure § 904.1(a)(3)-(13)

253a

☐ Other (*describe and specify code section that authorizes this appeal*):

2. For cross-appeals only:
 - a. Date notice of appeal was filed in original appeal:
 - b. Date superior court clerk mailed notice of original appeal:
 - c. Court of Appeal case number (*if known*):

Date: April 30, 2018

Gregory J. Mann
TYPE OR PRINT NAME

/g/ Gregory J. Mann
(SIGNATURE OF APPELLANT OR ATTORNEY)

* * *

254a

**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
FEBRAURY 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.

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 prescription 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.

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

Facts

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

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.

* * *

Cal. Civ. Code § 51

**Unruh Civil Rights Act; equal rights;
business establishments; violations of federal
Americans with Disabilities Act**

(a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.

(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

(c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, sexual orientation, citizenship, primary language, or immigration status, or to persons regardless of their genetic information.

(d) Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require

construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(e) For purposes of this section:

(1) "Disability" means any mental or physical disability as defined in Sections 12926 and 12926.1 of the Government Code.

(2)(A) "Genetic information" means, with respect to any individual, information about any of the following:

(i) The individual's genetic tests.

(ii) The genetic tests of family members of the individual.

(iii) The manifestation of a disease or disorder in family members of the individual.

(B) "Genetic information" includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(C) "Genetic information" does not include information about the sex or age of any individual.

(3) "Medical condition" has the same meaning as defined in subdivision (i) of Section 12926 of the Government Code.

(4) "Race" is inclusive of traits associated with race, including, but not limited to, hair texture and protective hairstyles. "Protective hairstyles"

includes, but is not limited to, such hairstyles as braids, locs, and twists.

(5) "Religion" includes all aspects of religious belief, observance, and practice.

(6) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(7) "Sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status" includes any of the following:

(A) Any combination of those characteristics.

(B) A perception that the person has any particular characteristic or characteristics within the listed categories or any combination of those characteristics.

(C) A perception that the person is associated with a person who has, or is perceived to have, any particular characteristic or characteristics, or any combination of characteristics, within the listed categories.

(8) "Sexual orientation" has the same meaning as defined in subdivision (s) of Section 12926 of the Government Code.

271a

(f) A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.

(g) Verification of immigration status and any discrimination based upon verified immigration status, where required by federal law, shall not constitute a violation of this section.

(h) Nothing in this section shall be construed to require the provision of services or documents in a language other than English, beyond that which is otherwise required by other provisions of federal, state, or local law, including Section 1632.

Cal. Civ. Code § 51.2

Age discrimination in sale or rental of housing prohibited; housing designed to meet physical and social needs of senior citizens; exceptions; intent; age preferences in federally approved housing programs

(a) Section 51 shall be construed to prohibit a business establishment from discriminating in the sale or rental of housing based upon age. Where accommodations are designed to meet the physical and social needs of senior citizens, a business establishment may establish and preserve that housing for senior citizens, pursuant to Section 51.3, except housing as to which Section 51.3 is preempted by the prohibition in the federal Fair Housing Amendments Act of 1988 (Public Law 100-430)¹ and implementing regulations against discrimination on the basis of familial status. For accommodations constructed before February 8, 1982, that meet all the criteria for senior citizen housing specified in Section 51.3, a business establishment may establish and preserve that housing development for senior citizens without the housing development being designed to meet physical and social needs of senior citizens.

(b) This section is intended to clarify the holdings in *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 72 and *O'Connor v. Village Green Owners Association* (1983) 33 Cal.3d 790.

(c) This section shall not apply to the County of Riverside.

(d) A housing development for senior citizens constructed on or after January 1, 2001, shall be presumed to be designed to meet the physical and

social needs of senior citizens if it includes all of the following elements:

- (1) Entryways, walkways, and hallways in the common areas of the development, and doorways and paths of access to and within the housing units, shall be as wide as required by current laws applicable to new multifamily housing construction for provision of access to persons using a standard-width wheelchair.
- (2) Walkways and hallways in the common areas of the development shall be equipped with standard height railings or grab bars to assist persons who have difficulty with walking.
- (3) Walkways and hallways in the common areas shall have lighting conditions which are of sufficient brightness to assist persons who have difficulty seeing.
- (4) Access to all common areas and housing units within the development shall be provided without use of stairs, either by means of an elevator or sloped walking ramps.
- (5) The development shall be designed to encourage social contact by providing at least one common room and at least some common open space.
- (6) Refuse collection shall be provided in a manner that requires a minimum of physical exertion by residents.
- (7) The development shall comply with all other applicable requirements for access and design imposed by law, including, but not limited to, the Fair Housing Act (42 U.S.C. Sec. 3601 et seq.), the Americans with Disabilities Act (42 U.S.C. Sec.

12101 et seq.), and the regulations promulgated at Title 24 of the California Code of Regulations that relate to access for persons with disabilities or handicaps. Nothing in this section shall be construed to limit or reduce any right or obligation applicable under those laws.

(e) Selection preferences based on age, imposed in connection with a federally approved housing program, do not constitute age discrimination in housing.

275a

**Selected Trial Exhibits from
July 22-29, 2022 Trial Proceedings**

*Department of Fair Employment and Housing v.
Cathy's Creations, Inc.*, Superior Court of California,
County of Kern, Metropolitan Division

Case No. BCV-18-102633



Standards of Service

Is it lovely, praiseworthy, or of good report?

Tastries provides custom designs that are
Creative, Uplifting, Inspirational and Affirming
Prepared especially for you as a
Centerpiece to your Celebration

All custom orders must follow Tastries Standards of Service:

- Look as good as it tastes, and taste as good as it looks ☺
- Beautiful and balanced: size is proportional to design
- Complimentary colors: color palettes are compatible; work with the design
- Appropriate design suited to the celebration theme
- Themes that are positive, meaningful and in line with the purpose
- We prefer to make cakes that would be rated G or PG

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

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

**Our designers are ready to help you
explore the many design options that we
can offer at Tastries!**

“... whatever is true, whatever is noble, whatever is right, whatever is pure, whatever is lovely, whatever is of good report, if anything is virtuous or praiseworthy, think about these things.” Phil 4:8



Some of our traditions and rituals are so old we have forgotten the reasons behind them. Ritual and traditions, though, are an important part of every culture. The wedding ceremony itself is one of our culture's oldest and most significant rituals. The sacrament of marriage was ordained by God and represents the depth of love God has for each of us. "As a bridegroom rejoices over his bride, so will your God rejoice over you." Is 62:5 Taking vows, making public declarations, and serving your guests and each other are all important parts of our culture's wedding ritual. You will spend a lot of time and money preparing to perform these rituals. Understanding the meaning behind each one will make your wedding day even that much more meaningful and memorable for both of you.



The Wedding Cake

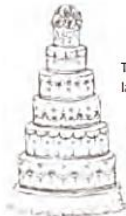


Many engaged couples spend hours searching for the right cake for their special celebration. But, do you know that as we enjoy the variety of wedding cakes available to us now, these cakes have a long deep history? The number of tiers, the color of the cake, the cake cutting and the existence of wedding cakes comes from a carefully planned longstanding tradition dating back to Roman and Medieval times. For centuries The Wedding Cake has often been the centerpiece of the wedding, typically sitting in a place of honor at the reception.



Helpful Hint: Think about where you want your cake to be placed? What is directly behind the cake that will be in your pictures? Is there enough space for people to gather around as you complete two of the 4 rituals at your reception? Lighting?

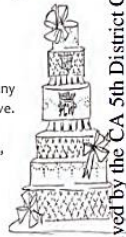
Stacking of the Cake



The tradition of stacking the cake represented fertility. Couples would stack as many layers as they could as this symbolized the number of children that they would have.

"So God created man in his own image, in the image of God he created him; male and female he created them. And God blessed them. And God said to them, 'Be fruitful and multiply and fill the earth.'" Genesis 1:27-28

So how many tiers would you like your wedding cake to be? _____ ☺



The Creative Custom Design

It is our desire to create a unique cake that captures your theme, personality, colors and taste blended together in a way that expresses the simplicity of you as a couple. So... What are your favorite 4 flavors of cake? ☺

The theme of your wedding is the picture you see in your minds eye when you close your eyes and envision one of the most life changing events you will ever have. For some it is simply seeing your future spouse for the first time on your wedding day. For others it is the décor and colors that set the tone and mood for the celebration. Wedding colors are an important part of setting the theme and tone for your ceremony and reception.



What colors are you thinking about for your wedding? _____

What color would you like your wedding cake to be? _____

Do you know what shape you would like your cake? _____

"Then the LORD God said, 'It is not good that the man should be alone; I will make him a helper fit for him.' ... So the LORD God caused a deep sleep to fall upon the man, and while he slept took one of his ribs and closed up its place with flesh. And the rib that the LORD God had taken from the man he made into a woman and brought her to the man." Genesis 2:18-25



If you have a picture of your cake email it to us now at Tastriesbakery@gmail.com and we will print it out a use it for inspiration. If you see a cake in the bakery that you like, let one of the girls at the front desk know and they will take a picture and print it for you.

Making the Magical Cut



As with all wedding traditions, cutting your first slice of wedding cake together is meant to represent something. Do you know what it represents? Do you know why you have that fancy silver knife and cake server? Do you know why the slicing of the cake is such a popular photo opportunity? Do you plan to smash that first slice of cake into the face of your new spouse? Perhaps once you learn more about this tradition, you'll re-think that plan...



"Be devoted to one another in love. Honor one another above yourselves." Romans 12:10

Cutting your wedding cake together, hands together on the knife, is the first domestic act you will perform together. You have ordered a large, beautiful cake, or maybe a smaller cake with the perfect dessert bar big enough to serve all of your family and friends. Just as you will offer hospitality to friends and family in your new home together, cutting and serving your cake as husband and wife is the first act of hospitality you will perform together. It is a ceremonial representation of the hospitality you will show to others, together as a new family unit.



"But at the beginning of creation God 'made them male and female.' For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh.' So they are no longer two, but one. Therefore what God has joined together, let man not separate." Mark 10:6-9



DFEH00092



Helpful Hint: Before the celebration, be clear and specific on where your cake will be placed. Let us know if you would like a stand for your cake. A cake stand is an inexpensive way to "add a layer" or height to your Wedding Cake. Do you think you are interested in a stand? _____ Many photographers take pictures of the cake being set up, the cake with the guests gathered around, and the moment you make your magical cut and feed each other for the first time as man and wife. Giving consideration to the background, lighting and visibility of your wedding cake will make these portraits extend these memories for a lifetime.



The Groom's Cake

Early American weddings had groom's cakes and many weddings have revived this tradition of this cake to showcase the groom's hobbies, individual taste, and even their favorite sports teams. They are usually chocolate to contrast the actual wedding cake, although any flavor or design is acceptable. Recently some newer trends have shown up:



- The Half and Half Wedding cake: Half of the cake is decorated as a beautiful white wedding cake and the other half is a delectable chocolate design or groom themed cake.
- The Grooms cake for the rehearsal dinner: A cake totally designed by the bride (secretly) as a gift to her future husband and a surprise for him at the rehearsal dinner.

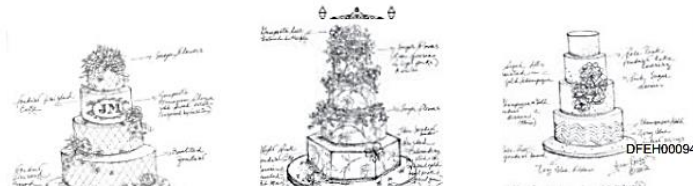
The Gift of Hospitality



A wedding reception is all about hospitality. We sometimes forget that wedding guests are just that - guests. They are guests who are witnesses to, and participants in, one of our most sacred traditions. Because they have honored us by playing important roles in our lives, and by agreeing to participate in our wedding ceremony, it is our obligation to honor them in return with hospitality after the ceremony is complete. In the past, the bride and groom would send guests home with a piece of their wedding cake similar to a wedding favor, later guests were given a little memento; something like flower seeds, mints or m&ms wrapped in a little piece of tulle with a matching ribbon. That tradition has evolved into treats being taken home. Some couples have chosen a personalized cookie with the bride and grooms initials or Thank You written on it and tied in a little bag with a wedding color ribbon. Some have chosen to have little boxes at a dessert bar with a thank you note for the guests to choose treats to take home with them...all of these are examples of appreciation to your guests for taking the time to spend the day celebrating you becoming husband and wife. Always remember that the wedding reception is your way of thanking your guests.



"Therefore a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh." Genesis 2:24



281a

7.RA.1747



282a

8.RA.1993



283a

8.RA.1996



284a

7.RA.1749



285a

7.RA.1752



286a

7.RA.1792



287a

8.RA.2024



288a

8.RA.2025



289a

8.RA.2026



290a

7.RA.1794



291a

7.RA.1795



292a

7.RA.1751



293a

8.RA.2018



294a

8.RA.2021



295a

8.RA.2022



296a

8.RA.2020



297a

7.RA.1791



298a

7.RA.1750



299a

8.RA.2027



300a

7.RA.1761

Decorator

Day: Sat
Event Date: 10/7/17
P/U or Del. 2-3
Cake Stand # _____



Name: Eileen Rodriguez-Del Rio

Phone #: [REDACTED]

Name: Mireya Rodriguez Del Rio

Phone #: [REDACTED]

Email: [REDACTED]

How did you hear about us? Walk in

of Guests: 125

Event: Wedding

Location: Metro Galleries

Event Time: 4:00

- ☐ Emailed picture
- ☐ Picture Attached
- ☐ Special Attention

Notes: _____

General Terms and Conditions:

Payment Terms: 25% non-refundable deposit with full payment required two weeks prior to delivery date. Tastries Bakery may cancel the order if full

payment is past due. Order deposit is non-refundable, but may be applied toward future purchase if order is cancelled more than one week prior to delivery date.

Design Specification: Tastries Bakery provides custom designs to complement event theme and decor. We use customer Information (such as color swatches, descriptions and pictures) along with other resources as Inspiration for a design based on each customer's request that is suited to the product size and order budget. By placing this order, *the customer acknowledges that a specific design has not beenguaranteed and Tastries Bakery can make variations to the design as it may determine are appropriate.*

Transportation: Bakery orders should be transported on a flat surface at cool temperatures (do not place on a lap or seat). Customer is responsible for the order after pick-up or delivery. Tastries Bakery recommends delivery service for cakes greater than two tiers.

Rentals: Rented Items must be returned within two business days after the event. Items returned late are subject to additional rental charges up to 50% of rental rate per day. Rental deposit may be used to cover any late fees, damage or extraordinary maintenance.

Tastries Tips:

Fondant: Should be kept cool but not refrigerated.

BC: Should be kept cool; we recommend refrigeration.

Colored Fondant or Buttercream may fade in sunlight, we recommend keeping your decorated treats away from light exposure until your event is ready to begin.

Customer Signature: /s/ Eileen Rodriguez-Del Rio

302a

Order Taken by: _____

Date: _____

Decorator	#	Items	Total
		Cakes	
		Cupcakes	
		Cookies	
		Treats	
		Rental	
		Rental Deposit	
		Services	
		Delivery	
		Total	
		Deposit	
		Paid	

AT&T 10:42 PM 80%



Wen Rod

August 26, 2017 · 2



I just don't know how to feel right now. It's like a mixture of all kinds of emotions. Discriminated against, angry, hurt, sad, whatever else that's on that spectrum. All we were doing was to taste some cake and making the decision of what we were doing for our wedding cake. I have never experienced being discriminated for loving a person of the same sex. On to a different place that will take the same money that straight, gay, white, Mexican, male or female, human being would have spent. No business for Tastries Bakery



Like



Comment



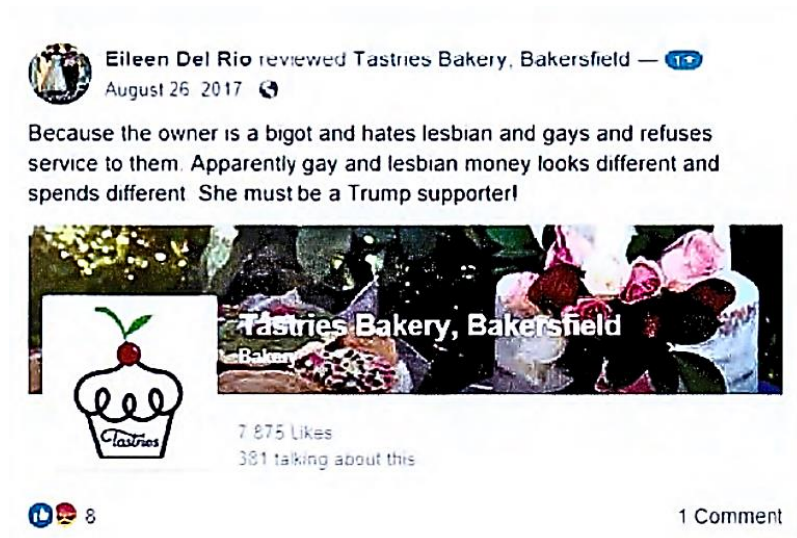
Share



Eileen Rodriguez-Del Rio and 21 others

304a

7.RA.1790



7.RA.2036

Dept.: J

Case #

BCV-18-102633

EXHIBIT 553B

EXHIBIT

553B

Eileen Rodriguez-Del Rio is with Jessica Camacho and 42 others at Tastries Bakery, Bakersfield.

August 26, 2017 · Bakersfield, CA

Saturday, August 26, 2017 at 1:13 PM

go to sign up for tasting and choose our wedding cake. The up the process. Well this rude ass person says I will make your order but I don't condone same sex marriages and will have no part in this process. Oh but you want to take my order and give it another bakery so that bakery can do it. The rude person is also the owner of the place. She don't condone same sex marriages so refused to make our wedding cake and set up our order. She wanted all our information to send to another bakery so they could make it. #discrimination#mustbeadonaldtrumpsupporter#rude!

BAKERY

Tastries Bakery, Bakersfield

53 Comments 8 Shares

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

7.RA.2037

EXHIBIT
553A

Dept.: J
Case #
BCV-18-102633
EXHIBIT 553A

Eileen Rodriguez-Del Rio is with Jessica Camacho and 42 others
at Tastries Bakery, Bakersfield
August 26, 2017 · Bakersfield, CA · 📍

So we go to this bakery a week ago to sign up for tasting and choose our wedding cake. The owner met with us today to set up the process. Well this rude ass person says I will make your order but I don't condone same sex marriages and will have no part in this process. Oh but you want to take my order and give it another bakery so that bakery can do it. The rude person is also the owner of the place. She don't condone same sex marriages so refused to make our wedding cake and set up our order. She wanted all our information to send to another bakery so they could make it.
#discrimination#mustbeadonaldtrumpsupporter#rude!



307a

7.RA.1605-1610



**DEPARTMENT OF FAIR
EMPLOYMENT & HOUSING**

Governor Edmund G. Brown, Jr.

Director Kevin Kish

* * *

October 26, 2017

Catharine M. Miller

Agent for Service for Cathy's Creations, Inc. dba
Tastries

3665 Rosedale Highway
Bakersfield, CA 93308

Respondent:

Cathy Miller, Cathy's Creations, Inc. dba Tastries

RE: Notice of Filing of Discrimination Complaint –
Response Requested

DFEH Number: 935123-315628

Rodriguez-Del Rio / Cathy's Creations, Inc.
Db a Tastries

To All Listed Respondent(s):

Enclosed is a copy of a complaint filed with the Department of Fair Employment and Housing (DFEH). The enclosed complaint, in which you have been named a Respondent or Co-Respondent, alleges unlawful discrimination pursuant to Civil Code section 51.

The DFEH serves as a neutral fact-finder and represents the state of California rather than the complaining party. The merits of this complaint have not been determined. It was, however, subjected to a

screening process, and the allegations, if proven, could support a finding of discrimination.

You must submit a response to the questions below including the supplemental questions, within thirty (30) days of the date of this letter.

1. State the legal name of your business and any other name(s) under which you do or have done business in California.
2. State your business address. Please note that you are required to notify the DFEH in writing of any change of address and the effective date of such change while the complaint is under investigation and throughout any administrative adjudication. (California Code of Regulations, title 2, sections 7403 and 7411).
3. State type of legal business entity you are, i.e., corporation, partnership, limited partnership, sole proprietorship.
4. Does your company have a current contract(s) for the provisions of goods, services or public works with the State of California or receive federal funds? If so, name the awarding agency(ies).

Your response and filing of your address can be submitted by mail. In all mailed correspondence, please include your matter number **935123~315628** and mail it to DFEH, 2218 Kausen Drive, Suite 100, Elk Grove, CA 95758.

If you are interested in discussing a possible settlement of this complaint, please contact me immediately. This will avoid unnecessary delay and limit any potential liability. All settlement discussions are confidential, and not subject to disclosure. All

309a

discussions referring to evidence or information which has a bearing on determining the merits of this complaint will not be considered part of a settlement discussion unless confidentiality is acknowledged by the DFEH. If a settlement is reached which is mutually acceptable to the parties, submission of the requested information may not be necessary.

If you have any questions, please contact me.

Sincerely,

/s/ Clara Hernandez

Consultant III-Spec.

REDACTED

REDACTEDREDACTED

Enclosure

CERTIFIED MAIL: 70170660000107888650

SUPPLEMENTAL QUESTIONS

Complainant Eileen Rodriguez-Del Rio

Co-Complainant: Mireya Rodriguez-Del Rio

Respondent: Cathy Miller, Cathy's Creations, Inc. dba
Tastries

1. Provide a statement of your position with regard to the allegations contained in the complaint:

On 8/26/2017, Cathy Miller, owner of Tastries, stated she would not make our wedding cake because she did not condone same sex marriages. She

310a

refused to provide us service, and steered us to another bakery.

2. Why did you refuse to make a wedding cake for the complainants?
3. What are the specific religious bases for your refusal to make or sell wedding cakes for same-sex wedding celebrations?
4. Have you made or sold cakes for same-sex wedding celebrations? If so, for each cake please state when the cake was made or sold, list the names and contact information of the customers, and state why you did not refuse to make or sell the cake for the same reasons you refused to make a wedding cake for the complainants.
5. Have you refused, on religious grounds, to make or sell cakes for other types of occasions, celebrations or events? If yes, please describe the types of occasions, celebrations or events for which you have refused for religious reasons to make or sell cakes.
6. Have you made or sold cakes to be used in wedding celebrations between a couple, at least one of whom had been divorced? If yes, why?
7. Have you made or sold cakes to be used in wedding celebrations between a couple, at least one of whom had children out of wedlock? If yes, why?
8. Have you refused to make or sell a wedding cake for an opposite-sex couple based on religious reasons? If

so, for each occasion please state when and why you refused, and list the names and contact information of the potential customers.

9. Since January 1, 2014, have you refused to make or sell cakes to a potential customer(s) for any reason? If yes, why? For each person denied service, state the individual's name, the date of denied service, the individual's contact information, and the reason service was denied.

10. For the period of January 1, 2014 to the present, provide a list of all potential customers you have denied service to due to their sexual orientation. For each individual listed state their name, the date of denied service, and the individual's contact information.

11. Describe all communications between Catharine Miller and Gimme Some Sugar and/or Stephanie Caughell-Fisher regarding referral of potential Tastries customers to Gimme Some Sugar.

12. Describe any agreement between Catharine Miller and Gimme Some Sugar and/or Stephanie Caughell-Fisher regarding referral of potential Tastries customers to Gimme Some Sugar.

13. For each potential Tastries customer referred to Gimme Some Sugar, please list the name(s) and contact information.

14. How many wedding cakes has Tastries sold in the last two years? Please provide your best estimate.
15. How many wedding cakes has Tastries custom designed in the last two years? Please provide your best estimate.
16. How many pre-designed or non-custom wedding cakes has Tastries sold in the last two years? Please provide your best estimate.
17. What percentage of the total number of cakes produced by Tastries in the last two years were wedding cakes? Please provide your best estimate.
18. Do Tastries wedding cakes typically have writing on them? If yes, what is the typical written message?
19. Describe the design process for creating a Tastries wedding cake.
20. Describe Catharine Miller's role in the wedding cake design process. Does her role differ for cakes other than wedding cakes?
21. What percentage of Tastries cakes did Catharine Miller design in the last two years?
22. Describe Catharine Miller's role in baking, sculpting, decorating, frosting, or otherwise assembling cakes (i.e., Catharine Miller's role aside from the design process of the cakes).
23. What percentage of Tastries cakes did Catharine Miller bake, sculpt, decorate, frost, or otherwise

assemble in the last three years? What is the percentage for wedding cakes?

24. Does Catharine Miller deliver cakes to wedding celebrations personally? If yes, what percentage of wedding cakes does Ms. Miller personally deliver to wedding celebrations? What is the decision-making process that leads to Ms. Miller personally delivering cakes to wedding celebrations?

25. Have Catharine Miller or other Tastries employees or independent contractors participated in wedding celebrations at which Tastries cakes are involved? If yes, please describe such participation.

26. Have Tastries employees or independent contractors been disciplined for their participation in wedding celebrations at which Tastries cakes were involved?

27. Have Tastries wedding cakes been delivered or displayed in such a manner that attendees at a wedding celebration knew the cake was a Tastries cake?

28. Describe all steps, if any, you take to ensure that a Tastries cake is used by the customer(s) to whom it is sold, rather than transferred to a third party.

29. How many employees do you employ? If this number has changed since January 1, 2014, please describe the changes, including when the changes occurred.

30. How many independent contractors work with you? If this number has changed since January 1, 2014, please describe the changes, including when the changes occurred.

31. Describe the job duties of each Tastries employee and independent contractor.

32. Describe the duties associated with each job title at Tastries. Please provide duty statements for each job title at Tastries.

33. Provide a list of all employees who have worked at Tastries for the period of January 1, 2014 to the present. For each individual listed state their name, date of hire, employment status, and last known contact information.

34. Provide a list of all independent contractors who have worked with Tastries for the period of January 1, 2014 to the present. For each individual listed state their name, date of hire, employment status, and last known contact information.

35. Provide a description of your policies on harassment. Provide a copy of each written policy, and explain what steps have been taken to implement it.

36. Provide a description of your policies on discrimination. Provide a copy of each written policy, and explain what steps have been taken to implement it.

37. Describe your policies and procedures for handling customer and employee or independent contractor complaints. Provide a copy of each written policy, and explain what steps have been taken to implement it.

38. Describe all complaints of harassment or discrimination made by an employee or independent contractor from January 1, 2014 to the present. Provide a copy of each written complaint of harassment or discrimination made by an employee or independent contractor since January 1 , 2014.

39. Describe all complaints of harassment or discrimination made by a potential customer(s) against Ms. Miller since January 1, 2014. Provide any written complaints.

40. Describe all complaints of harassment or discrimination made by a potential customer(s) against any Tastries employee or independent contractor since January 1, 2014. Provide any written complaints.

41. Identify all owners of Cathy's Creations, Inc.

7.RA.1611-1613

**COMPLAINT OF DISCRIMINATION
BEFORE THE STATE OF CALIFORNIA
DEPARTMENT OF FAIR EMPLOYMENT AND
HOUSING
Under the California Unruh Civil Rights Act
(Civ. Code, § 51)**

DFEH No. 935123-315628

Complaint of Eileen Rodriguez-Del Rio, Complainant.
Mireya Rodriguez-Del Rio, Co-Complainant

REDACTED

Bakersfield, California 93313

vs.

Cathy Miller; Cathy's Creations, Inc. dba Tastries
dba Tastries Bakery, Respondents.
3665 Rosedale Highway
Bakersfield, California 93308

THE PARTICULARS ARE:

1. Eileen Rodriguez-Del Rio and Mireya Rodriguez-Del Rio, allege that respondents took the following adverse actions against complainants. Complainants were denied full or equal accommodations, advantages, facilities, privileges, or services by a business establishment, including both private and public entities because of one or more Fair Employment and Housing Act (which incorporates Civil Code section 51) protected basis: **Sexual Orientation.**

2. Our belief is based on the following: On 8/26/2017, Cathy Miller, owner of Tastries, stated she would not make our wedding cake because she did not condone same sex marriages. She refused to provide us service, and steered us to another bakery.

3. We initially visited Tastries on August 17, 2017, to inquire about ordering a wedding cake. A Tastries employee assisted us. She provided a quote for the simple wedding cake we chose, and suggested we return for a cake tasting on August 26, 2017. We were pleased with the service the employee provided us, and after looking at cakes at other bakeries, we expected to order our cake from Tastries assuming all went well at the tasting.

4. We did not taste cakes during our August 26, 2017, visit to Tastries. We arrived for our appointment, met Eileen's mother and our two friends, and were greeted by the employee, who helped us previously. She then informed us her boss would assist us. Her boss, Cathy Miller, introduced herself and told us she was taking over. Ms. Miller asked us what we were looking for, and we informed her we had already provided details about the wedding cake we wanted. She responded that the cake would cost \$230, and that she was sending the order to another bakery because she does not condone nor work on same-sex weddings. Ms. Miller said she always sends orders for same-sex wedding cakes to another bakery. We were shocked.

Since Tastries refused to bake our wedding cake, we saw no point in tasting its cakes, so we left.

5. Complainants **Eileen Rodriguez-Del Rio** and **Mireya Rodriguez-Del Rio** reside in the City of **Bakersfield**, State of **California**.

VERIFICATION

I, Eileen Rodriguez-Del Rio, am a complainant in the above complaint. I have read the above complaint and know its contents. I declare under penalty of perjury under the laws of the State of California that the above is true and correct of my own knowledge, except as to those matters alleged on information and belief, which I also believe to be true.

Signature of Complainant or Complainant's Legal Representative:

/s/ Eileen Rodriguez-Del Rio

Eileen Rodriguez-Del Rio

Date: October 18, 2017

VERIFICATION

I, Mireya Rodriguez-Del Rio, am a complainant in the above complaint. I have read the above complaint and know its contents. I declare under penalty of perjury under the laws of the State of California that the above is true and correct of my own knowledge, except as to those matters alleged on information and belief, which I also believe to be true.

319a

Signature of Complainant or Complainant's Legal
Representative:

/s/ Mireya Rodriguez-Del Rio

Mireya Rodriguez-Del Rio

Date: October 18, 2017

320a

ELECTRONICALLY FILED
7/12/2022 12:00 PM
Kern County Superior Court
By Gina Sala, Deputy

* * *

**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,

Defendants.

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

Real Parties
in Interest.

CASE NO.:
BCV-18-102633

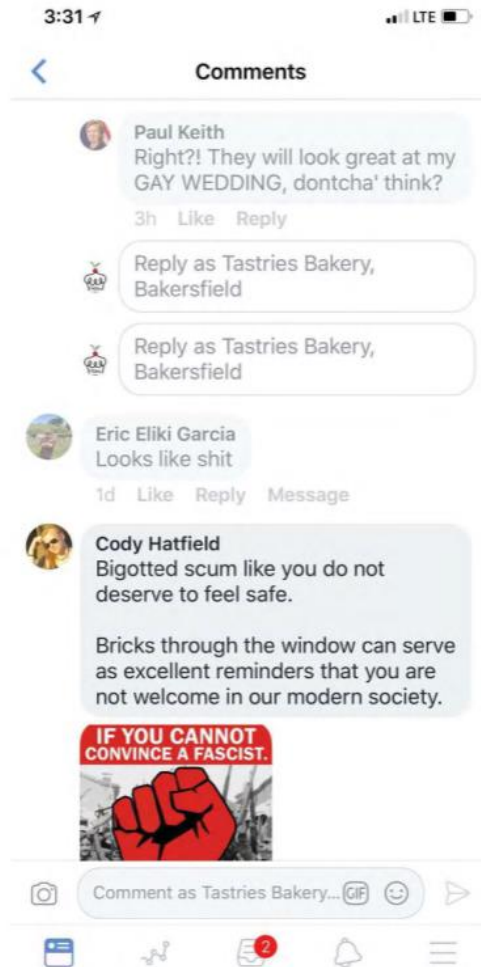
**[EXCERPTED
EXHIBITS OF]
DECLARATION OF
GREGORY J. MANN
SUPPORT OF
PLAINTIFF
DEPARTMENT OF
FAIR
EMPLOYMENT AND
HOUSING'S
MOTIONS IN
LIMINE AND
EXHIBITS
THERE TO**

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

321a

* * *

6.AA.1135



CM1527

AA01135

322a

* * *

6.AA.1153



CM1545

AA01153

323a

* * *

7.AA.1214



CM1605

AA01214

324a

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8.AA.1486



325a

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8.AA.1514



326a

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8.AA.1515



327a

* * *

8.AA.1516



328a

ELECTRONICALLY FILED
9/8/2021 5:26 PM
Kern County Superior Court
By Gracie Goodson, Deputy

* * *

**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

**DECLARATION OF
CATHARINE
MILLER 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

I, Catharine Miller, declare and state as follows:

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

**OVERVIEW OF MY ARTISTIC
BACKGROUND**

2. I am a creative designer who owns and operates Cathy's Creations, Inc., doing business as Tastries Bakery—a small bakery in Bakersfield, California. I am the 100% shareholder of Tastries Bakery. Opened in January 2013, Tastries Bakery is primarily a custom bakery that will collaborate with clients to design custom cakes, cookies and pastries for their event or occasion.

3. I have used my creative talents in many ways over the years: through music, elementary education, floral arrangements, interior design, and event planning. I have always had a unique ability to provide inspiring and creative vision to every project and service. With Tastries Bakery, I direct a team of culinary artists who, by creating a vast selection of artistic bakery designs, help enrich my clients' life celebrations.

4. Music has been a part of my artistic expression for most of my life. Some of my fondest memories center around playing the clarinet in various bands and orchestras. I continue to play

my clarinet today and have been part of a worship orchestra at my church for many years.

5. Prior to owning Tastries Bakery, I was a teacher in preschool, elementary school, middle school, and high school for 30 years. My classrooms were a work of art. Every single wall and ceiling was decorated to inspire my students based on a theme I wanted to emphasize. I have led chorus groups and directed musicals where I put together the music, the script, the choreography, and the scenery. For five years, I lead drama teams for our church youth group and Bakersfield Christian High School where we put on skits and plays.

6. In addition to being a teacher, I have run events for about 30 years. I have orchestrated company parties, birthdays, anniversaries, and weddings. In addition to coordinating these events, I have provided the cake, photography, and floral arrangements. I also ran a floral business for four years and for a time I worked in interior design, modeling or remodeling homes or buildings.

7. Finally, I've been decorating cakes from home since I was 18 and created my own recipes. Over the years, I took classes in both baking and decorating. The baking classes have focused on ingredient interaction—allowing me to develop recipes for a wide range of products in different applications.

OVERVIEW OF MY SINCERELY HELD RELIGIOUS BELIEFS

8. I am a practicing Christian and woman of deep faith; I seek to honor God in all aspects of my life. Jesus taught us that the greatest commandments are to “Love the Lord your God with all your heart and with all your soul and with all your mind and with all your strength. The second is this: Love your neighbor as yourself.” (Mark 12:30–31.) How I treat people and how I run my business is very important to me. I believe God has called me to abide by His precepts that He set forth in the Bible. In other words, I strive to honor God by making my life edifying to Him.

9. Although I still organize some events, I have coordinated fewer events lately because it is harder to coordinate events that abide by my Christian principles. I have to work in accordance with my faith, which teaches that, “Whatever you do, work at it with all your heart, as working for the Lord, not for human masters” (Colossians 3:3), and “All whatsoever you do in word or in work, do all in the name of the Lord Jesus Christ.” (Colossians 3:17; see also 1 Corinthians 10:31; 1 Peter 4:11.)

10. As a Christian, I desire my life to be one of grace, love, compassion, and truth. Among the fundamental principles of my faith is the belief that God designed marriage to be a covenant between one man and one woman. Accordingly, this belief guides Tastries Bakery’s marriage-

related products and services. I understand that others may hold views that are different from mine (including customers and employees), but I do not require anyone to share my views on marriage as a condition for service or employment. In fact, the bakery has served many LGBT customers and I have hired multiple members of the LGBT community.

11. My faith also teaches me to welcome and serve everyone. And I do. I welcome people from all lifestyles, including individuals of all races, creeds, marital situations, gender identities, and sexual orientations. In other words, I offer my artistic vision to create specially designed custom cakes and desserts for anyone. I eagerly seek to serve all people, but I cannot design custom cakes that express ideas or celebrate events that conflict with my core religious beliefs. It would violate the first and greatest commandment if I were to create custom cakes that express messages or celebrate events that conflict with my love for God. (See Ephesians 4:29; 1 Timothy 5:22; 1 Corinthians 10:1–22; 2 Corinthians 6:14–18.)

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. These limitations on my custom work have no bearing on my premade items, which were not tailored for any specific purpose or message and

are available to all customers for any use they may choose.

13. A potential customer's identity or characteristic simply has no bearing on whether I accept a custom cake order. Although I do not ask, sometimes customers tell me or it is obvious that a customer is a member of the LGBT community, and so I know that I have created cakes that celebrate birthdays, graduations, and adoptions for LGBT customers or for one of their family members or friends. I welcome LGBT customers and am honored to serve them as they celebrate important people in their lives.

14. There are many custom cakes that I will not create. For example, I will not design cakes that celebrate divorce, that display violence, that glorify drunkenness or drug use, that contain explicit sexual content, that present gory or demonic images or satanic symbols. I also will not design cakes that demean any person or group for any reason, or that promote racism, or any other message that conflicts with fundamental Christian principles.

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. This has been Tastries Bakery policy from the beginning and has been a written policy for many years. A true and correct copy of our written

design standards, which have been slightly tweaked over the years, is attached as Exhibit A. Copies of these written design standards are kept in the binders showing prior cakes we have made, as well as posted in the bakery.

16. I first wrote down these design standards, probably in 2016, when marijuana became legal and prolific in Bakersfield. At that time, we were receiving requests for marijuana laced or themed products, and I could not in good conscience promote those messages. Then, we were also getting more requests for X-rated cakes for bachelorette parties, or other bachelorette cakes with drunken Barbie dolls that I would not create. Thus, I decided that we needed a written policy. I have declined numerous requested Halloween cakes or marijuana cakes and have referred many such custom requests to one of the many other competent bakeries in Bakersfield.

17. Once, a man requested a beautiful seven-tier cake that he planned to use at a vow-renewal ceremony that he was planning for his wife. He intended to surprise her at the ceremony by announcing his intention to obtain a divorce. Because using our cakes in this manner violates my policy about demeaning and humiliating people, I declined the order.

18. Whenever a customer requests a cake that we cannot make, I first try to design a cake that fits their theme and will meet our standards. That often will resolve the issue, but if that does not

work, I will help them find a bakery with the skill for the design they want. 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. I can refer couples to any of these competent bakeries and will provide more referrals if a couple does not like a specific bakery.

19. Tastries Bakery’s design standards apply across all products, and my 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 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.

20. Like many Christians, I believe that marriage is a sacred union between one man and one woman. God’s plan for marriage comes straight from His Word: “[F]rom the beginning of creation, God made them male and female, for this reason, a man will leave his father and mother

and be united with his wife and the two will become one flesh. So they are no longer two, but one.” (Mark 10:6–9.) Weddings therefore signify that the “two [have] become one flesh.” (*Id.*)

21. I also believe, in accordance with the Bible’s teachings, that marriage represents the relationship between Jesus Christ and His Church. Thus, for me, my creative message is also transcendent. In each custom wedding cake, I am affirming that marriage is not only a sacred union between man and wife but representative of the relationship between Jesus Christ and His Church. Regardless of whether my wedding clients plan an overtly religious event, I believe that all weddings are sacred and that they create an inherently religious relationship.

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.

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.

24. Because of my religious beliefs, I would consider it sacrilegious to express through Tastries designs an idea about marriage that conflicts with my religious beliefs. For this reason, I cannot provide custom products and services that celebrate any form of marriage other than the Biblical model of a husband and wife.

THE DESIGN PROCESS FOR CREATING A TASTRIES WEDDING CAKE

25. All pre-ordered wedding cake made by Tastries Bakery are custom cakes, and I participate in every part of the custom cake design and creation process. First, I participate in the creation of all recipes used at Tastries Bakery. Some recipes were made by me over many years. Others were developed after I started the bakery. The development of recipes is both an art and a science that takes time to master. Any time we design a new flavor or product, it can take 3 to 6 months to make its way into use at the bakery. 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. All decorators at Tastries are gifted artists. Some have come to us with prior cake decorating experience, but all decorators have received specialized training in decorating techniques, sculpting and color selection. Each decorator has specialized skills that are shared through cross training and teamwork. We also have many specialized tools to help decorators accomplish amazing designs.

26. Most clients interested in a custom designed wedding cake are pre-scheduled for a cake tasting where up to four people can sample cake and filling flavors. After sampling flavors and reviewing our wedding packet, I (or one of my designers) will sit down with the client to develop specific features of the custom wedding cake. First, we talk about the overall theme, color palette, venue (indoor or outdoor), and style of the wedding. Then we turn to the details of the cake by learning of their preferences or any inspirational pictures, discuss cake and filling flavors, dietary needs (i.e., free of gluten, sugar, nuts, eggs, dairy), expected outdoor temperature, and how many people will be served. All these factors can dramatically alter the design options.

27. During this process, I don't just let the client know about our 16 cake flavors, 20 filling flavors, 5 types of frosting, 11 tier shapes, and

other details—expecting the client to randomly pick what they want. Rather, it is a collaborative process where I offer the best design options for appearance and integrity of the cake based on the client's preferences. Sometimes, we need to dissuade clients from poor choices, which usually is greatly appreciated. Attached as Exhibit B is a true and correct copy of the wedding cake binder used by my designers to consult with prospective wedding cake customers. Although we show the binder to clients while in the store, we do not let anybody take a copy because the binder has proprietary business information. For this reason, my attorneys are submitting the binder under seal.

28. Also, during this process, I discuss the meaning and importance of marriage and how they need to spend as much time on marriage preparation—preparing to be husband and wife—as they spend on wedding planning. For Christian couples, I will discuss how the Lord brought them together and how they could incorporate Bible verses into their vows. I also have a wedding packet that I give to couples that discusses these topics and is attached as **Exhibit C**.

29. This process can take considerable time, often lasting over an hour to design a unique creation for each bride and groom. Once this design process is complete and the client wishes to commission Tastries for the custom wedding cake, my client and I complete the order form. The order

form oftentimes includes a hand-drawn design of the cake or a picture with notes to reflect specific changes. The order will usually include details of delivery and set-up at the wedding venue.

30. My custom wedding cakes are often delivered close to the time that the event begins. My husband, Mike Miller, delivers most of the wedding cakes, but on some occasions I or a staff member will help with deliveries. We will often be seen during delivery and set-up. Most of the time, we deliver in the Tastries Bakery car with our logo on the side. And all staff delivering cakes are supposed to be wearing Tastries' uniforms, and they oftentimes interact with guests as they're placing the cake, adding flowers or setting up a dessert bar.

31. Guests will often ask who designed the cake, and I will receive follow-up custom cake requests from wedding guests. Our standard practice is to leave a Tastries card that says "Thank you for letting us be a part of your sweet event." Some clients even ask for my business cards to display at the reception. 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. My clients often share my contact information with those who are interested in commissioning Tastries for their own events.

32. To show the artistry that goes into each and every wedding cake that we design and create, I

have selected some photos of our cakes. Those photos are attached as **Exhibit D**.

TASTRIES BAKERY'S GUARANTEE OF FULL AND EQUAL SERVICES

33. As explained above, if Tastries Bakery cannot make a custom product because it violates our design standards, I will connect the customer with another one of Bakersfield's many competent bakeries or home bakers.

34. In the summer of 2016, two gentlemen came into Tastries Bakery seeking a wedding cake. It was the first time that I ever had a same-sex couple come in, and I was not prepared for what to do. I ended up meeting with them, and designing a beautiful, Disney-themed cake, and they left a deposit. That evening I struggled with my conscience and did not know what to do, but then I remembered Stephanie from Gimme Some Sugar. She was a member of the LGBT community that I had tried to hire—she was an amazing decorator—but now owned and ran a bakery called Gimme Some Sugar. When I had first opened Tastries Bakery, she had told me to come to her if I ever needed any help.

35. I contacted Stephanie and met with her at her shop. I told her I had a situation and needed help. I was upset because my conscience was telling me that I could not do the wedding cake for the two gentlemen. I wanted to be kind, and make sure they got what they needed, but I knew I

couldn't be a part of it. I told her, "Stephanie I am not sure what to do, and I don't want to offend you, but at the same time I am hoping we can work together. I have two men who would like me to do their wedding cake and I just can't do it. I know you are in a relationship with another woman, I know that we both are Christians and we see things differently, but would you be willing to do their cake? I don't want to hurt anyone, but with my Christian beliefs I just can't bake the cake, but I want to help them get what they need."

36. Stephanie came around the counter and hugged me. By then we were both teary-eyed and we talked about our beliefs. She said, "I totally understand how you feel because you are just like my mother. She loves me but does not understand my relationship." We talked about our religious convictions and understood each other. Again she said, "I totally understand, my mother and you think the same way. It is ok." Then she said, "Why don't you just send me their contact information and I can give them a call. Here are my business cards, you can just refer your clients to me, I understand." She went behind the counter, gave me her business cards. I was choked up and very appreciative. I thanked her and told her I would bring their order form and deposit by.

37. After meeting with Stephanie, I contacted the two men that had placed the order and explained my concerns. They were very gracious

and accepted my request to transfer their order to Gimme Some Sugar.

38. Since then, I have referred three couples to Stephanie. All of them were very understanding of my sincerely held religious beliefs about marriage, and two of them have continued to frequent the bakery. Stephanie has since sold her bakery. Gimme Some Sugar is now called Cornerstone Bakery and the new 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.

SUMMARY OF THE INCIDENT WITH EILEEN AND MIREYA

39. Tastries Bakery offers a complementary cake-tasting party for newly engaged couples who are interested in ordering a custom wedding cake. I specifically designed the party to be a memorable occasion for couples during the often-stressful rite of wedding planning. During the appointment, couples enjoy a selection of cupcakes with an assortment of fillings and frostings. While the couple samples the cupcakes, I help them create a vision for their wedding cake or custom dessert bar.

40. During one of these tastings, I welcomed Mireya and Eileen Rodriguez Del-Rio to my cake shop on August 26, 2017, just like I would any

other prospective client. They came into the shop with an older woman (Eileen's mother) and joined a couple of men who were already there. This was not unusual; I often meet with couples along with members of the wedding party. I believed these five were the bride and groom along with the maid of honor, the best man, and a mother.

41. Strangely, however, no one began filling out the custom cake request form or wished to sample the cupcakes that had been prepared for tasting. So, I asked for some details. Mireya told me that she wanted a custom three-tiered wedding cake with decorative ribbon and two sheet cakes with matching finish. I then asked Mireya to fill out the custom cake request form. Mireya said that Eileen would do it. As I handed the clipboard with the form to Eileen, I asked, "Which one of you is the groom?" One of the men pointed to Eileen and said, "She is." I turned to Eileen, who was filling out the custom cake request form. Eileen laughed and said, "I still have trouble remembering to write Rodriguez-Del Rio." This perplexed me. Ordinarily, people change names after they marry, not before.

42. So, I asked where they were getting married. They said, "At the Metro." I asked some other general questions like "What time are you getting married?" and "Did you get the early or late set-up time at the Metro?" These questions were important because delivering cakes to the Metro is inordinately difficult—they have a very

short delivery window. But Mireya and Eileen had difficulty answering these questions. To me, it appeared that they were thinking about these details for the first time.

43. At this point, the design consultation had just begun—we hadn't discussed flavors or fillings or other details. I knew that I could not create custom cakes to celebrate a same-sex wedding, so I assumed the best and told them that I could not make their wedding cake because doing so would violate my Christian beliefs. I offered to connect them with Stephanie at Gimme Some Sugar. I also invited them to stay and sample the cake flavors.

44. Suddenly, one of the men startled me by reaching over my shoulder to grab the order form. Then the group abruptly left the shop. I later learned the two men had signed up for a cake tasting at a separate time, and that Mireya and Eileen had been legally married since December 26, 2016, nine months before, but were planning a delayed traditional wedding ceremony and reception.

AFTERMATH: NEWS FRENZY AND CRIMINAL HARASSMENT

45. The cake tasting with Eileen and Mireya began shortly after 1:00 p.m., and lasted five to seven minutes. Shortly after leaving Tastries Bakery, Eileen posted on Facebook. This began a social media storm that went viral. My business was engulfed in negative Facebook and Yelp

reviews along with a call to action by local LGBT advocate Whitney Weddell. Tastries social media pages were under siege by vicious written attacks on my character and about the bakery. The bakery was also inundated with malicious emails and phone calls that included pornographic images and threats of violence. A collection of hate mail we received is attached as **Exhibit E**.

46. Within a few hours of the Eileen's Facebook posting, we also began receiving calls from numerous media outlets, demanding statements and interviews. Reporters swarmed the Tastries Bakery parking lot and began interviewing customers.

47. In one incident, a man called Tastries Bakery to order a sheet cake. He specified that he wanted the caking frosting to be a specific picture. The man told the Tastries employee, an 18-year-old girl, that he had just emailed the picture. He also told the employee that he wanted her to stay on the line while she opened the picture so he could tell her how he wanted it placed on the cake. The email arrived, and the employee opened the attached image. To her horror, it was a photograph of two naked men engaged in a pornographic act. The young woman screamed; the caller burst out laughing. Another employee rushed to her side, and the two girls frantically tried to delete the image. But the image expanded to full screen, and the only way to remove it was to print it.

48. In another example, an anonymous man would call the bakery incessantly, threatening violence. The first time the man had called, my female employees were so distraught that they fled to the back of the bakery, sobbing and shaking. The threats of violence became so pervasive and extreme that I had to call the police. When the police arrived at the bakery, the phone calls immediately stopped. The police officer stayed for approximately thirty minutes. During that time, the man did not call. But as soon as the officer left, the man called again—and again. I then realized in terror that I and my employees were being watched. Our tormentor had been lying in wait until the police had left.

49. The chronic phone, email and social media harassment lasted for three months. They start up again every time Tastries Bakery is mentioned in the news. After these events, we lost many employees due to the threats and hateful comments.

50. The threats of harassment led to actual violence. My car was broken into and an employee was assaulted in back of the bakery by an individual who mentioned this case during the attack. Attached as **Exhibit F** are portions of my deposition where I describe these criminal acts. They were designated confidential under the protective order, my attorneys are submitting that

exhibit under seal, and I request that the court maintain the seal to protect the employee's privacy.

51. I later learned that other wedding professionals came forward to offer services free of charge for Mireya and Eileen's celebration, including a baker that provided a free wedding cake along with cake cutting services.

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 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.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct. Executed this 8th day of September 2021, at Bakersfield, California.

/s/ Catharine Miller

Catharine Miller

**Excerpts from Deposition of Jessica Criollo
July 14, 2021**

*Department of Fair Employment and Housing v.
Cathy's Creations, Inc.*, Superior Court of California,
County of Kern, Metropolitan Division

Case No. BCV-18-102633

* * *

[TR. PAGE 47-50; AA270-73]

A. Yeah. "Congratulations, Renee, Tiers of Joy are the best."

Q. Who's Renee?

A. The give-away winner. They just responded to something I posted on my story.

Q. Okay. And before that,

A. December 8, 2018, again a response to a story that I had on Instagram, and what they said was, "Beautiful." And I responded, "Thank you."

Q. Did you respond to the most recent one in June?

A. I did. You double-click the message and it gives a little heart symbol on their message. That's considered a response.

Q. Have you talked to them about this lawsuit since it started?

A. Yes. A lot of my messages -- like I think it was a text message, because I can't find it anywhere. I looked on Instagram, Facebook, text messages. So whatever I

provided is what I have. But I do remember sometime last year I contacted either Eileen or Mireya asking if I could post the cake -- the picture of their wedding cake, I asked if it was a good idea, and they said that they would speak to their lawyer. And then they responded with it's not a good idea, and that was it.

Q. And why did you want to post a picture of the wedding cake?

A. Because I like to share my work on Instagram.

Q. Was that a wedding cake that you were proud of?

A. Yes.

Q. Why is that?

A. In my opinion, it looked beautiful.

Q. Okay. In your opinion, it was beautiful. What was beautiful about it?

A. I'm sorry. I'm not understanding the question.

Q. You just said -- I'm just asking what you meant. I'm sorry if it's -- I'm sorry if it's frustrating, but my question is: You said you're proud of it because it's beautiful, and I'm asking what did you mean by that? What was beautiful about it?

A. The way I decorated it.

Q. Can you describe -- give me some more detail what was beautiful about the way you decorated it?

A. Sorry. I'm trying to find the right words because I've never been asked that question. If I find it beautiful, I find it beautiful.

Q. Well, I guess I'm giving you a chance to promote your cake-making skills. I'm not familiar with decorating or making cakes. When you say it looked beautiful and you were --

A. It had a pretty design, it was clean, the flowers gave a nice touch. It was pretty.

Q. Is Tiers of Joy a corporation or is it like a -- is it just a fictitious business name or is it -- what kind of deal or entity for your business -- sorry, you called it a hobby. Is there actually a corporation or a business form for this, or is it just --

A. It's just a name I picked out. There's nothing.

Q. Is it like a -- is it a name that you've registered?

A. There's no LLC or dba.

Q. And you have an Instagram page for Tiers of Joy, or is it for you personally?

A. It's for Tiers of Joy, to show my work.

Q. Okay. And would you consider yourself a cake artist?

A. Yes.

Q. Would you consider yourself pretty skilled in decorating cakes?

A. Yes.

Q. What sets you apart as Tiers of Joy? What makes you guys stand out and what's your pitch to why someone should get a cake from you guys?

A. I spend a lot of time working on my cakes, more time than others do, and you can tell that my work is very clean and neat. And I bake my cakes from scratch, and that's something that I pride myself in.

Q. When you say you bake them from scratch, what do you mean by that?

A. Flour, sugar, eggs. I don't make the butter, I do buy that. But I don't make it from a cake box, mix, that you would buy at the grocery store.

Q. Okay. And so you use no -- for any flavor, no matter what it is, it's all made from 100 percent scratch, nothing from a box ever, is that your testimony?

A. Yes and no. Yes for all my cakes except for smash cakes that I do make from a box because it's going to be smashed. So I don't spend extra time making that.

Q. Okay. And is there a business license for Tiers of Joy?

A. Did you already ask that question?

* * *

[TR. PAGE 71-73; AA277-279]

Q. So in paragraph six where you say, "None of the wedding cakes I worked on at Tastries were made from scratch," that should be corrected -

A. No. That would be as in like baking.

Q. You have to let me finish my question.

A. I'm sorry. I'm sorry.

Q. No, it's one of the rules in a deposition. Let's just start over.

So in paragraph six where you say, None of the wedding cakes I worked on at Tastries were made from scratch," that's not completely accurate because you didn't actually make any wedding cakes when you were at Tastries, correct?

MR. MANN: Objection, mischaracterizes prior testimony.

Q. By Mr. Jonna) You can answer the question.

A. What I was referring to when I made that statement was baking, because then -- I mean, I'm talking about from scratch, so it's in regards to the baking portion of the wedding cakes. I baked all the cakes, so that would be including wedding cakes.

Q. What exactly -- so you're saying -- how many wedding cakes do you remember baking when you were at Tastries?

A. That's a little difficult to answer because what we -
- what happened is that we would have all the cakes for the week listed on a sheet, like an Excel spreadsheet, and it would just give you for the list of chocolate you need to have two of this size, five of this size, six of this size. So I don't know exactly specifically which cakes I did, but most likely I baked

portions of wedding cakes, if not all the wedding cakes.

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

A. If I spent all of Tuesday or -- if it was all Monday or all Tuesday or all Tuesday and all Wednesday baking, it has a high chance of me baking coming across one of the cakes that I baked.

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

A. Correct.

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

A. You grab the box that's labeled carrot cakes and then you add the eggs, the oil, and the water that's given in directions on the back of the box, mix it, pour it into the pan, and then --whatsoever of what they wanted.

MR. MANN: Objection, mischaracterizes prior testimony.

Q. (By Mr. Jonna) Do you want to clarify that for the record? Do you remember what cake they wanted?

A. Ok, so when you asked me that, I don't remember the conversation that I had with them at my house. Looking at the picture, obviously we had to have discussed the design.

Q. The design. You said that was a beautiful design, right? I mean you were proud of that design?

A. Yes.

Q. And you were actually so proud of it that you wanted to post it on the internet.

A. Yes.

Q. You thought that the flowers and the texture and the way it came out was particularly beautiful, true?

A. Yes.

Q. And that's something that not any other baker without your skill level could have just duplicated. Would you agree?

A. No. I think even a beginner could accomplish that design.

* * *

[TR. PAGE 112; AA285]

You said earlier you consider yourself a cake artist. What do you mean by that?

A. I feel any form of creativity is considered an art.

Q. You consider the cake that you made for Eileen and Mireya to be art?

A. Yes. Might be simple, but it's still art.

Q. Will you give me an idea, as someone who's never made a cake, what goes into making a cake that makes it art? Or just explain to like a layperson like me who's never made a cake.

A. Well, I mean there's no specific thing. It's just if it's your creation, it's art.

Q. I'm looking at all kinds of beautiful pictures of cakes that you've made, and I don't think I'm going to need to ask you about these. They are beautiful, though.

A. Thank you.

Q. It's possible I just have a few wrap-up questions, and I know that Greg has a couple of questions, so it will probably be most efficient if we just took another short break, let me see if I have any final questions, and then -- we can go off the record. Is that okay?

A. Yes.

**Excerpts from Reporter's Transcript of
Trial Proceedings**

DEPARTMENT OF FAIR
EMPLOYMENT AND
HOUSING,

Plaintiff/Appellant,

v.

CATHY'S CREATIONS, INC.
DBA TASTRIES, A
CALIFORNIA CORPORATION;
CATHY MILLER,

Defendant/Respondent.

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

Real Parties in Interest

**CERTIFIED
TRANSCRIPT**

Case No. BCV-
18-102633

Court of Appeal
No. F085800

Bakersfield,
California

**July 22-29,
2022**

Direct Examination of Rosemary Perez

[5.RT.922:5-21]

Q. Now, in the front-end, there is a couple of refrigerated cases where the products are kept?

A. Yes.

Q. And those baked goods are available as long as they are in the case, first-come, first-served?

A. Yes.

Q. So those baked goods are not ordered in advance?

A. No.

Q. Correct?

A. Yes.

Q. And Tastries calls those case items?

A. Yes.

Q. And in there, there is muffins, one-tiered cakes, cookies, cupcakes, eclairs, cheesecakes, the whole gamut of baked goods?

A. Yes.

* * *

[5.RT.932:18-933:3]

Q. ... So for the design consultations, the customers tell you about the kind of baked goods that they want?

A. Yes.

Q. And they will tell you about the design of the baked goods that they want?

A. Yes.

Q. If it is a cake, they will decide how many tiers, what type of frosting, what flavors, what the decoration is, correct?

A. Yes.

Q. And if they have a photo of a cake for inspiration, they could provide that to you?

A. Yes.

* * *

Cross Examination of Rosemary Perez

[5.RT.0960:11-21]

Q. Nicole. Okay.

But you were shown the custom cake order form of – I believe it was Elena Davis.

How did that situation come about that Cathy was not made aware that there was being a wedding cake ordered for a same-sex couple at that time?

A. Well, after I did order them, I was given them -- they were given to Natalie or Nicole. So if they didn't want Cathy to go over the order, they just -- they kept it. They didn't show her. So she didn't actually know that it had happened.

* * *

[5.RT.964:5-965:2]

Q. As part of your work, I believe Mr. Mann brought out that you would sometimes deliver wedding cakes to the location where the wedding reception would take place?

A. Yes.

Q. And were you wearing any type of clothing that identified you as being with Tastries?

A. Yes. We wear the uniform and we drive the vehicle.

Q. The vehicle has the logo of Tastries on the door?

A. Yes, it does.

Q. Okay. And the uniform has the name of Tastries on the shirts?

A. Yes, it does.

Q. Okay. Would you oftentimes interact with people that are present arriving for the reception?

A. Yes. The people that are setting up or holding down the fort until everybody gets there. Yes.

Q. Okay. Does Tastries offer the service to customers, if they want it, who order a wedding cake that they would not only deliver it, but they would have someone stay and help cut and serve the cake?

A. Yes.

Q. And have you ever done that?

A. Yes, I have.

* * *

Redirect Examination of Rosemary Perez

[5.RT.982:19-983:6]

Q. Based on your experience baking, would you say baking, not decorating, baking is also an art?

A. Yes.

Q. Why is that?

A. Because you are being creative. I did cinnamon roll cakes for a wedding -- it was the groom's cake -- and I made these little cinnamon roll hearts. I mean, you still are being creative. You're creating by design.

Q. How about decorating, based on your experience --

A. That is very much an art. I decorated for years, and I decorated for Lucky's and Albertsons. So when Cathy hired me, because it's such a high-pressure job, I didn't want to even get into that at Tastries too much.

* * *

[5.RT.991:5-24]

Q. So tell us a little bit about what you remember happening between August and November in terms of how things changed at the bakery after this incident?

A. It became a very scary place to be. There were threats coming in. I fielded those threats. I took phone calls. I received threats personally.

Q. What kind of threats?

A. Violent threats, acts of violence and retaliation. I sifted through e-mails after e-mail. We all had to pitch in because the front and Cathy were caving from -- it was a lot. So all of us took on this responsibility, and it had everybody in tears at one point in time or another. We had police that would come because we had customers that would come in and make a scene. I would not witness it start to happen, but I would always see the fallout. The police would come, and

we'd all get told the police were coming. There were a couple of times that they escorted people out. It was not a fun place to be.

* * *

[5.RT.1001:4-14]

Q. So like you testified with the mix, you never used a premade frosting as like a base and added to it?

A. There were times when we would and our customers knew -- and it was special needs, like our sugar-frees, we would use those. And the customer knew. Like when we -- I even think I took an order one time, and I explained to them we're just going to use a purchased sugar-free frosting. Those are things where you are dealing with somebody with a health issue or a religious belief, and so Cathy was just always really careful to not do something that would harm somebody.

* * *

Direct Examination of Mary Johnson

[5.RT.1020:1-10]

Q. What was your process in coming up with the designs for the display cakes?

A. When I first started working there, it was -- she left -- Cathy left a lot of it up to us. She would say, bring designs in, show me designs that you like. We would make those designs. And as the years went on, by the time I was leaving, it was pretty precise. She would print out pictures of exact cakes that she wanted and say, maybe pick this, or assign this decorator to do these display cakes.

* * *

[5.RT.1021:10-1022:4]

Q. So let's turn to deliveries of Tastries' cakes. I know you did mention that, but did you ever deliver cakes for Tastries?

A. I did. Not towards the end of my employment, but yes, I did quite a few at the beginning and middle.

Q. And did you ever deliver Tastries' wedding cakes to customers' wedding celebrations?

A. Yes, I did.

Q. Could you give us an idea of when you would be completing those deliveries?

A. As far as what time of day?

Q. In terms of -- in reference to the event?

A. Usually they would be quite a bit before. In the summertime you have to be careful because if it's outside, or even the Bakersfield heat would affect it indoors, and the buttercream -- you don't want a melting cake. We would try to get it as close to before anyone was attending the event as possible.

Q. Did you ever interact with attendees during the delivery?

A. Not often. There may have been a bridesmaid or two, but usually, as I said, there was someone at the venue that was worked the venue setting up.

* * *

Cross Examination of Mary Johnson

[5.RT.1040:12-24]

Q. And you believe that decorating a cake is a form of art, don't you?

A. I believe it can be.

Q. And you believe that the Rodriguez-Del Rios' cake, which you looked at, is a form of art; isn't that true?

A. Edible art.

Q. What's that?

A. Edible art, so yes, I suppose.

Q. You're also aware that some cake decorators call themselves cake artists. That's not an uncommon thing, right?

A. I'm aware of it, yes.

* * *

**Direct Examination of Mireya
Rodriguez-Del Rio**

[5.RT.1057:19-26]

Q. And so you still had the October 7th date. What was that date going to be?

A. That was going to be with more family -- extended family and friends from out of town.

Q. And was the plan to do a ceremony and a reception on October 7th?

A. Yes. We wanted to exchange vows in front of them and have a reception.

* * *

[5.RT.1060:10-21]

Q. And do you remember which bakery you were doing a tasting at that night?

A. It was for De Coeur.

Q. And how did it go at De Coeur?

A. It went really good. They were nice.

Q. And did you discuss the tasting with Eileen once you got home?

A. I did.

Q. And what did you two decide about getting a wedding cake from De Coeur?

A. That we weren't going to do it because it was a little expensive.

* * *

[5.RT.1061:9-1065:2]

Q. Well, how did you end up tasting from Gimme Some Sugar? Was that at Gimme Some Sugar?

A. No. My wife drove by there and she stopped and picked up some of their cupcakes and fillings and frostings that they do there and she brought it home.

Q. And did anybody taste with you?

A. My wife and her mom.

Q. What did you think about the taste of the cupcakes?

A. They were too sweet. And a lot of our family are diabetic.

Q. So the search continued?

A. Yes.

Q. So we saw you had a tasting with Patrick at De Coeur on August 15th. And then you saw that he was suggesting on August 17th Sugar Twist Bakery.

What happened on August 16th?

A. August 16th we had went to Tastries.

Q. And how did Tastries come into the picture?

A. My wife was also driving by and saw the sign, so she told me about it, picked me up, and we ended up going to Tastries that day.

Q. And had you heard about Tastries before?

A. I had not.

Q. Had you ever been there before?

A. No.

Q. Had you heard of Mrs. Miller?

A. No.

Q. Did you know anything about her religious beliefs?

A. No.

Q. What were you thinking when Eileen suggested going to Tastries?

A. It was another bakery to see if we would get a wedding cake.

Q. What did you think when you drove up on that day?

A. We were just excited to hopefully be the last stop that we would have to get a wedding cake.

Q. And did you notice anything particular about the decor when you went inside?

A. Not necessarily. I mean a bakery has lots of cakes or baked goods like pastries, cookies, things like that. There was other items that I didn't pay too much attention to, but -- I'm not going to -- not like knickknack stuff but things to purchase as well, like additional to the bakery.

Q. Did you see any cakes that were on display throughout the bakery?

A. Yes.

Q. Was there -- when you went in, did you have an idea of the kind of cake that you wanted?

A. I somewhat did, yes. I had looked -- just to get some ideas, online search, internet search.

Q. What did you have in mind at the time?

A. It was still the three-tier, round shape cake.

Q. Was there any display cakes at Tastries that helped influence your decision?

A. There was two different ones. One like up on the wall. It had like little hole to show and another one right on top of those display refrigerators, I believe they're called.

Q. And did a Tastries employee come up and help you at all?

A. Yes.

Q. And who was that?

A. That was Rosemary.

Q. And can you tell me about your interaction with Rosemary?

A. It was pleasant. She invited us to see if we needed any help, very friendly, smiling most of the time, and got to do the -- she was asking the questions, you know, how many layers of cakes do you want? Do you already know flavors? Any colors? Do you have a color scheme for your wedding? For how many people?

Q. And was she taking notes or writing down any of this information?

A. Yes. It was maybe just like a back of a sheet paper that she had on the counter.

Q. And did either you or Eileen start filling out any information for them?

A. There was a form, but I don't remember if it was that day or was it the second time that we went to Tastries.

Q. All right. Let's take a look at Exhibit 11, please. With this one, looking at it, does it look like Eileen's writing on it?

A. Yes. That's her writing.

Q. I will ask Eileen about that. So you told us about some of the information you were providing Rosemary. Three tiers. Did you know what kind of frosting you wanted?

A. Was going to be white, not fondant, but the other, I guess, buttercream.

Q. And was there any design or decoration that you wanted on it?

A. Nothing too elaborate. It was going to be simple. For me I like -- from her two displays, I like one that had like a rustic kind of look, but the other one had like a scaly, so I didn't want it on too light or too thick. They had like a scaly, wavy kind of design.

* * *

[5.RT.1065:19-1066:2]

Q. Did Rosemary talk to you about having any other cake with it, or would that be the only one?

A. She did say about how some customers have asked to have like a sheet cake on the side, half a sheet or a full sheet, depending on how many guests they had. So that was an idea of doing that because we were still not too sure about the flavors. And -- or it was just going to be kind of plain just because of how some of the -- we thought about allergies, about other people, so we didn't want them to be, you know, having some kind of allergy reaction to it, to the cake.

* * *

[5.RT.1066:8-15]

Q. With the overall experience, how did you feel at the time when you finished with Rosemary?

A. I think we were going to settle, and if we could -- if we knew what flavors we wanted the cake in, we would have probably already had. But she did suggest -- they were going to have a cake tasting like a week or two later of the day of the 16th, so she invited us back to do that cake tasting.

* * *

[5.RT.1069:23-26]

Q. Let's go to August 26th. Do you remember that is the day of the tasting?

A. Correct.

* * *

[6.RT.1227:5-20]

Q. I want to correct the record from a mistake that I made yesterday when I was questioning you. I talked about the date of your first visit to Tastries being August 16th.

Could we look at 108, please.

And you testified that this was the receipt of the tote bag that you brought on the first trip to Tastries; is that correct?

A. Yes.

Q. And can you see the date up there at the top?

A. Yes.

Q. And what's that date?

A. August 17, 2017.

Q. Is that the day you remember of your first visit to Tastries?

A. Yes.

* * *

[6.RT.1243:17-21]

Q. And you did have a cake cutting, right?

A. Yes.

Q. And you fed each other the cake like folks do at weddings?

A. Yes.

* * *

[6.RT. 1244:4-8]

Q. And how would you sum up your feelings about your big day on October 7th, 2017 when you finally married Eileen?

A. We says finally. Well, I think that was her word, probably. We were happy.

* * *

**Cross Examination of Mireya
Rodriguez-Del Rio**

[6.RT.1249:8-21]

Q. Now, when you spoke to Rosemary at Tastries, you guys discussed having Rosemary bring the cake to your reception, hanging out at the wedding and celebrating with you guys. And then actually having her, a Tastries employee, cut the cake and serve it for you guys; isn't that true?

A. She offered.

Q. And that's what you wanted, true?

A. Yes.

Q. And, in fact, with Jessica Criollo, the one who actually ended up making your cake, you had her at the celebration as well serving the cake; isn't that true?

A. Yes.

* * *

[6.RT.1250:6-15]

Q. And in response to those posts, you guys got offers for free services, free makeup, free hair, free photography, and a free cake; isn't that true?

A. No, not everything.

Q. Which one of those did you not get?

A. The free hair. We paid some money for it.

Q. You got offers, though, from different people for different services, including free makeup, free photography, and a free cake; isn't that true?

A. Yeah, there was offers, yes.

* * *

[6.RT.1256:7-19]

Q. Right. You had – for your wedding, you had a traditional wedding. Isn't that what you guys wanted, more of a traditional wedding?

A. Sure. Yes.

Q. And the cake that you got from Tiers of Joy, Jessica Criollo, a three-layer cake with the top layer were real and the other two layers were not real. They were Styrofoam, isn't that true?

A. Correct.

Q. And let's take a look at Exhibit 631. This is the wedding cake that Jessica Criollo made for you for your wedding, right, ma'am?

A. Yes, without the flowers.

* * *

**Redirect Examination of Mireya
Rodriguez-Del Rio**

[6.RT.1272:25-27]

Q. Did your cake have a cake topper?

A. We were going to put a topper, but we didn't. It did end up having flowers after all.

* * *

Cross Examination of Patrick Salazar

[6.RT. 1300:1-4]

Q. And Mireya, I think you said, ordered a cake topper for the cake, which you believe included two women, correct?

A. Yes.

* * *

**Direct Examination of Eileen
Rodriguez-Del Rio**

[6.RT.1330:24-1331:13]

Q. And Mireya said that you originally planned to get married in October, but you ended up getting married in December; is that correct? I'm sorry. You planned to get married in October 2017, but you got married in December 2016?

A. Correct.

Q. Why is that?

A. I had been talking to her about the end the year, and there was talks -- me and my mom had talked, and my mom was like, well, we better hope that Trump

doesn't go in the presidency because you guys might -- they might overturn gay marriage. And I was like, well shoot. I -- you know, I talked to her, and I was like, well, maybe we should get married before he goes into presidency because we will be denied that option.

Q. And was the fear about marriage equality ending?

A. Yes.

* * *

[6.RT.1332:17-23]

Q. And what did you -- what did you all think about Gimme Some Sugar?

A. It was too sweet. My mom was like, I -- the frostings were way too sweet for her. So -- and both of our parents are diabetics. We wanted to look for other options because that wasn't even an option at that point.

* * *

[6.RT.1333:5-10]

Q. And can you tell me about that first experience on August 17th?

A. So we walked into the bakery, and we met the lady at the counter, and I walked up, and said, yeah, we are looking for a wedding cake for our wedding. And she said --

* * *

[6.RT.1335:4-10]

Q. And by the end of your conversation with Rosemary, was there any other information she

was requesting from you about the cake that you wanted?

A. She wanted to know the flavors, and we weren't sure because we were trying to figure out the best flavors to go with diabetics and people that possibly have nut allergies and stuff like that.

* * *

[6.RT.1338:5-7]

Q. And did Rosemary -- or did you discuss another cake with Rosemary on the side?

A. Yes. A sheet cake.

* * *

[6.RT.1341:7-1342:8]

Q. And who was with you?

A. It was me, my wife, and my mother.

Q. And was it important that your mom be with you?

A. Yes.

Q. Why is that?

A. She is my ride or die. She has been -- she's been with me always. Like my mom is my heart. My wife is my heart, but my mom is also my heart.

Q. And what happened when you got to Tastries? Were Patrick and Sam already there?

A. Yes, they were there. So we walked in. Of course, my wife greeted them. Again, I just walked in, ready to do business and get some cake tasting on. And then

she came to me and said -- Rosemary apologized and said that her boss was taking over the order.

Q. Mireya said that to you?

A. Yes.

Q. And what happened next?

A. We were -- we were escorted to the back of the bakery, and then this lady -- I didn't know at the time was Cathy Miller -- started asking all the questions that I had already discussed about the cake and what we wanted, and I was like, why are we talking about this? We already talked to Rosemary about all the needs of that.

Q. And why were you at Tastries that day?

A. Just for the tasting.

Q. And that was to help you pick the flavors?

A. Yes.

* * *

Cross Examination of Eileen Rodriguez-Del Rio

[6.RT.1361:5-12]

Q. Cake topper with two females, correct, for your wedding cake?

A. Yes, we did.

Q. And it got lost?

A. No.

Q. That's what you said at your deposition.

A. The -- the Etsy one got lost. There was two ordered.

* * *

**Direct Examination of Eileen
Rodriguez-Del Rio**

[7.RT.1521:18-1522:1]

Q. Mr. Jonna asked about a cake topper.

Did you and Mireya have a cake topper at home?

A. We did.

Q. And did you use it on the cake or the cake bar?

A. We did not.

Q. And were you planning to use that if you would have gotten a cake from Tastries?

A. If we were going to use it, it would have been when we were setting up at the reception, but we were still undecided. We weren't going to use it and give it to them to place on the cake.

* * *

Direct Examination of Michael Miller

[7.RT.1530:9-23]

Q. Did you help her set up her new business in terms of the corporation documents and such?

A. I did. It kind of fit with what I was going to be doing as a small business consultant, so I took over those kinds of responsibilities.

Q. Did you help her with the investments that needed to be made to start the new business?

A. Yes. The full investment for the business came from our own resources. We didn't have any outside financing.

**Q. Was the business organized in such a way as -
- well, who was the owner of the business?**

A. Cathy was, and always has been, 100 percent owner of the business. It was an S corp, as is my consulting business.

* * *

[7.RT.1537:22-1539:20]

Q. Let's talk about your participation in making deliveries for Tastries. How early on in your work for Tastries were you involved in making deliveries?

A. From the beginning.

Q. Okay. About -- can you estimate what percentage of the deliveries of Tastries' products are made to weddings, wedding cakes being --

A. Of the delivered products?

Q. Right.

A. Two thirds to 75 percent, I would say.

Q. Okay. And what percentage of people that actually buy wedding cakes at Tastries want to have them delivered?

A. I'm going to say 95 percent. It's pretty high.

Q. Okay. Can you estimate about how many deliveries of wedding cakes you would make in a typical week?

A. Typical, four to six. Busy season, which just happens to be wedding season, spring and fall, we can get 10 to 12 in a single week, in a single Saturday, and then we may have others on Friday and Sunday, as well.

Q. Would you use a company truck to make those deliveries?

A. I would.

Q. Does it have any Tastries markings on it?

A. Yes. One -- we use two vehicles for deliveries as needed, but the primary one does have the Tastries logo on it.

Q. Would you wear any clothing that indicated you were with Tastries when you made the deliveries?

A. Yes. I would wear a polo shirt with our logo on it.

Q. Would you sometimes have helpers from Tastries if it was a larger order, required, maybe, a bigger cake and other bakery products?

A. Yes. And staff usually wear their Tastries shirts at work anyway, so even on a surprise, when I call them to help me unexpectedly, they are prepared to already be wearing a Tastries shirt.

Q. Can you estimate about what percentage of time when you are delivering wedding cakes at events that there are actually people present there when you are setting up the cake?

A. Vast majority, I will say 75 percent of the time. Somebody is there from -- not just from the venue or

from other vendors but actually from the guests or the wedding party themselves.

Q. Would you sometimes interact with the people?

A. I like to do that. I enjoy the -- getting to know people, talking. A lot of times people are very interested, especially if I'm there for a while stacking the cake or adding flowers. It is a great opportunity to have a conversation.

* * *

[7.RT.1540:22-27]

Q. Have you stacked wedding cakes at wedding receptions?

A. Yes.

Q. How many times?

A. Probably 25 to 50 times. I generally do that with a decorator with me.

* * *

[7.RT.1543:18-1544:26]

Q. How long are you at a wedding reception when you deliver a cake?

A. It varies. 15 minutes to an hour. 15 minutes when the cake is fully stacked and simply needs to be placed. I still need to locate the cake table and sometimes relocate it slightly. So I would say 15 minutes, in that case. But if we are adding flowers, if we are stacking, if there is a dessert bar, it's an hour.

* * *

[7.RT.1546:17-1548:1]

Q. Okay. You were at Tastries shortly afterwards. Were you aware of what was going on in the aftermath of the incident at Tastries?

A. Yes. There was a tremendous amount of media attention, social media, e-mail. The public media were showing up out front.

Q. What was the -- we've heard testimony, but what was your impression of the social media attention that Tastries was getting in the immediate aftermath of the incident?

A. There was a lot of hate-filled posts and e-mails. There were threats of violence, totally detestable content, pornographic, and many other awful kinds of portrayals. Pictures were e-mailed. It was pretty horrific. And it was an avalanche of material. We had to shut down our social media. For a while, I think Cathy had to close the store because of the activity, so it was very disruptive.

Q. What was the impact on the staff?

A. We lost six employees. Several of those were a result of -- the direct result of what they were confronted with in the social media and on the phone calls. They were afraid. They were exposed to content that they've never heard or thought about before.

Q. What was the impact on the ratings that Tastries had had on the Internet, Yelp and those types of ratings?

A. We were being attacked with fake reviews and one-star ratings, and so our high rating that Cathy spent years building up -- we had a great reputation in the

community and a lot of five-star, four-star good strong reviews were crashed.

Q. Did you ever -- were you able to regain your prior standing on Yelp and other reviews?

A. No. I don't believe we've been able to fully regain it. We tried to countermand it now with more advertising, so it costs us something to kind of regain our public image that way, but not in terms of the reviews. Every time this case hits the -- every time this case comes up, you know, and as it is now, again, we are going to have -- those attacks will start again.

* * *

[7.RT.1549:10-27]

Q. 2013, then, to August 26, 2017, what were, would you say, average revenues for wedding cake sales and related services?

A. Revenues, probably in the order of 10 to 12,000 a month in wedding services. Percentage-wise, I would say it's about 20 percent, a little more, in that time. Right now, it's probably in the neighborhood of 20 percent. But that only reflects the wedding services. It doesn't reflect the full impact of wedding on our -- on Cathy's business. So we get a lot of referrals from weddings. You know, guests at a wedding, our vendors that we have relationships are primarily wedding vendors, so they bring a lot of referrals. And the clients themselves, we hopefully build a lifetime relationship with them, so there's baby showers and birthdays and graduations. So I think that the full effect of having the wedding business is easily 25 to 30 percent.

* * *

Direct Examination of Catharine Miller**[7.RT.1591:18-19]****Q. When did you open up Tastries Bakery?**

A. January 1st, 2013.

* * *

[7.RT.1594:3-1596:11]**Q. [...] Exhibit 1-001, referring to the screen. What's depicted here with regard to the layout for Tastries Bakery?**

A. Okay. That's the front of the bakery. To your left is the cold case, which you'll see a closer picture. Straight ahead and the white bookshelf on the left are what I call my display cakes. The purpose of the display cake is so that clients can say, oh, I like that on that cake, or that color on that cake. It makes it easier for them to picture what they want.

Q. Okay. Let's go to 003.

A. Okay. That is the case cake which everybody keeps talking about. That's my case cake, my cold case. It is not possible to have more than a single tier in that case, and those cakes are made as needed so people can come purchase a cake last minute.

Q. Can people buy -- anyone buy those cakes and use them for any purpose at any time?

A. Yes. Anybody can buy anything that's out in the front of the bakery at any time for any purpose.

Q. Okay. 004, please. What do we have here?

A. That's our cupcake case with macarons, and then at the bottom are morning pastries.

Q. Okay. How often do you have to bake cakes for the case – for cold counter cases we see here to keep them fresh?

A. We bake daily.

Q. You have to rotate them out daily?

A. Yeah. Anything we have left over, we give to the homeless.

Q. Okay. Let's go to 005. What do we have here?

A. That's my cross wall.

Q. Okay.

A. It's part of our boutique.

Q. All of those are for sale?

A. Oh, everything is for sale, yes, except my display case.

Q. Okay. 006. And what is this?

A. That's our design center. We made it look kind of like a little wedding. Just past the arch, on the back wall, look very carefully at the back wall, there is a white shelf. And you will see sixteen glass domes. Each glass dome has a flavor of cupcakes. There you go. And then right below that is a shelf with our 16 flavors of fillings and frostings.

Q. Okay. Great. When we talk about tastings, are they talking about tasting those various flavors and fillings?

A. Yes.

Q. All right. Good. We will get to that, I expect, more in a moment. 013, please. What do we have here?

A. So the back wall is, again, a display of our display cakes. Everything on the outside is real, what we would use on a cake, but the inside is Styrofoam. Down below is our decorated cookies, our gourmet cookies, and our brownies.

Q. Out of curiosity, I didn't ask you this before, but how long can you keep one of those display cases with real frostings and no real insides?

A. Once they're on the shelf, they can stay there for probably six months to a year, if I keep them clean. If I put them down low, people try to eat them.

* * *

[7.RT.1598:10-25]

Q. What's the purpose of having all the Christian items and symbols in your bakery?

A. From day one I told my -- my employees, and Mike and I have agreed, that this is God's business. I manage it, and we work for Him. So we pray before our meetings. We work as a family. We don't work as a corporate unit. We are always helping each other and working together. This is just an extension of that so that others will know this is what their --

Q. You play music in the shop?

A. Yes.

Q. What kind?

A. Christian music. It's 88.3.

Q. Do you have a mission statement?

A. We have a mission statement, to honor God in all that we do.

* * *

[7.RT.1599:23-1601:7]

Q. [...] What's the purpose of these design standards that are part of the same Exhibit 4036 but further down on the page?

A. So as we have progressed from when I purchased the bakery, it became evident that some people would require or request cakes that were not in line with what I was able to make. I'm not going to do gory, and I'm not going to do -- I'm going to say something a little bit bad. We would get e-mails for penis cookies or breast cookies and cakes, and we don't do that. And so I had to put some kind of standard out there to show what I was able to offer at my business. And then it progressed, like when marijuana became a law, then I had to address the marijuana issue. And then there's some cartoon-type adult cartoons. I had to address that. So I took several just do PG or G-rated. And then when marriage -- homosexual marriage came into being, I had to address that, and I never even thought of that being an issue, and so I added that. So this is a work in progress, and I address the issues that I'm faced with.

Q. Okay. Why is it you believe it's appropriate for your design standards, or at least for you, to have that last bullet point that says, "Wedding cakes must not contradict God's sacrament of marriage between a man and a woman"?

A. So I was raised as a Catholic, and then my husband and I met at First Presbyterian Church and were married, and I've been intricately involved in church, but that's a religion. As far as my faith, my faith is founded on God's word. And God's word says in Genesis that God created man and woman in his

likeness, and marriage was between a man and a woman. Then you go to Leviticus; then you go to 1 Corinthians and 1 Thessalonians, 1 Timothy, Jude. You can look all throughout the Bible. Marriage is between a man and a woman and is very, very sacred, and it's a sacrament. And I can't be a part of something that is contrary to God, and it states in the Bible that I can't be a part of that.

* * *

[7.RT.1602:6-1610:7]

Q. Okay. All right. I'm going to go to the Exhibit 7 series, 7A-001. And we are going to go through these kind of quick. If you can describe what's depicted in these photographs beginning with 001.

A. That is one wall, about half my cookie cutters. Everything is custom, so I have over three thousand cookie cutters in various sizes, shapes, and we can make almost any cookie that you would like.

Q. Great. Next slide, 002.

A. Those are decorating tools that help us to give a little bit of a unique design to some of the buttercream cakes.

Q. 003.

A. Those are a few of the piping tips that we use with our buttercream.

Q. 004.

A. Those are the small tips for usually doing the intricate work.

Q. 005.

A. Those are just a few of the spatulas that we use when creating your cake.

Q. 006.

A. This is fun. So up on your right-hand side are the gel colors. And we have -- I keep in stock over 36 different colors, and then I have a chart with over two hundred colors that the customer can choose from so that we can create a color that would match whatever they are wanting us to match to go along with their theme.

Q. So in other words, you actually create colors; you don't just take colors out of a bottle that somebody else prepared?

A. Every once in a while, but not usually. There are a variety of tips on there you can see. There are all kinds of -- that is showing --

Q. What number are we on, 008? 008. Go ahead.

A. That is showing you can use the most basic rudimentary tools. That was a ruler on that there. And then that's our cake stick that we use for marking because we are trying to look like a wooden base for that cake, and that's a really fun cake. In the next picture --

Q. That was 7. Now let's go to 8.

A. Okay. That picture, that girl is a replica of this woman's daughter, and she -- we took her picture, and we are making her to go on top of the cake.

Q. Is that edible?

A. Yes, the whole thing is edible. It is Rice Krispies and fondant. That probably took about three, three and a half hours to make.

Q. Okay. 9?

A. And there you can see her sitting to the side, and Caroline is doing the final coat on the top tier.

Q. 10?

A. This is a work of art. This is where we mix probably around twelve different colors. It's -- we use it just like you would use paint on a canvas. We do the same thing on cakes. This is my favorite to do.

Q. Number 11, please. The same?

A. You can see how she is mixing and putting the colors on the cake.

Q. Okay. We've seen a number of wedding cakes, but I'm going to ask you to bear with us and look at ten more samples. And we'll go through these kind of quickly, as well. Beginning with the 7B, as in boy, series, 003.

A. That was one of the creations that we -- to show the different -- so each size difference, as you are going vertically, you have a 6-inch, 8-inch, 10-inch, 12-inch, 14-inch, 16-inch cake there, but the top tier has three layers; the second tier has one; the third has one; the fifth tier has three layers. So there is a lot of design work that goes into creating these cakes. That's fondant with stencil work and with floral placement.

* * *

Q. Okay. I guess I shouldn't have asked it that way, but that's fine. Next, 7B-013.

A. That is a very typical wedding cake from about three years ago, four years ago, about when this took place. Quilting on top, our piping. This is our swirly piping design, and then quilting. And then, again, we

are mixing the round with the square with a round with a square with a large fondant bow. There is a lot of work that goes into designing that to meet all the different needs.

Q. Again, is everything we see there edible?

A. Yes. That's a real cake.

Q. Right. But for my labors and eyes, I don't know if that green is like ribbon or that bow is is meant -- might be edible or what.

A. Those are fondant ribbons. The entire cake is edible.

Q. Okay. Great. Thank you. 015 -- -14. I'm sorry. What's this?

A. Okay. That is a buttercream lateral cake with silk -- I can't tell from this distance -- either silk or real flowers, with a Mr. and Mrs. topper.

Q. Okay. So everything, I take it, is edible except flowers and topper, correct?

A. Correct.

* * *

Q. Okay. 017.

A. Now, that's our fondant work with more stenciling work, so we are showing you different types of artistry that goes into these cakes.

* * *

Q. Okay. Let's talk about your wedding packet. I'll pull up Exhibit 5-001. Now, if can you explain to us what the wedding packet is.

A. So I love to do events. I love to do weddings. As -- once I bought the bakery, the bakery kind of took a life

of its own and I had to back off from that. I only did a few a year. So in about -- I started sharing with my brides and grooms about weddings and the meaning of weddings, and I found that they didn't know the traditions. So I put it in my wedding packet. And when a bride and groom come in, I say, Welcome to Tastries. This is your cupcake date. This is my wedding packet to you. And it talks about marriage between a man and a woman. And I tell them that these are the Bible verses that I've used in weddings, the many weddings that I've coordinated before. And then I'll ask them, do you know the meaning behind why you cut the cake and you feed each other the cake? Because everybody does that. They will even order a little six-inch cake with a whole dessert bar just so that they can cut the cake.

Q. What do you tell them about the meaning of feeding each other?

A. When you feed each other the cake, it is your first act of marriage, and the wife is saying I am going to provide for you in our relationship. I'm going to feed you. I'm going to provide for you. I will be there for you. The man is saying I am going to be able to provide for you in providing -- whatever it is in their relationship. So it's the first act of the two coming together as one, and then they share the rest of the cake with their guests as their gift to their guests, saying thank you for coming to celebrate our union.

Q. What's the message of the cake -- wedding cakes that you mean to convey?

A. That this is a marriage ordained by God between a man and a woman and we are here to celebrate that with you. And as a coordinator for years in weddings,

there's three times that everyone looks at the bride and groom. When they come down the -- I'm talking about the reception, not the wedding. The reception. When they walk through that door, when they cut the cake, and when they're sitting together at the table. But when they are cutting the cake, everybody is watching to see. That is a big part of the wedding celebration.

* * *

[7.RT.1611:20-1612:15]

Q. We talked about the case cakes. These custom cakes, can you describe the process how one goes about buying one of those?

A. Okay. So for -- a wedding cake is a custom cake and the -- and as is -- we also do party cakes, but we will focus on the wedding cake. A couple will call and say they are interested in coming to us for their wedding cake. We will sign them up on a form. Right now it is in a binder. And we put the bride's name, groom's name, and their phone numbers. They will come in at the appropriate time, and I welcome them with my packet and they sit down. If I'm unavailable, my fellow employees in the front will sit them in the back of the bakery, which we have talked about, and they will sit down and have -- I'm sorry. I got distracted. They will sit down and start to take -- taste the cake, the little cupcakes and the fillings, and then I will come up. So it just kind of depends where I am at. Now, the -- when I come to sit with the couple, they will talk about their wedding, and that's where I start. I start with the packet. We talk about their colors. We talk about the flowers. Because all of that comes into play when I'm designing their cake.

* * *

[7.RT.1613:26-1614:7]

A. The frostings I have been working on and we have used from year two on. And the box -- the tub one that they keep talking about from Sam's Club is lactose-free. I can't make buttercream without butter. And my own daughter is lactose intolerant. So I use that during the summer. When it is 105 out, I will use that. But I tell them at the cake tasting, I buy this buttercream -- icing and I will have to use it if it's 105 outside if you want your cake outside. Okay? And they're okay with it.

* * *

[7.RT.1618:23-1619:3]

A. These are -- this is the first page of many pages of shapes of pans that I use for cakes, and we can mix and match them. When I sit down with a bride or groom, we have to determine not only the flavor and the filling and the outside, the fondant or buttercream, but we also need to decide the sizes for the number of people they want to serve, but also the shapes. And as you can see in some of the samples, we mix and match those. It's really fun.

* * *

[7.RT.1621:1-15]

Q. Did you need see anything in between or is this sufficient?

A. It just showed making each tier, how you stack each tier, and the intricacy of that, and then putting the piping on.

Q. Okay. Let's go to 14, then. Also not in evidence, but for illustration purposes, 14-8.

A. You can see her color palette over there. You see the colors and how we mix the colors, and then we start the artwork. So it is just like an artist with a canvas, but our canvas is cake. This is a very -- this is becoming so popular. Before we would use a piping bag to do a lot of this work and now we are using different tools and turning it into a canvas.

* * *

[7.RT.1623:4-1624:5]

Q. Michael Miller talked a little bit how the written policy came about, the design standards. What's your recollection in that regard?

A. The design standards you see today?

Q. Right.

A. So when I opened the bakery, I didn't think I needed to put anything in print. I really, I guess, was naive. And by probably 2014, 2015, right in there, I realized I needed to set guidelines and boundaries, and that's when I stopped working the front as much. I was baking more. And so then I -- Mike and I talked, and I prayed about it, and I created a design standard. And then as -- just as with attorneys, these new laws come into effect and you use those, with us as they -- this is just easy to explain. When they made marijuana legal, everybody wanted me to make -- they would bring me the marijuana and I'd make marijuana brownies or something. Well, I can't do that. So I had to add that to my list. And then -- so it's a work in progress. Each year I have to update it.

Q. Okay. Fair enough. Besides consulting with your husband, Michael Miller, on these issues involving the design standards, did you also consult with your pastor?

A. Yes.

Q. Who is that?

A. Pastor Roger Spradlin.

Q. Okay. Did he provide the guidance you needed to come up with your present design standard?

A. Yes.

* * *

[7.RT.1629:11-1630:27]

Q. Okay. But you will sell other products to gay people, right? Just not wedding cakes?

A. Yes.

Q. Would you sell a wedding cake to polyamorous couple, say a man who wants to marry two women?

A. That's not acceptable in the Bible.

Q. How about have you ever had a situation where someone wanted to buy a divorce cake?

A. Yes.

Q. And what did you say?

A. I had a gentleman come in, and it was like either a five- or a seven-tiered cake he wanted, and it was going to have yellow accents. And he was African-American, and he came in with his daughter who is about twelve, and his little one that was right around one and a half.

And he said, I need to order a wedding cake for a reception. And I said okay. And so we started talking about it. And then I said, what would your – what flavors would you -- it was an anniversary celebration, not a wedding. It was for their anniversary. And then when I started talking to him, he said it doesn't matter about the flavor. I said, What would your wife like? And it didn't matter. So I invited him for a cake tasting. He said, no, it's going to be a surprise. Come to find out he told me that he was going to go up there in front of everybody, and when they renew their vows in front of 300 and something people, he was going to say, I divorce you.

Q. Would –

A. I looked at him, and I said, I'm sorry. I can't do your cake. He says, you're discriminating against me. And I said, no. My cameras are right there. I'm not discriminating. I am not going to be a part of something like that.

Q. Okay. Thank you. Does Tastries offer a service where the people want to have one of your employees go to their reception and cut – and help cut and serve to the attendees the cake that you will provide?

A. Yes. So o there's a page in my book, right after this, different shapes that they can – it's offered.

* * *

[7.RT.1632:21-1634:14]

Q. Can you tell us what arrangements you made to be able to make referrals to someone else if a same-sex couple came to Tastries to buy a wedding cake? What did you do in that regard?

A. The first time I was aware was Mike -- we had taken an order for a same-sex wedding, but we didn't know we had. And he delivered it and he came home and said, Cathy, we need to pray about this. And so then we were trying to figure out, okay, what we are going to do? And we came up with some ideas. But right after that is when this other couple, that I referred to Stephanie, they came in and they wanted this -- I call it the Disney cake. It really isn't. It's a five-tiered cake, and it just says, "Happily Ever After" in silver and they picked out a topper. But I sat down with them, and I took it. They were very, very kind, very sweet men, and I worked with them. And I actually left early that day, and I went home, and I told Mike, I said, I can't do this. This is -- and I went to scriptures. I knew I couldn't do it.

But I have developed a relationship with Stephanie because -- from a previous venue that I used to run, and so I went to her and I told her -- I asked her, I said, look, I can't do this. I know that -- I know that you love the Lord. I know you are Christian; and I'm a Christian. We interpret it differently. And she said, you're just like your mom.

Q. Never mind what she said. Just -- were you able to make the arrangements with her?

A. Yes. She was very happy to take the cake order, and so I gave the check to Mike, and he took the order and took the money, gave it to Stephanie. And then after that, I would just call her and say, hey, this is the couple. This is their phone number.

Q. Let's look at Exhibit 10-001. Is this the check that you wrote to Gimme Some Sugar, which was transferring the payment from the same-sex

couple that came to you in this time frame of September 2016?

A. Mike wrote the check, yes.

Q. Exhibit 10-002. I guess that's the back of the check. How about 003? Okay. I guess that just shows it went through. After that additional referral to Gimme Some Sugar, how many referrals would you say you've made to Gimme Some Sugar of same-sex couples that first came to Tastries?

A. Between two and three. There haven't been that many.

* * *

[7.RT.1636:5-19]

Q. It's been suggested that one of the ways you could have addressed this situation is to have an employee with your knowledge and consent make the wedding cakes for Tastries without your involvement in the process at all. In your view, would that be a workable solution?

A. No.

Q. Why?

A. There's a myriad of reasons, but the most important to me is, this is my business. This is the Lord's business that he put in my hands, and I'm a steward of it, and I cannot participate in something that would hurt him and not abide by his precepts in the Bible.

* * *

[7.RT.1639:16-1644:4]

A. Yes. I need to clarify some misunderstandings. Rosemary took their order and they -- they did fill it out with Rosemary, but Natalie told Rosemary, give me the order form, because she saw that it was for a same-sex wedding. When I was given the clipboard, it was a blank document. It was this, but it was not filled out, so I handed it to them. That's when I handed it to Mireya, and I asked her to fill it out, thinking that I was talking to the bride. And then she said, oh, I think she would be better to fill it out, which was Eileen, and I'm thinking, oh, her maid of honor is going to help her. That was my mentality here. I had no clue what was really going on.

Q. Okay. And you asked them about the venue?

A. Yes.

Q. What did they say?

A. So they -- so the venue happened after -- so they asked me -- I asked them, I said, what is the venue? And they said the Metro. The Metro is very difficult to work with. They have a very strict policy, and for cake delivery we are only allowed to bring it at the very end. So I asked, is it the morning setup or the afternoon setup? When I asked them the time of the wedding, they were kind of joking around. And I was like, well, they should have this down. You know, I mean, this is just what I was thinking. And so when they were joking around like that I thought they should know this if they really have a venue booked. That's what was going through my head.

Q. At some point did you ask who was the groom?

A. Yes.

Q. What were you told?

A. So -- can I use that board and draw a diagram?

Q. No. I'd rather --

A. Okay. So I'm standing here --

Q. I could show you the exhibit -- last exhibit, 231-014.

A. Okay. So there's two high-top tables. Okay. There you go. They were -- Mireya had that one chair kind of up against the wall, and Eileen was over to the half wall. I was standing about where I am there talking to them, but I was up a little closer. In back of me were Patrick and Sam. And you can see on the -- my case there, I had the cupcakes all up on the top of the case, and I've never had anybody not try the cupcakes. I'm usually saying, please don't eat the cupcakes. They didn't try them. The fillings were there; they're all labeled. And they should have been trying the cupcakes.

Now, when I found out that this was a same-sex union, I thought, oh, I need a minute. I need to pray. I need a minute. Go ahead and try the cupcakes. And I went around the side to get more order forms. I came back. A lot of times I need a minute. I came back over, and we talked about the -- and I said -- can I continue?

Q. Go ahead.

A. I said, I'm sorry, but I can't do your wedding cake, but I have someone that I refer to and it's Stephanie at Gimme Some Sugar. And Eileen said, why won't you do my wedding cake? And I said, I can't do the wedding cake, but I can refer you to Stephanie. She's really

good. I offered her a job at one point. It was joking, but we were in the same -- and she asked a third time, why won't you do my wedding cake? And that's when I looked at the two girls and I said, I can't be a part of a same-sex wedding because of my deeply held religious convictions, and I can't hurt my Lord and Savior. Those were my exact words. They resonate in my brain to this day.

Q. Did you use the word I don't condone same-sex --

A. I don't use that vernacular. That's not -- that's not in my language.

Q. What happened next?

A. And I had the clipboard, and I was -- I had the clipboard which they filled out, and I don't know who it was. The two boys were in back of me. One put his hand on my back and reached over and grabbed the clipboard. There was a lot going on. The girls were feelings were hurt. I was shocked. The boys were saying things. And there was just a lot going on. And

I just stood there, and they grabbed -- and they said, we will take care of this. And they just walked out. And there was a lot of -- I am not saying anybody was yelling or any of that. I'm just saying there was a lot of commotion. Okay. That's a very small area. If you look at that, each of those squares are one foot. So you've got two feet to three feet between those chairs and tables, and there were five of us -- no, there were six because your mom came.

* * *

Q. How do know it was one of the men that reached over and took the clipboard and not Eileen Rodriguez-Del Rio?

A. Eileen was right here. Right to my left. Mireya was on this side of the high-top, and the mother was right next to her, and the two boys were in back of me.

Q. Okay. Indicating with your hand, the two women and Eileen's mother were in front of you?

A. Yes.

Q. Okay. And did they take the custom form out of Tastries Bakery?

A. Yes, because I didn't see it until Mr. Mann showed it to me at my deposition.

Q. Okay. Again, is that one proprietary form that you don't ordinarily let leave the bakery?

A. Yes.

Q. Are you sure that he put his -- actually put his -- one of the men put his hand on your back when he reached over and grabbed the clipboard out of your hand?

A. He put his hand on my back because that's the thing that startled me, and then I saw him come up and go like this and take it and say you won't be needing this. I will take care of it.

* * *

[7.RT.1648:28-1649:5]

Q. Okay. Did you lose clients?

A. Yes, we did.

Q. Corporate clients?

A. Most of our corporate clients left.

Q. Including big accounts?

A. Huge accounts.

* * *

Cross Examination of Catharine Miller

[7.RT.1659:9-20]

Q. Let's talk a little bit about the order process. You refer to it as design consult? Or what's the language you want to use?

A. For wedding, it's their cupcake date that is in my design center. For parties and quinceañeras, I call it a design consultation.

Q. To help me, can I refer to it as design consultation --

A. Yes.

Q. -- for both weddings and any other custom cakes?

A. Yes.

* * *

[7.RT.1663:17-25]

Q. And back in the previous period up through September of 2018, there were design consultations for custom cakes where you were not involved at all, right?

A. In the design consultation, correct.

Q. And when you have good front staff, you didn't need to be as involved in the design consultations, right?

A. In the design part of it, I could turn that over, yes.

* * *

[7.RT.1815:13-19]

Q. The design consultations and how you meet with the couple and get to know them and talk with them.

A. Correct.

Q. That can last anywhere from 20 minutes to an hour?

A. Yes.

* * *

[RT.1930-1931]

CATHARINE MILLER (CONTINUED)

Cross-Examination by Mr. Mann	v8:1809
Redirect Examination by Mr. LiMandri	v8:1827
Recross Examination by Mr. Mann	v8:1838
Redirect Examination by Mr. LiMandri	v8:1838

EXAMINATIONS - ALPHABETICAL

JOHNSON, MARY

Direct Examination by Ms. Mesinas	v5:1009
Cross-Examination by Mr. Jonna	v5:1031
Redirect Examination by Ms. Mesinas	v5:1048

MASSEY, MELISSA

Direct Examination by Mr. Jonna	v5:974
Cross-Examination by Ms. Tanacea	v5:992
Redirect Examination by Mr. Jonna	v5:1006

MILLER, CATHARINE

Direct Examination by Mr. LiMandri	v7:1588
Cross-Examination by Mr. Mann	v7:1650

MILLER, CATHARINE (CONTINUED)

Cross-Examination by Mr. Mann	v8:1809
Redirect Examination by Mr. LiMandri	v8:1827
Recross Examination by Mr. Mann	v8:1838
Redirect Examination by Mr. LiMandri	v8:1838

MILLER, MICHAEL

Direct Examination by Mr. LiMandri	v7:1527
Cross-Examination by Ms. Tanacea	v7:1553
Redirect Examination by Mr. LiMandri	v7:1577

PEREZ, ROSEMARY (Pursuant to Evid. Code 776)

Direct Examination by Mr. Mann	v5:917
Cross-Examination by Mr. LiMandri	v5:957
Redirect Examination by Mr. Mann	v5:971

RIO, EILEEN RODRIGUEZ-DEL

Direct Examination by Mr. Mann	v6:1326
Cross-Examination by Mr. Jonna	v6:1359

RIO, EILEEN RODRIGUEZ-DEL (CONTINUED)

Cross-Examination by Mr. Jonna	v7:1506
Redirect Examination by Mr. Mann	v7:1520

RIO, MIREYA RODRIGUEZ-DEL

Direct Examination by Mr. Mann	v5:1050
Direct Examination by Mr. Mann	v6:1227
Cross-Examination by Mr. Jonna	v6:1244
Redirect Examination by Mr. Mann	v6:1268

SALAZAR, PATRICK

Direct Examination by Mr. Mann	v6:1279
Cross-Examination by Mr. Jonna	v6:1298
Redirect Examination by Mr. Mann	v6:1320
Recross Examination by Mr. Jonna	v6:1324

EXHIBITS

EXHIBIT 2 - Received	v6:1210
EXHIBIT 3 - Received	v6:1210
EXHIBIT 5 - Received - Document	v8:1808
EXHIBIT 8 - Received	v6:1210
EXHIBIT 10 - Received	v6:1210
EXHIBIT 11 - Received	v6:1210
EXHIBIT 103 - Received	v6:1210
EXHIBIT 104 - Received	v6:1210
EXHIBIT 104-001 - Received - Document	v5:930
EXHIBIT 108 - Received	v6:1210
EXHIBIT 110 - Received	v6:1210
EXHIBIT 110 - Received - Document	v8:1808
EXHIBIT 111 - Received	v6:1210
EXHIBIT 111 - Received - Document	v8:1808
EXHIBIT 113 - Received	v6:1210
EXHIBIT 114 - Received	v6:1210
EXHIBIT 115 - Received	v6:1210
EXHIBIT 115 - Received - Document	v8:1808
EXHIBIT 117 - Received	v6:1210
EXHIBIT 118 - Received	v6:1210
EXHIBIT 118 - Received - Document	v8:1808
EXHIBIT 123 - Received	v6:1210
EXHIBIT 125 - Received	v6:1210
EXHIBIT 126 - Received	v6:1210
EXHIBIT 127 - Received	v6:1210
EXHIBIT 128 - Received	v6:1210

EXHIBIT 129 - Received	v6:1210
EXHIBIT 130 - Received - Document	v8:1841
EXHIBIT 131 - Received - Document	v8:1841
EXHIBIT 132 - Received - Document	v8:1841
EXHIBIT 133 - Received - Document	v8:1841
EXHIBIT 134 - Received - Document	v8:1927
EXHIBIT 138 - Received	v6:1210
EXHIBIT 139 - Received	v6:1210
EXHIBIT 140 - Received	v6:1210
EXHIBIT 141-001 - Received	v6:1241
EXHIBIT 144 - Received	v6:1210
EXHIBIT 148 - Received - Document	v8:1841
EXHIBIT 150 - Received	v6:1210
EXHIBIT 151 - Received	v6:1210
EXHIBIT 152 - Received	v6:1210
EXHIBIT 153 - Received	v6:1210
EXHIBIT 154 - Received	v6:1210
EXHIBIT 155 - Received	v6:1210
EXHIBIT 156 - Received	v6:1210
EXHIBIT 157 - Received	v6:1210
EXHIBIT 498 - Received	v6:1210
EXHIBIT 553A - Received	v6:1363
EXHIBIT 553B - Received	v6:1365
EXHIBIT 554 - Received	v6:1210
EXHIBIT 627A - Received	v6:1210
EXHIBIT 630 - Received	v6:1210
EXHIBIT 631 - Received	v6:1210
EXHIBIT 671-001 - Received	v6:1267
EXHIBIT 671-002 - Received	v6:1267
EXHIBIT 700A - Received - Document	v8:1927
EXHIBIT 700B - Received - Document	v8:1927