No. F085800

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

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

Plaintiff and Appellant,

v.

CATHY'S CREATIONS, INC., D/B/A TASTRIES, A CALIFORNIA CORPORATION, ET AL.

Defendants and Respondents;

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

Real Parties in Interest.

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

APPELLANT'S OPENING BRIEF

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October 20, 2023

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Case Name: *Civil Rights Department v. Cathy's Creations, Inc.*

Court of Appeal No.: Case No. F08500

CERTIFICATE OF INTERESTED PARTIES OR ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

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[X] There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d).

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Full Name of Interested Entity or Party	Party *Check One*	Non-Party *Check One*	Nature of Interest *(Explain)*
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The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

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INTRODUCTION

In 2017, Mireya and Eileen Rodriguez-Del Rio, a lesbian couple, were excited to celebrate their marriage with their loved ones. As part of their planning, they sought to buy a cake for their celebration from a local bakery, Cathy's Creations, Inc., which is known as "Tastries." But Tastries refused to sell them a cake based on a set of written "Design Standards" that limit the sale of wedding cakes to opposite-sex marriages. In doing so, Tastries violated the Unruh Civil Rights Act (Unruh Act), which requires that California businesses provide full and equal service without discrimination on the basis of sexual orientation. To remedy the harm to the Rodriguez-Del Rios and ensure that Tastries stopped its discriminatory practices, the California Civil Rights Department ("the Department") filed the underlying suit in Kern County Superior Court.[1]

During the five-day bench trial, the Department proved that Catharine Miller, who owns Tastries, refused to sell the Rodriguez-Del Rios a cake for their marriage celebration because theirs is a same-sex union.[2] But the trial court determined that Tastries's actions did not violate the Unruh Act because: Ms. Miller was (1) motivated by her religious beliefs regarding

[1] The Civil Rights Department was formerly the Department of Fair Employment and Housing or DFEH, and is referred to as such in the underlying record.

[2] Hereinafter, "Ms. Miller" and "Tastries" are used interchangeably to refer collectively to both Respondents, except where describing Ms. Miller's individual actions or testimony at trial, or as otherwise noted.

marriage rather than by malice toward the Rodriguez-Del Rios' sexual orientation; and (2) referred the Rodriguez-Del Rios to another "comparable, good" local bakery. Finally, the court concluded that, even if Tastries had violated the Unruh Act by refusing to serve the Rodriguez-Del Rios, such discrimination was protected under the First Amendment because the wedding cake at issue constituted both pure speech and expressive conduct.

For several reasons, the trial court's rulings constitute legal error and should be reversed. First, the Department met its burden of proving that Tastries's actions were intentionally discriminatory, i.e., that they purposefully denied the Rodriguez-Del Rios service based on their sexual orientation. Indeed, Tastries's discriminatory intent was evident on the face of its written Design Standards that limited the sale of wedding cakes to marriages between opposite-sex couples. Tastries used those Design Standards to deny the Rodriguez-Del Rios service because they were a lesbian couple.

Contrary to the trial court's conclusion that there was no discriminatory intent because Tastries's Design Standards reflected Ms. Miller's religious beliefs and not any malice toward non-heterosexual relationships, the Unruh Act does not require a showing of malice to establish discriminatory intent, nor does it excuse such discrimination when it is derived from sincerely held religious beliefs. A business's refusal to provide gay and lesbian couples the same service that is offered to heterosexual couples is discrimination on the basis of sexual orientation regardless of the underlying rationale for the discriminatory conduct. The court

further erred by concluding that, for purposes of the Unruh Act, discriminating against same-sex weddings is not discrimination based on sexual orientation. As courts have made clear, and as common sense confirms, when a business such as Tastries discriminates against individuals seeking to enter into same-sex marriages, it *necessarily* discriminates on the basis of sexual orientation.

Second, the court erred by ruling that Tastries's referral of the Rodriguez-Del Rios to a different bakery was equivalent to providing the full and equal service required under the Unruh Act. Neither the text of the Unruh Act, nor any reported case interpreting the statute, allows a business to refuse to serve individuals based on a protected trait so long as that business refers them to a separate business for service. This misinterpretation of the Unruh Act would undermine California's antidiscrimination laws by allowing businesses to selectively serve individuals under the long-defunct guise of "separate but equal"—on the basis of their sexual orientation, as well as their race, religion, sex, and other protected traits.

Third, the trial court erred in sustaining Tastries's First Amendment defense. Although the First Amendment prohibits the government from compelling a person to express a message with which they disagree, the type of action compelled under the Unruh Act in this case—that Tastries make all of its goods and services equally available to all customers without discriminating on the basis of a protected trait—was not compelled speech. The cake at issue was a plain, predesigned cake without any writing

or symbols, and was used interchangeably for a variety of celebrations, from birthday parties to baby showers. It did not remotely resemble the kind of customized wedding website, consisting of words and images, that was at issue in the U.S. Supreme Court's recent decision in *303 Creative LLC v. Elenis* (2023) 600 U.S. 570. A commercial bakery's sale of a plain, predesigned cake to a customer is neither pure speech nor expressive conduct protected under the First Amendment. Under the trial court's flawed reasoning, virtually any vendor whose services relate to celebrating marriage—from caterers to party rental stores—could potentially refuse to provide their services to gay and lesbian customers simply because they disapprove of same-sex marriage. The First Amendment does not require such a perverse, damaging result.

The Department does not seek to force Ms. Miller or Tastries to endorse same-sex marriage; the Department acknowledges and respects that she opposes same-sex marriage on account of her religious faith. But businesses that serve the public may not discriminate based on sexual orientation, and selling the Rodriguez-Del Rios a plain, unadorned, predesigned cake cannot reasonably be construed as speech endorsing their union.

STATEMENT OF THE CASE

This appeal arises from a government enforcement action under the Unruh Act. The Civil Rights Department derives its enforcement authority from the Fair Employment and Housing Act (FEHA). (See generally Gov. Code, §§ 12900-12996.)

I. TASTRIES AND ITS "DESIGN STANDARDS"

Tastries is a commercial bakery open to the public in Bakersfield, California. (Appellant's Appendix (AA) 68; Reporter's Transcript (RT) 1562, 1591.) It is a for-profit "S" corporation with approximately eighteen employees. (AA68; RT 1530, 1592.) Respondent Catharine Miller is the owner and sole shareholder of Tastries Bakery. (AA2532; RT 1591.) Some Tastries employees work directly with customers and handle sales, while others work in the kitchen to produce and decorate cakes and other baked goods. (AA2533; RT 921-922, 1593)

Tastries sells baked goods, which are available for immediate purchase from its refrigerated cases. (AA2532; RT 922, 1594.) These "case" baked goods include cakes, cupcakes, brownies, and cookies. (AA2532; RT 922, 1594, 1596.) Tastries also accepts advance orders for all of its baked goods, including wedding cakes. (AA2532; RT 923.) When ordered in advance, Tastries refers to its baked goods—even its cookies and brownies—as "custom," regardless of whether the design or recipe is unique or entirely duplicative of standard design or case baked goods. (AA2532-2533; RT 923, 1662.)

To place an advance order, a customer must complete a form to select the details of their baked goods or cake including the size, shape, number of tiers, colors, frosting, filling, and decorations. (AA2272-2281; RT 924.) Typically, a Tastries employee will help the customer fill out the form. (RT 923-924.) Customers regularly reference a pre-existing case cake, display cake, or photo of an existing cake when describing the cake-design they want. (AA2536; RT 923, 1662.)

At all times relevant to this case, Tastries has used the following written "Design Standards":

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 [sic]; wedding cakes must not contradict God's sacrament of marriage between a man and a woman

(AA2282-2285, AA2535; RT 934.)

These Design Standards apply to all preordered or "custom" baked goods. (AA2533; RT 934-935.) Ms. Miller developed these standards based on her own Christian beliefs, and she requires her employees to implement the standards regardless of their own beliefs. (AA2533-2534; RT 936, 1600-1601.)

In accordance with its written Design Standards, Tastries regularly sells and provides wedding cakes to heterosexual couples. (AA2533-2534; RT 938, 1826.) However, its design policy prohibits providing a preordered baked good for use in the celebration of a same-sex marriage, even if the preordered cake is identical in size, shape, and design to a premade case cake or one purchased by a heterosexual couple. (AA2534-2535; RT 938-939. 1820.) Tastries interprets the Design Standards to also prohibit the sale of anniversary or engagement cakes for gay and lesbian couples. (RT 1676.)

Ms. Miller does not participate in the design or preparation of every preordered cake. (RT 1664.) Despite its Design Standards, Tastries has had employees who did not share Ms. Miller's beliefs and who have provided preordered wedding cakes to gay and lesbian couples without Ms. Miller's knowledge. (AA2535; RT 925.) These employees have been ready, willing, and able to serve Tastries's gay and lesbian customers. (*Ibid.*) At the time that the Rodriguez-Del Rios attempted to purchase a wedding cake, Tastries employed staff who were comfortable with baking and providing wedding cakes to gay and lesbian couples. (*Ibid.*)

Tastries is able to deliver, and has delivered, its cakes to wedding venues. (AA2533; RT 1021.) On those occasions, Tastries employees frequently drop off the cake or other baked goods before wedding guests and participants arrive. (AA2533; RT 1021.)

II. THE RODRIGUEZ-DEL RIOS' ATTEMPTS TO PURCHASE A WEDDING CAKE FROM TASTRIES

Real Parties in Interest Mireya and Eileen Rodriguez-Del Rio are a same-sex couple who live in Bakersfield. (AA2532; RT 1050.) They were married in December 2016, in a small, private ceremony with their immediate families. (AA2534; RT 1056.) The couple also wanted to celebrate their marriage with their extended families and friends, and they set a date of October 7, 2017, to exchange vows and host a traditional wedding reception. (AA2534; RT 1057.)

While planning their wedding, the Rodriguez-Del Rios visited several local bakeries in Bakersfield, including one called

Gimme Some Sugar, to taste and view wedding cakes. (AA2535; RT 1060-1061.) However, they did not find a cake that they both liked that fell within their price range and was not too sweet. (*Ibid.*)

On August 17, 2017, the Rodriguez-Del Rios visited Tastries. (AA2536; RT 1061, 1227.) They were greeted by an employee who welcomed them into the store. (AA2536; RT 1063.) After viewing the options from a menu and display case, the Rodriguez-Del Rios decided to order their wedding cake from Tastries. (AA2536; RT 1063-1066.) Because they wanted a simple cake design, the couple chose a design based on one of Tastries's pre-existing sample cake displays—a round cake with three tiers, frosted with white buttercream frosting, decorated with a few frosting flowers on the sides—and two matching sheet cakes. (AA2536; RT 1063-1065.) They did not request any written messages, images, or cake toppers such as figurines. (AA2536; RT 1065.) The Rodriguez-Del Rios were prepared to order the cakes on-the-spot, but the store associate suggested they first return for a cake tasting to select their flavors and fillings. (AA2286, AA2536; RT 1066.) The couple agreed and set a tasting date. (AA2536; RT 1066.)

On August 26, 2017, the Rodriguez-Del Rios returned to Tastries Bakery for their scheduled tasting. (AA2536; RT 1068.) They were joined by Mireya's mother and two close friends. (AA2536; RT 1070-1071.) They were initially greeted by the same employee who had taken their order during their first visit, but this time the employee informed them that she did not

believe she could complete their order. (AA2536; RT 1071.) She directed the wedding party to the back of the store to meet with Tastries's owner, Ms. Miller. (AA2536; RT 1071-1072.) After asking questions to confirm that the Rodriguez-Del Rios were a lesbian couple, Ms. Miller told the party that she could not take their order because she did not condone same-sex marriage. (AA2537; RT 1073.) Ms. Miller told the couple she could refer them to another bakery, Gimme Some Sugar, which she believed served gay and lesbian customers. (AA2537; RT 1074.) Tastries was not able to guarantee that the Rodriguez-Del Rios would actually be able to obtain a cake from Gimme Some Sugar, let alone at the same price and on the needed date. (See AA2208, AA2297-2300; RT 1817-1818.)

The Rodriguez-Del Rios were shocked and humiliated to learn that they could not purchase a Tastries cake because they were a lesbian couple. (AA2537; RT 1073.) Mireya "felt rejected," because her "money is the same everywhere you go." (RT 1075.) Later that afternoon, after the shock wore off, Mireya ended up crying so hard she developed an extended nosebleed. (RT 1076-1077.) Eileen testified that she was upset, but also angry. (RT 1345.) "I was really angry and frustrated because they hurt [Mireya], and it's my job to protect her." (*Ibid.*) Eileen described how her wife "just broke down. She started crying like I had never seen her before. And I comforted her . . . [b]ut I felt helpless because . . . I can't take that away." (RT 1348.)

This harm was compounded by the fact that the denial of service occurred in front of their family and close friends. (RT

1344.) Eileen took on a care-taker role: "I was more concerned with my wife and my mom, to get them out of the situation and take them outside. My mom was so upset. To have my mom go through that pain that she was feeling for me and my wife, we just—I took them out[side]." (RT 1344.)

The Rodriguez-Del Rios left the bakery with their guests, distraught. (AA2537; RT 1075, 1344.) The event that was once exciting and celebratory was marred by Ms. Miller's refusal to sell them a good that was provided without qualification to heterosexual couples. (AA2537; RT 1075, 1826.)

III. THE RODRIGUEZ-DEL RIOS' COMPLAINT TO THE DEPARTMENT

The Civil Rights Department is the state agency charged with enforcing the civil rights of all Californians to use and enjoy any public accommodation without discrimination because of, inter alia, sexual orientation, under the Unruh Act, Civil Code section 51 et seq., as incorporated into the FEHA. (Gov. Code, § 12930.) The FEHA empowers the Department to receive, investigate, conciliate, and litigate complaints that allege violations of law within the broad scope of its jurisdiction. (*Id.*, §§ 12930, subd. (f); 12965.)

On October 18, 2017, the Rodriguez-Del Rios filed an administrative complaint with the Department alleging that Tastries unlawfully refused to provide them full and equal service on the basis of their sexual orientation. (AA2293-2295; RT 1234; see Gov. Code, § 12960, subd. (c).) The Department opened an investigation into the matter pursuant to Government Code section 12963. (AA2287-2295.) After investigating, the

Department found cause to believe that Tastries had discriminated against the couple in violation of the Unruh Act and issued a letter on October 10, 2018, notifying Ms. Miller of its findings. (AA2296.)

IV. THE DEPARTMENT'S CIVIL ACTION AGAINST TASTRIES FOR VIOLATIONS OF THE UNRUH ACT

On October 17, 2018, the Department filed the underlying civil action, seeking injunctive relief and monetary damages, against Tastries in Kern County Superior Court for violations of the Unruh Act. (See AA2579; Gov. Code, § 12965, subd. (a)(1).) The Department filed a First Amended Complaint on November 29, 2018, and Tastries filed its First Verified Amended Answer on April 22, 2019. (AA2579, AA2583.)

On September 8, 2021, the Department and Tastries filed their respective motions for summary judgment. (See AA2589-2591.) On January 6, 2022, the trial court denied both motions. (See AA2595-2596.) The matter proceeded to a bench trial on July 25-29, 2022. (AA2529, AA2604-2605; RT 1-2048.)

The trial court issued a tentative ruling in favor of Tastries on October 21, 2022. (AA2407.) The Department requested a statement of decision from the court pursuant to Code of Civil Procedure section 632 on October 31, 2022. (AA2407-2426.) Tastries filed its objections and responses to the Department's request for clarification on November 9, 2022. (AA2428-2434.) The Department filed a request to clarify omissions and ambiguities in the tentative statement of decision pursuant to Code of Civil Procedure section 634 on December 5, 2022, and

Tastries filed further objections on December 8, 2022. (AA2443-2488, AA2490-2510.)

After taking the matter under submission, the trial court adopted its tentative ruling as its final Statement of Decision on December 27, 2022. (AA2518-2523.) On January 5, 2023, Tastries served the Department with notice of entry of the judgment. (AA2525-2555.)

STATEMENT OF APPEALABILITY

The trial court's final judgment is appealable under Code of Civil Procedure section 904.1, subdivision (a)(1). The Department timely filed its notice of appeal on February 24, 2023. (AA2557-2561; Cal. Rules of Court, rule 8.104(a).)

STANDARD OF REVIEW

This Court reviews issues of statutory and constitutional interpretation de novo. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527; *Silicon Valley Taxpayers Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448-449.)

An appellate court "should accept a trial court's factual findings if they are reasonable and supported by substantial evidence in the record." (*Guardianship of Saul H. v. Rivas* (2022) 13 Cal.5th 827, 846.) "However, 'the application of law to undisputed facts ordinarily presents a legal question that is reviewed de novo.'" (*Id.* at p. 847.) "Similarly," an appellate court's "review is de novo when 'the question is predominantly legal' and 'requires a critical consideration, in a factual context, of legal principles and their underlying values.'" (*Ibid.*)

ARGUMENT

I. TASTRIES VIOLATED THE UNRUH ACT BY REFUSING TO SELL A CAKE TO THE RODRIGUEZ-DEL RIOS FOR THEIR WEDDING CELEBRATION BECAUSE OF THEIR SEXUAL ORIENTATION

The Unruh Act provides that "[a]ll 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." (Civ. Code, § 51.) The Act's primary purpose is to ensure "the equality of all persons in the right to the particular service offered by an organization or entity covered by the [A]ct." (*Curran v. Mount Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712, 733.) "The Legislature's desire to banish [discrimination] from California's community life has led [the California Supreme Court] to interpret the Act's coverage 'in the broadest sense reasonably possible.'" (*Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 75-76.)

"[A] person suffers discrimination under the [Unruh] Act 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 v. Square, Inc.* (2019) 7 Cal.5th 1019, 1023.) Here, the Rodriguez-Del Rios experienced clear discrimination in violation of the Act when Tastries refused to sell them a wedding cake because of their sexual orientation, even though Tastries regularly sells the same wedding cakes to heterosexual couples. The trial court was wrong to conclude otherwise.

A. Tastries's refusal to serve the Rodriguez-Del Rios because of their sexual orientation constitutes intentional discrimination

To establish an Unruh Act violation, a person must demonstrate the exclusionary policy or practice they encountered was intended to deny service on the basis of a protected characteristic. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1175; *Martinez v. Cot'n Wash, Inc.* (2022) 81 Cal.App.5th 1026, 1036 [courts look for evidence of intent "to accomplish discrimination on the basis of [a protected trait]"].) Under the relevant Judicial Council of California Civil Jury Instructions, this is satisfied by showing "[t]hat a substantial motivating reason for [a defendant's] conduct was . . . sexual orientation." (Cal. Civ. Jury Instruction 3060; AA2539.)

Courts have interpreted "substantial motivating reason" to mean that a plaintiff must show "that an illegitimate criterion was a *substantial factor*" in the challenged determination. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232, quoting *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 276, italics added.) However, the illegitimate criterion need not be the only "but for" cause for the discriminatory conduct. (*Id.* at p. 232-233.) Similarly, the Jury Instructions define "substantial motivating reason" as "a reason that actually contributed to [denial of service]" that is "more than a remote or trivial reason," but "does not have to be the only reason motivating the [denial of service]." (Cal. Civ. Jury Instruction 2507.)

Businesses engage in intentional discrimination prohibited under the Unruh Act when they design and employ policies that expressly make distinctions based on membership in a protected

class. (*Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910 [313 Cal.Rptr.3d 330, 340-344].) In *Liapes v. Facebook*, for example, the court held that allegations showing Facebook designed and employed ad optimization tools "that expressly rely on users' age and gender" to exclude women and older people from accessing certain advertising "when creating the target audience for insurance ads," stated a cause of action for intentional discrimination. (*Ibid.*) Similarly, in *Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 518, a restaurant engaged in intentional discrimination where a company policy and physical layout of the premises "allowed patrons who were not physically handicapped to use a restroom . . . but denied that same service to physically handicapped patrons even though there was a restroom on the premises . . . that a physically disabled person could otherwise use." (*Ibid.*) In contrast, no intentional discrimination occurs when a plaintiff is unable to obtain a service that is uniformly denied to all visitors—for example, it is not intentional discrimination for a website to decline to make closed-captioning available to hearing-impaired customers when that service is not available to anyone. (*Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.* (9th Cir. 2014) 742 F.3d 414, 427.)

Here, then, the dispositive question is whether the Rodriguez-Del Rios faced purposeful unequal treatment by Tastries on account of their sexual orientation that members of other sexual orientations did not experience. (See *Smith v. BP*

Lubricants USA Inc. (2021) 64 Cal.App.5th 138, 154.) It is clear that they did.

By operation, Tastries's Design Standards expressly treat one class of individuals—heterosexuals—differently from other non-heterosexual classes. (AA2282-2285.) The Design Standards specifically state that Tastries will only provide a cake for a wedding between a man and a woman. (*Ibid.*) Thus, gay or lesbian couples, whose marriages are same-sex oriented, are denied the opportunity to purchase a Tastries cake to celebrate their marriage—one that is made freely available to couples of a heterosexual (i.e., a couple formed by combining a man and woman) orientation. (*Ibid.*) When Tastries realizes a couple is not heterosexual and having a wedding, it purposefully refuses to provide a cake on that basis alone. (AA2282-2285; RT 1073, 1600, 1820.) A substantial factor—indeed, quite possibly the *only* factor—in that denial is the sexual orientation of the persons getting married, because their sexual orientation is the reason the wedding is not between one man and one woman. (AA2282-2285; RT 1674, 1820, 1826.) The Design Standards, which Ms. Miller wrote and implemented, thus intentionally define a group of persons for whom service will not be provided because of their membership in a protected group, although those services are otherwise available.

When the Rodriguez-Del Rios tried to buy a wedding cake from Tastries in August 2017, they were denied goods and services in accordance with the Design Standards *because* they were not a heterosexual couple of one man and one woman. (RT

1073, 1671, 1674, 1820, 1826.) Tastries would have provided a cake had the Rodriguez-Del Rios been a heterosexual couple getting married. (RT 1600, 1645, 1826 ["If a straight couple came in, you would have taken their order and Tastries would have provided that cake, right?" "Correct."].) Accordingly, Tastries made an intentional distinction on account of the couple's sexual orientation in violation of the Unruh Act, and the trial court erred by holding otherwise.

In addition to disregarding the facially discriminatory nature of the Design Standards as drafted and implemented, the trial court made two other critical errors in determining that Tastries did not intentionally discriminate against the Rodriguez-Del Rios. First, the trial court mistakenly thought that Ms. Miller would only have violated the Unruh Act if she had discriminated against the Rodriguez-Del Rios for malicious reasons, as opposed to doing so on account of her religious faith. (AA2540.) Second, the court justified Tastries's discriminatory practices by attempting to separate discrimination due to same-sex marriage from discrimination due to the sexual orientation of the couples who enter into such marriages, adopting a distinction that has long been rejected by state and federal courts. (*Ibid.*) This Court should reject the trial court's analysis on both counts.

1. The trial court failed to apply the proper standard for discriminatory intent

The trial court held that Tastries's denial of service to the Rodriguez-Del Rios originated from Ms. Miller's sincere Christian beliefs that "God's sacrament of marriage" was reserved for unions between a man and a woman, and not out of malice

toward gay and lesbian customers. (AA2541.) "That motivation was not unreasonable, or arbitrary, nor did it emphasize irrelevant differences or perpetuate stereotypes." (*Ibid.*) Thus, the court reasoned, the Department could not prove that Tastries's refusal to sell a cake to the Rodriguez-Del Rios was based on sexual orientation. (*Ibid.*)

But, as discussed above, the court's reasoning misinterprets the standard for proving intentional discrimination, which looks to whether the customer's membership in the protected class was "a substantial factor" in the challenged denial of service. (*City of Santa Monica, supra*, 56 Cal.4th at pp. 230-32.) The Department was not required to show that Ms. Miller's refusal to serve the Rodriguez-Del Rios based on their sexual orientation was wholly independent of Ms. Miller's religious beliefs; in fact the rationale for the differential treatment is irrelevant for purposes of identifying unlawful discrimination once it is established that the denial of service occurred *due to membership in the protected class*. (*Ibid.*; see also *Liapes, supra,* 95 Cal.App.5th 910 [313 Cal.Rptr.3d at p. 342] [holding that a "defendant who pursues discriminatory practices" even if in pursuit of other goals "such as economic gain, nonetheless violates the Unruh Civil Rights Act."].) Here, the Design Standards plainly state that Tastries will only sell its wedding cakes to heterosexual couples, that is, Tastries will deny service to individuals based on their membership in a protected class. (AA2282-2285.)

Accordingly, whether or not the Design Standards reflected Ms. Miller's religious beliefs, it was undisputed in the record

before the trial court that the Rodriguez-Del Rios' sexual orientation was a substantial motivating factor in Tastries's denial of service. (AA2282-2285; RT 1073, 1600, 1645, 1671, 1674, 1820, 1826.)

When there is facial discrimination, as here, liability "does not depend on why [someone] discriminates but rather on the explicit terms of the discrimination." (*Internat. Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, et al. v. Johnson Controls, Inc.* (1991) 499 U.S. 187, 199 [in analogous Title VII employment context]; see also *Liapes, supra,* 95 Cal.App.5th 910 [313 Cal.Rptr.3d 330, 341-344] [intentional discrimination alleged when expressly deny access to certain advertisements based on protected characteristics based on facial nature of discrimination and regardless of potential reason for distinction].) Thus, the trial court's determination that Tastries's discrimination was motivated by religious morals and not malice is irrelevant. (Cf. *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 115, 128 [explaining that *City of Santa Monica's* "substantial motivating factor" test does not require a plaintiff to prove the discriminatory action "was motivated by animosity or ill will"].) As the California Supreme Court has explained, businesses may engage in discrimination for many reasons, such as "'from a motive of rational self-interest,' e.g., economic gain," but their actions would still "unquestionably violate the Unruh Act." (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 740, fn. 9.)

On rare occasion, courts construing the Unruh Act have allowed claims of discrimination in access to public accommodations based on a protected classification to stand when there are compelling social reasons to permit the unequal treatment. "For example, it is permissible to exclude children from bars or adult bookstores because it is illegal to serve alcoholic beverages or to distribute 'harmful matter' to minors." (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 31, citing Bus. & Prof. Code, § 25658 and Pen. Code, § 313.1.) "This sort of discrimination is not arbitrary because it is based on a 'compelling societal interest' and does not violate the Act." (*Ibid.*, citations omitted.)

Here, however, both courts and the California Legislature have determined that there is no compelling societal interest that justifies distinguishing between same-sex and opposite-sex marriages because this emphasizes "irrelevant differences" and "perpetuates stereotypes." (See, e.g., *In re Marriage Cases* (2008) 43 Cal.4th 757, 783-784, superseded by constitutional amendment as stated in *Hollingsworth v. Perry* (2013) 570 U.S. 693, 701 [differential treatment on the basis of sexual orientation, such as treating same-sex and opposite-sex marriages differently, relies on "biased and improperly stereotypical treatment"].) These courts have explained that differential treatment regarding access to marriage between same-sex and opposite-sex couples "harms the state's interest in equality, because it mandates that men and women be treated differently based only on antiquated and discredited notions of

gender." (*Perry v. Schwarzenegger* (N.D. Cal. 2010) 704 F.Supp.2d 921, 998.) And as the Legislature has emphasized, "all laws relating to marriage and the rights and responsibilities of spouses apply equally to opposite-sex and same-sex spouses." (2014 Cal. Legis. Serv. Ch. 82 (S.B. 1306) [amending Family Code section 300 to define marriage as a personal relationship between "two persons" rather than "a man and a woman."].)

Ms. Miller's objection to serving the Rodriguez-Del Rios originates from her religious beliefs that marriage is reserved for heterosexual couples. (RT 1600.) The Department acknowledges and respects Ms. Miller's religious beliefs. But, as the trial court itself acknowledged when rejecting Tastries's defense under the Free Exercise Clause of the First Amendment, the "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).'" (AA2544, quoting *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990) 494 U.S. 827, 879.) Here, the Unruh Act is a neutral law of general applicability, so its application does not violate the Free Exercise Clause. (*Employment Div.*, *supra*, at p. 879.) And the Unruh Act does not otherwise provide a defense for discrimination motivated by a business operator's religious beliefs.

The California Supreme Court has addressed the difference between a "substantial motivating reason" under state antidiscrimination laws and a separate, affirmative defense

based on free exercise of religion. (*Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143.) In *Smith*, a landlord named Ms. Evelyn Smith refused to rent "to anyone who engage[d] in sex outside of marriage" due to her religious belief that "it is a sin for her to rent her units to people who will engage in nonmarital sex on her property." (*Id.* at p. 1151.) Ms. Smith then rejected the Real Parties' application to rent because they were unmarried. (*Id.* at p. 1152.) Thus, as in this case, Ms. Smith purposefully refused to provide services to a couple on the basis of a protected trait (marital status), and her underlying rationale was a religious belief. The Fair Employment and Housing Commission determined that Ms. Smith's action violated the Unruh Act and the FEHA. (*Id.* at p. 1153.)

On review, the Supreme Court upheld the Fair Employment and Housing Commission's determination. (*Smith, supra*, 12 Cal.4th at p. 1160.) The Court first considered whether Ms. Smith's denial of housing on the basis of marital status had violated state antidiscrimination law, and concluded that it had.[3]

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[3] At the time *Smith* was decided, the Unruh Act did not specifically enumerate marital status as a protected characteristic, whereas the FEHA did. The Supreme Court held that Ms. Smith's actions violated the FEHA. (*Smith*, *supra*, 12 Cal.4th at pp. 1155.) As this alone provided a proper basis for the Commission's decision, the Court found it unnecessary to decide whether the Unruh Act also barred discrimination based on marital status in the first instance. (*Id.* at p. 1160, fn. 11.) The FEHA analysis in *Smith* is instructive here because when evaluating intentional discrimination under the Unruh Act, courts look to the FEHA's "substantial motivating reason" test as set forth in *City of Santa Monica, supra*, 56 Cal.4th 203, 232.

(continued…)

(*Smith, supra*, 12 Cal.4th at pp. 1155-1160.) Notably, the Court did *not* consider Ms. Smith's underlying religious rationale at this stage. (*Id.* at p. 1155 ["Smith asked whether Randall and Phillips were married and refused to rent to them because they were not. The conclusion that she thereby violated FEHA seems unavoidable."].) The Court *then* turned to the free exercise question: "Having concluded that [Ms.] Smith violated [the] FEHA, we must now determine whether the state is required to exempt her from that law to avoid burdening her exercise of religious freedom." (*Id.* at p. 1161.) The Court rejected that theory. (*Id.* at pp. 1164-1166, 1176, 1179; see AA2547-2548.)

As *Smith* illustrates, the trial court was wrong to consider Ms. Miller's underlying religious rationale as part of its intentional discrimination analysis under the Unruh Act. (See AA2540-2541.) Rather, these are separate inquiries, and Ms. Miller's religious beliefs are properly considered only within the context of a second, separate question: does the Act's requirement that she sell her plain and predesigned wedding cakes equally to all customers, without discrimination on the basis of sexual orientation, nonetheless violate her rights to freely exercise her

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(…continued)

(Cal. Civ. Jury Instruction 3060; see, *supra*, at p. 24.) The Unruh Act was subsequently incorporated into FEHA (Gov. Code, § 12948, Stats. 1996, c. 498 (S.B. 1687), § 5.5.), and later amended to expressly include marital status as a protected characteristic. (Civ. Code, § 51, Stats. 2005, c. 420 (A.B. 1400), § 3.)

religion. And, as the trial court correctly concluded, it does not. (AA2543-2549.)

2. Tastries's conduct violated the Unruh Act even if the bakery would have served same-sex couples in non-wedding contexts

The Unruh Act "applies not merely in situations where businesses exclude individuals altogether, but also where unequal treatment is the result of a business practice." (*Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1145-46; cf. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Com.* (2018) 138 S.Ct. 1719, 1728 [bakery petitioners conceded that refusal to sell "any cakes for gay weddings" would be a denial of services that violated state public accommodations law].) Nevertheless, the trial court concluded that Tastries had not engaged in intentional discrimination on the basis of sexual orientation because it is willing to serve gay and lesbian customers generally, just not in the context of celebrating a same-sex wedding; and because the bakery would likewise have refused to sell a cake to a heterosexual customer for use in a same-sex wedding. (AA2540.)

That analysis reflects a basic misunderstanding of the Unruh Act, which requires "equal treatment of patrons in *all* aspects of the business." (*Koire, supra*, 40 Cal.3d at p. 29, italics added; *Rolon v. Kulwitzky* (1984) 153 Cal.App.3d 289, 290-292 [Unruh Act was violated when "two lesbian women [] were refused service in a semiprivate booth at a restaurant . . . [but] offered service at a table in the main dining room of the restaurant"]; *Liapes, supra*, 95 Cal.App.5th 910 [313 Cal.Rptr.3d 330, 341-344] [plaintiff stated claim where she alleged she was

denied equal access to certain insurance advertisements based on her age and gender].) A business that refuses to sell certain products to gay and lesbian customers, while making them available to heterosexual customers, violates the Unruh Act even if it agrees to sell *other* products to gay and lesbian customers.

Nor was the trial court correct that the Unruh Act permits businesses to discriminate against heterosexual persons associated with people who are celebrating a same-sex marriage. (AA2540.) The Unruh Act defines "sexual orientation" to include a person who "is associated with" a person of a certain sexual orientation. (Civ. Code, § 51, subd. (e)(6).) Accordingly, the Act prohibits both denying service to someone because they are gay or lesbian *and* denying service to someone because they are "associated with" someone who is gay or lesbian. (See, e.g., *Hubert v. Williams* (1982) 133 Cal.App.3d Supp. 1, 5 [disabled plaintiff stated claim when evicted due to hiring lesbian assistant because "the right to associate with members of the protected class, as a class, is likewise protected under the act"]; *Winchell v. English* (1976) 62 Cal.App.3d 125, 129 [mobile home park violated Unruh Act by prohibiting white tenants, generally allowed to sub-rent, from sub-renting to Black tenants].)

The trial court ignored this precedent, reasoning that Tastries was not discriminating on the basis of sexual orientation because it equally applied its discriminatory policy to all customers, regardless of the purchaser's own sexual orientation. (AA2540 ["Miller and Tastries do not design or offer to any person—regardless of sexual orientation—custom wedding cakes

that 'contradict God's sacrament of marriage between a man and a woman."]; see RT 1829.) But, buying a cake for a gay or lesbian wedding creates an "association" with gay or lesbian persons, regardless of the purchaser's sexual orientation. And refusing to sell a cake to "any person" because they are "associated with" gay and lesbian persons entering into a same-sex marriage also constitutes a violation of the Act. Thus, even if Tastries is correct that it would (hypothetically) have refused to sell a cake to a heterosexual customer for use in a same-sex wedding, that fact does not help Tastries, because such a refusal would *also* violate the Unruh Act. Further, Tastries's hypothetical uniform application of a policy, which on its face excludes gay and lesbian couples from services it provides to heterosexual couples, does not negate the discrimination embedded within the policy itself.

More broadly, the trial court apparently concluded that for purposes of the Unruh Act, discriminating because a wedding is a same-sex wedding is distinct from discriminating based on sexual orientation. (AA2540-2541.) But courts have squarely rejected this distinction, and for good reason. The California Supreme Court has explained that prohibitions of same-sex marriage "properly must be understood as classifying or discriminating on the basis of sexual orientation." (*In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 783-784.) The Court explained that although provisions restricting marriage to a man and a woman "on their face, do not refer explicitly to sexual orientation," they "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." (*Id.* at p. 839; see also *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 837 ["[T]he [Unruh] Act requires businesses to treat registered domestic partners [same-sex union] the same as [opposite-sex] spouses."].)

The U.S. Supreme Court has agreed; its "decisions have declined to distinguish between status and conduct in this context [of sexual orientation discrimination]." (*Christian Legal Society Ch. of the U. of Cal., Hastings College of the Law v. Martinez*, (2010) 561 U.S. 661, 689.) The Court reiterated this in *United States v. Windsor* (2013) 570 U.S. 744, which held that the federal Defense of Marriage Act's exclusion of state same-sex marriages from federal recognition imposed "disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages" and had "the purpose and effect of disapproval of that class." (*Id.* at p. 770; see also *Loving v. Virginia* (1967) 388 U.S. 1, 11 ["There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races."].)

This case is no different. Denying service to only those couples who are having a same-sex wedding is the equivalent of prohibiting only same-sex marriages, which "singles out a class of persons deemed by a State entitled to recognition and protection." (*Windsor*, *supra*, 570 U.S. at p. 775.) That the denial extends to engagement and anniversary celebrations (see RT 1676) demonstrates that the discrimination is inexorably tied to the

fact of the non-heterosexual relationship and not the one-time act of marriage. Discrimination against same-sex marriage constitutes discrimination based on sexual orientation.

B. Tastries's refusal to sell a wedding cake to the Rodriguez-Del Rios on the basis of sexual orientation denied them full and equal service as required by the Unruh Act

The Unruh Act requires that all customers, regardless of sexual orientation, are entitled to "the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments." (Civ. Code, § 51, subd. (b).) "The Legislature's choice of terms evidences concern not only with access to business establishments, but with equal treatment of patrons in all aspects of the business." (*Koire*, *supra*, 40 Cal.3d at p. 29.) Tastries violated this mandate when it refused to sell a wedding cake to the Rodriguez-Del Rios, a lesbian couple. The trial court, however, held that Tastries' denial of service based on sexual orientation did not violate the Unruh Act because Ms. Miller referred the Rodriguez-Del Rios to a separate bakery—Gimme Some Sugar—that, according to Ms. Miller, was willing to provide a wedding cake to gay and lesbian couples. (AA2542.) The trial court concluded that this referral constituted full and equal service and nullified any harm flowing from the initial discriminatory refusal of service. (AA2542.)

This holding is incorrect because it relied on misinterpretations of two cases interpreting the "full and equal service" requirement under the Unruh Act (*North Coast Women's Care Medical Group, Inc. v. Super. Ct.* (2008) 44 Cal.4th 1145, and *Minton v. Dignity Health* (2019) 39 Cal.App.5th 1155) and

erroneously equates a referral to a separate business with providing full and equal service.

1. Providing a referral to a separate business establishment is not the equivalent of providing full and equal service

The Unruh Act does not allow a business to avoid liability for discriminatory conduct by referring customers to a separate and independent business establishment for service, nor does it allow a discriminatory denial of service because a nearby business provides similar service without discrimination. In fact, even the existence of another branch of the *same* business establishment does not constitute "full and equal" service when a customer is denied access to one branch because that "endorse[s] the 'separate but equal' theory . . . [in] requir[ing] [customers with protected characteristics] go to another location to be served." (*Rivera v. Crema Coffee Co., LLC* (N.D. Cal. 2020) 438 F.Supp.3d 1068, 1076 [existence of separate branch of the same coffee shop 350 yards away from inaccessible coffee shop did not constitute full and equal service]; see also *Rolon*, *supra*, 153 Cal.App.3d at p. 290 [even requiring lesbian patrons to move to a different table inside the same restaurant violated the Act].) Neither *North Coast* nor *Minton* have interpreted the Unruh Act to permit businesses to deny equal access to services as long as they are referred to another separate and independent business establishment. The trial court erred in finding so here.

In *North Coast*, the Court held that a Free Exercise claim does not exempt a medical practice from the Unruh Act's requirement to provide "'full and equal services'" regardless of a

patient's sexual orientation. (*North Coast, supra*, 44 Cal.4th at p. 1159, quoting Civ. Code, § 51, subd. (b).) The Court then observed—in dicta—that if a medical practice wanted to avoid a conflict between a specific physician's religious beliefs and the Unruh Act's antidiscrimination provisions, the medical practice could refuse to provide the procedure at issue for any patient; or it could provide "access to that medical procedure through a North Coast physician lacking [the specific physician's] religious objections." (*Ibid*.) Thus, in the context of medical procedures, receiving the same procedure from another doctor employed by the same medical practice could potentially avoid the liability that would otherwise attach by one doctor offering services to some patients but refusing service to others. The patient would still receive services from the medical practice itself—the business establishment covered by the Unruh Act. *North Coast* does not suggest that after denying services on the basis of a protected characteristic, such as sexual orientation, a business may avoid liability by providing the name of a *completely different business establishment* that might provide a service, however similar.

Nor does *Minton* support such a proposition. In *Minton*, the trial court had relied on *North Coast* to conclude that Dignity Health's denial of surgery to a transgender patient did not violate the guarantee of full and equal service because the patient's same doctor was eventually allowed to perform the procedure at another facility owned by Dignity Health. (*Minton, supra*, 39 Cal.App.5th at pp. 1161.) But the Court of Appeal *rejected* that

analysis, concluding that the patient had suffered discrimination at the time his surgery was canceled. (*Id.* at p. 1164.) Although Dignity Health later made arrangements for the patient's same doctor to perform the surgery at one of its other hospitals, that merely "mitigate[ed] the damages" and had no impact on whether he "was denied full and equal access to health care treatment, a violation of the Act." (*Id.* at p. 1164.)

The trial court here incorrectly relied on *Minton* to conclude that Tastries's "timely" provision of a referral to a "comparable, good bakery" was sufficient to eliminate its *liability*.[4] (AA2542.) But the *Minton* Court explicitly did not rule on whether a timelier accommodation of Mr. Minton's surgery at another Dignity Health hospital—that was still part of the single defendant business establishment Dignity Health hospital group—would eliminate liability for an Unruh Act violation. (*Minton, supra*, 39 Cal.App.5th at p. 1158 [resolving the case "without determining the right of Dignity Health to provide its services in such cases at alternative facilities"].) Any commentary on that point was pure dicta, and, in any event, says nothing of whether a referral to a separate and independent business establishment would eliminate such liability, with no certainty that the same good or service—here, the specific cake

[4] Moreover, the trial court's finding that Gimme Some Sugar was a "comparable, good bakery" contradicts the evidence in the record as to the Rodriguez-Del Rios, who had already tried and decided against using Gimme Some Sugar because its cakes and frostings were "too sweet" for their family members with diabetes. (AA2542; RT 1061, 1332.)

that the Rodriguez-Del Rios wanted—would be available. (AA2208, AA2297-2300, AA2542; RT 1817-1818.)

The trial court tried to minimize the fact that Tastries and Gimme Some Sugar were separate and independent business establishments: "[t]here is nothing in *Minton* to suggest that the two hospitals were anything other than separate and distinct business organizations," both owned by Dignity Health, that had "different doctors, nurses and administrative staff, using different equipment and medicines." (AA2542.) But, again, *Minton* never decided whether access to alternative hospital facilities constituted full and equal service under the Act. (*Minton, supra*, 39 Cal.App.5th at p. 1158.) Rather, *Minton* held that Dignity Health denied full and equal service when it cancelled Minton's procedure and told his doctor that he could never have the procedure at Mercy hospital. (*Ibid.*, see also *id.* at p. 1160-61 [expressing concern over whether Mr. Minton's same doctor would be able to timely perform the surgery at another facility with his insurance coverage].) While the court in Minton speculated that Dignity's provision of alternative facilities to accommodate Minton's same operation by his same doctor three days later likely mitigated the damages Minton suffered, it never decided, much less addressed, whether offering the surgery at a separate Dignity facility would have constituted full and equal service had it been offered to Minton instead of rejecting his surgery outright. (*Id.* at pp. 1164-1165.)

Moreover, even if the court were to consider whether the referral of the Rodriguez-Del Rios to Gimme Some Sugar could

have mitigated damages, the facts in this case illustrate the inefficacy of Tastries's "referral." As Ms. Miller admitted at trial, Tastries and Gimme Some Sugar were "different bakeries" in "different buildings" with different employees who made different cakes. (RT 1817-1818.) The Rodriguez-Del Rios wanted a cake from Tastries, not Gimme Some Sugar; the record indicates that Gimme Some Sugar could not supply them with a cake they both liked that was not too sweet and appropriate for their diabetic family members. (RT 1061, 1332.) Moreover, Tastries was unable to guarantee that customers it referred to Gimme Some Sugar would actually be able to obtain a cake at the same price and on the needed date—or even that they would be able to obtain a cake at all. (See AA2208, AA2297-2300; RT 1817-1818) It is impossible to provide full and equal service without a guarantee that there will be any service provided at all.

Finally, the trial court's finding that the existence of "another good bakery" that the Rodriguez-Del Rios could go to constituted "full and equal service" undermines the purpose of the Unruh Act itself. (AA2541.) "To say prospective [customers] may [go] elsewhere . . . is also to deny them the right to be treated equally by commercial enterprises; this dignity interest is impaired by even one [business's'] refusal [of service], whether or not the prospective [customers] eventually find [service] elsewhere." (*Smith, supra*, 12 Cal.4th at p. 1175.) The U.S. Supreme Court acknowledged that danger in *Masterpiece Cakeshop*, observing that if a "[First Amendment] exception [to the public accommodations laws] were not confined [to clergy

unwilling to perform same-sex marriages], 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 Cakeshop, Ltd., supra*, 138 S.Ct. at p. 1727.)

In short, the Unruh Act addresses the actions of individual business establishments. Each business establishment must provide full and equal service to each customer, regardless of whether another, independent business establishment in the same community also provides such services.

2. The Rodriguez-Del Rios were harmed as a result of Tastries denying them full and equal service

California's antidiscrimination laws protect "dignity interests in freedom from discrimination based on personal characteristics." (*Smith, supra,* 12 Cal.4th at p. 1170.) Accordingly, the Unruh Act is violated at the time of the denial of service. (*Minton, supra*, 39 Cal.App.5th at p. 1164; see also *Sullivan ex rel. Sullivan v. Vallejo City Unified Sch. Dist.* (E.D. Cal. 1990) 731 F.Supp. 947, 961 [granting preliminary injunction to ameliorate Unruh Act violation due to immediate injury to plaintiff's "dignity and self-respect"].)

In *Minton*, for example, Mr. Minton suffered "great anxiety and grief" at the time his surgery was initially denied. (*Minton, supra*, 39 Cal.App.5th at p. 1159.) Although he was later able to reschedule his surgery at another in-network hospital, the Court

noted that this referral might "mitigate the damages" under some circumstances, but did *not* undo or wipe out the initial harm. (*Id.* at p. 1164.)

Likewise here, the Rodriguez-Del Rios suffered harm at the time of the denial of service, and the referral to Gimme Some Sugar did not and could not alleviate that harm. After their initial positive visit to Tastries, the Rodriguez-Del Rios returned for their appointment to complete their order and do a tasting with both of their mothers and two close friends who were members of their bridal party, anticipating making the final decisions about their cake flavors for the wedding celebration together. (RT 1066, 1068.) When the Rodriguez-Del Rios told Tastries they were a lesbian couple of "two brides," and Tastries immediately refused them service—the same service it would provide a heterosexual couple celebrating an opposite-sex marriage—they were "in shock" from the "discrimination." (RT 1073.)

At trial, the couple described the emotional toll they experienced. Initially, Mireya "felt rejected" and "distraught." (RT 1075-1076.) She "couldn't believe what had happened." (RT 1076.) Later that afternoon, after the shock wore off, Mireya ended up crying so hard that she got an extended nosebleed. (RT 1076-77.) Her wife, Eileen, testified that she "was upset, but . . . also . . . really angry and frustrated because they hurt [Mireya]" and Eileen couldn't "protect her." (RT 1345.) Eileen described how "[Mireya] just broke down. She started crying like I had never seen her before. And I comforted her, and . . . was trying to

be there to support her. But I felt helpless because . . . I can't take that away." (RT 1348.)

This harm was compounded by the fact that the denial of service occurred in front of their family and close friends. (RT 1344.) In addition to trying to process the discrimination herself, Eileen was concerned for her family. (*Ibid.*) "I was more concerned with my wife and mom, to get them out of the situation and take them outside. My mom was so upset. To have my mom go through that pain that she was feeling for me and my wife, we just—I took them out[side]" to attempt to protect and take care of them. (*Ibid.*)

Tastries's referral to Gimme Some Sugar, a separate, independent business establishment, did nothing to alleviate the toll of being humiliated and rejected on the basis of their sexual orientation. And, it did nothing to help the Rodriguez-Del Rios obtain a wedding cake. In fact, the Rodriguez-Del Rios had already visited Gimme Some Sugar and decided not to purchase a cake there because it was too sweet. (AA2535; RT 1061, 1332.) Both of the Rodriguez-Del Rios' parents have diabetes, and the couple wanted a cake that their entire family could enjoy. (RT 1061, 1332.) As Eileen testified, it was a mystery how Ms. Miller "felt like she was offering . . . equal services, when it's not equal. . . . [T]he bakeries are different. They are not owned by the same person, so it's not the same cake." (RT 1346-1347.)

II. THE DEPARTMENT'S ENFORCEMENT OF THE UNRUH ACT DID NOT VIOLATE TASTRIES'S FIRST AMENDMENT RIGHTS

The trial court alternatively held that Tastries's First Amendment right to free speech barred the Department's

enforcement of the Unruh Act under the circumstances.[5] (AA2532.) In the trial court's view, Tastries could not be compelled to "participate in" or "celebrate" same-sex marriages by selling to the Rodriguez-Del Rios the cake the couple wished to purchase—one, as the trial court found, "with a popular design . . . that was on display" and had "no writing or 'cake topper'" (AA2536)—because the act of creating and selling the cake for a wedding was the equivalent of engaging in either "pure speech" or "expressive conduct." (AA2551-2555.) It is true that Ms. Miller and Tastries cannot be compelled to participate in or endorse same-sex weddings—but the trial court was wrong in concluding that the Department's enforcement action ran afoul of that bedrock principle.

The First Amendment both protects individuals' right to speak freely and "prohibits the government from telling people what they must say." (*Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (2006) 547 U.S. 47, 61.) Thus, for example, a state may not require schoolchildren to recite the Pledge of Allegiance and salute the flag (*W. Va. State Bd. of Ed. v. Barnette* (1943) 319 U.S. 624, 642), or require motorists to display a state motto on their license plates (*Wooley v. Maynard* (1977) 430 U.S. 705, 717). However, the Department's enforcement of the Unruh Act in this case—i.e., requiring Tastries to make available to all its customers a predesigned cake

[5] Because Tastries raised the First Amendment as an affirmative defense to preclude the Department from enforcing the Unruh Act, Tastries bore the burden of proof on this issue.

without any words or symbols—did not implicate the First Amendment because it did not compel Tastries to engage in speech, much less speech supporting same-sex marriage.

First, the Department's enforcement of the Act to require that Tastries make *all* of its predesigned goods and services available to *all* customers regardless of sexual orientation did not implicate the First Amendment because the cake chosen by the Rodriguez-Del Rios to celebrate their marriage was not pure speech. The plain white cake they selected lacked any indicia of self-expression commonly associated with objects typically accorded protection as pure speech. Nor did the Department seek to force Tastries to speak or adopt a particular message. For example, the Department made no demands about the design of Tastries's products; it merely asked that it sell its products equally to all customers.

Second, the acts of preparing and selling a cake of the kind the Rodriguez-Del Rios sought to purchase do not qualify as protected expressive conduct because they lack sufficient communicative elements to implicate the First Amendment. The U.S. Supreme Court's recent decision in *303 Creative LLC v. Elenis*, *supra*, 600 U.S. 570 reinforces this conclusion; the standard cake at issue here does not remotely resemble an "'original, customized'" wedding website—replete with "text, graphics, and in some cases videos," some of which are generated by the designer for each individual client. (*Id.* at p. 594.) On the facts of *this* case, the trial court's ruling would, if upheld,

undermine large swaths of public accommodations law and thwart the core purposes of the Unruh Act.

A. The Department's enforcement of the Unruh Act did not compel pure speech

"[P]ure speech"—i.e., the expression of ideas unaccompanied by any other relevant conduct—is "entitled to comprehensive protection under the First Amendment." (*Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 505-506.) Speech that "qualif[ies] for the First Amendment's protections" extends beyond "'oral utterance and the printed word'"; it also includes "'pictures, films, paintings, drawings, and engravings'" and their equivalent. (*303 Creative LLC*, *supra*, 600 U.S. at p. 587, quoting *Kaplan v. California* (1973) 413 U.S. 115, 119-120.)

While California courts appear to have had few opportunities to address what constitutes pure speech for First Amendment purposes, federal case law is instructive. The U.S. Supreme Court has explained that even the "painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll," despite their lack of a "narrow, succinctly articulable message," constitute pure speech. (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 U.S. 557, 569.) An original painting similarly constitutes protected speech because "an artist conveys his sense of form, topic, and perspective"; "may express a clear social position"; or may express a "vision of movement and color." (*White v. City of Sparks* (9th Cir. 2007) 500 F.3d 953, 956.) "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." (*Ibid.*)

For just this reason, however, "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." (*Cressman v. Thompson* (10th Cir. 2015) 798 F.3d 938, 953, citations omitted, ellipsis in original.) The nature of this inquiry is necessarily "context-driven." (*Ibid.*) For example, the mass reproduction of an image of a sculpture on a state license plate does not generally "implicate[] concerns about self-expression" and thus does not constitute pure speech. (*Id.* at pp. 953-954.) Nor does the sale of "playing cards with artistic designs on the back" or "T-shirts emblazoned with the stars and stripes." (*Mastrovincenzo v. City of N.Y.* (2d Cir. 2006) 435 F.3d 78, 94.)

The wedding cake in this case falls on the non-speech side of that dividing line. 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. As the trial court acknowledged in its decision, the Rodriguez-Del Rios "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.'"[6]

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[6] As demonstrated by the images below (see page 52, *infra*), Tastries sells "cake toppers," which are small decorations placed on top of the cake that depict images or words such as "Mr. and Mrs." or "Oh baby!" (AA2301-2302; RT 1544.)

(AA2536.) The couple did not request that the cake have *any* words, images, or depictions, let alone any words, images, or depictions that would have indicated their sexual orientation or that the cake would be eaten at a celebration of their marriage (such as a figurine of two brides). (AA2536; RT 1065, 1272-1273, 1336.) If the Rodriguez-Del Rios had wanted a cake with words or with a topper containing symbols, *that* might well have constituted speech, because words and symbols both convey meaning and have traditionally been regarded as speech. But that question is not presented in this case.

Rather, the predesigned cake at issue is like the commercial products that courts have held are not pure speech, such as non-customized license plates, T-shirts, and playing cards. The evidence at trial showed that the particular cake design the Rodriguez-Del Rios selected for their wedding celebration was sold by Tastries for multiple non-wedding celebrations. (RT 943, 1022.) As Tastries acknowledged, it regularly makes and sells the same cake for various types of parties, such as birthdays, baby showers, and quinceañeras. (RT 942-943, 1022, 1825.) When shown a picture of the very cake design the Rodriguez—Del Rios tried to purchase from Tastries, Tastries manager Rosemary Perez conceded that: (1) a plain, white, three-tier cake such as the one the Rodriguez-Del Rios wanted at their wedding was—without writing or a topper—indistinguishable from a cake intended for an anniversary, a baby shower, a fancy party, or a quinceañera; and (2) Tastries sold such a cake for an array of events. (RT 942-943.)

Similarly, when shown a picture of the cake design the Rodriguez-Del Rios used for their wedding celebration, a former Tastries employee Mary Johnson testified that style of cake is sold at Tastries not just for weddings, but also for "anniversaries, birthdays, and weddings" and "bridal showers, baby showers, and quinceañeras." (RT 1022.) And when shown a similar Tastries cake, Ms. Miller agreed that a cake like that "could be used for different events, a really nice birthday party or quinceañera." (RT 1825.) This shows that the plain cake at issue here could not be speech, because it could not express a particular message about the nature of marriage when served at a wedding but not express that message, or express a different message, when served at a quinceañera or birthday party.

The following trial exhibits demonstrate visually how the same, popular cake serves multiple functions:

Wedding Cake
(AA2301)

Baby Shower Cake
(AA2302)

The photograph on the left shows the type of three-tier wedding cake that the Rodriguez-Del Rios tried to buy from

Tastries Bakery (though, as discussed above, they wanted it without a topper of any kind); the photograph on the right shows how the same cake is used for baby showers. It is only from the words on the toppers—and not from the cakes themselves—that one learns of each cake's intended use. Accordingly, the plain, unadorned cake selected by the Rodriguez-Del Rios was simply a non-expressive commercial product.

The trial court also concluded that the cake the Rodriguez-Del Rios wished to buy was pure speech because Ms. Miller intended Tastries's cakes, when used at weddings, to send a message of support for heterosexual marriage. (AA2551-2555.) But Ms. Miller's personal *intent* that a cake serve as an "expression of support" for heterosexual marriage, alone, is legally insufficient to transform a commercial product into a work of self-expression, particularly where the product itself does not independently convey or express that message. Whether an image or object constitutes pure speech depends on an objective analysis of "the expressive content of the materials being sold," not the subjective intent of "the vendor." (*Mastrovincenzo*, *supra*, 435 F.3d at p. 94; see also *Rumsfeld, supra*, 547 U.S. at p. 69 ["saying conduct is undertaken for expressive purposes cannot make it symbolic speech"].)

First, as discussed above, the plain, white, cake selected by the Rodriguez-Del Rios was bereft of words, imagery, or flourishes that conveyed or even hinted at Ms. Miller's point of view about marriage. And Tastries provided no evidence at trial that guests at a wedding reception or any other members of the

public would readily understand the cake in question to communicate any particular message regarding marriage, let alone Ms. Miller's intended message. To the extent wedding guests might understand a plain white cake to convey any message—and there is no evidence of that here—it would be purely because of the *customer's* choice in using the cake. For example, the cake selected by the Rodriguez-Del Rios could not plausibly be understood to say anything about Ms. Miller's views on marriage if displayed at a birthday party, just as an identical cake Ms. Miller intended for a birthday party could not plausibly express Ms. Miller's views on birthdays if displayed at a wedding.

Second, even the trial court acknowledged that Ms. Miller's intent was only evident from the written Design Standards. (AA2552.) Although the Design Standards themselves may constitute pure speech, there is no legal basis to conclude that cakes baked in accordance with those standards become imbued with an otherwise invisible message that transforms them into pure speech. And, in any case, there was no evidence at trial that anyone who saw the cake at the Rodriguez-Del Rios' wedding—or saw a Tastries cake at any other event—would have any knowledge of those internal Design Standards. Thus, Ms. Miller's intent alone—even if contained in an extrinsic writing—did not convert Tastries's goods and services into speech.

B. The act of preparing and selling a standardized, predesigned, unadorned cake is not expressive conduct under the First Amendment

The trial court held that, in addition to being pure speech, baking and selling the wedding cake the Rodriguez-Del Rios

wished to buy constituted protected expressive conduct. (AA2552.) This alternative holding, too, was error.

The First Amendment's speech clause protects "'conduct'" that is "'sufficiently imbued with elements of communication.'" (*Texas v. Johnson* (1989) 491 U.S. 397, 404, quoting *Spence v. Washington* (1974) 418 U.S. 405, 409.) The Supreme Court has accordingly extended First Amendment protection to numerous acts of symbolic expression, including flag burning (*Id.* at p. 399), wearing a black armband to protest the Vietnam War (*Tinker*, *supra*, 393 U.S. at pp. 508-511), wearing uniforms and displaying swastikas in a march (*Nat. Socialist Party of America v. Skokie* (1977) 432 U.S. 43, 44), displaying a red flag (*Stromberg v. California* (1931) 283 U.S. 359, 369), placing a peace sign on an American flag to protest the Kent State shooting and extension of the Vietnam War (*Spence*, *supra*, 418 U.S. at pp. 409-10), and refusing to salute the flag (*Barnette*, *supra*, 319 U.S. at p. 632). In each instance, the conduct was held constitutionally protected because the symbol or activity clearly communicated an intended message. That is far from the case here.

Protected expressive conduct or symbolic speech must meet two conditions: (1) "'[a]n intent to convey a particularized message was present,'" and (2) "'the likelihood was great that the message would be understood by those who viewed it.'" (*Johnson*, *supra*, 491 U.S. at p. 404, quoting *Spence*, *supra*, 418 U.S. at p. 410-11.) This case falls well short of those requirements.

The trial court thought the *Spence-Johnson* test was satisfied because of Tastries's Design Standards. "The [D]esign

[S]tandards . . .," the trial court wrote, "leave *no* room for doubt that Miller intends a message" and that "a*ll* 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." (AA2552.) But that cannot be correct; even Ms. Miller herself could not have intended to express a message that marriage is about the union of one man and one woman *through the cake* because, as discussed above, that type of cake was sold for many different types of celebrations. (RT 943, 1022, 1825; see, *supra*, at pp. 51-52.) Thus, the first prong of the *Spence-Johnson* test has not been satisfied in this case.

Nor has the second prong. As the trial court acknowledged, the message that Ms. Miller believed the cake expressed "is not a message that everyone may perceive, or accept." (AA2552.) That observation was correct: common sense dictates that few would perceive the preparation of a standard cake devoid of words or images that could be used for a range of celebrations as offering support or opposition to same-sex marriage, rather than a business simply selling a standard good to a customer. At its core, this was a typical sales transaction that falls within the realm of public accommodations laws, not expressive conduct protected by the First Amendment. More importantly, there was no evidence at trial that anyone other than Ms. Miller perceived

the cake in this way, much less that there was a great likelihood it would be so understood.[7]

The second prong of the test is not satisfied for another, familiar reason as well: the Supreme Court has "extended First Amendment protection only to conduct that is *inherently* expressive." (*Rumsfeld*, *supra*, 547 U.S. at p. 66, italics added.) As discussed above, there is nothing inherently expressive about an unadorned cake generally—and that's particularly true for a cake used interchangeably for birthday parties, baby showers, and quinceañeras, as well as weddings. Even the trial court recognized that the Design Standards—and not the cake itself—were the source of any particular message about marriage. (AA2552.) Unlike the red flag in *Stromberg* or the black armband in *Tinker*, the cake was not expressive on its own. As discussed above (see, *supra*, at pp. 15-16), these standards do state that Tastries will not make wedding cakes that "contradict God's sacrament of marriage between a man and a woman." (AA2282-2285.) But as the Supreme Court has held, when "such explanatory speech is necessary," there is "strong evidence that

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[7] The trial court also noted that Tastries will deliver cakes to wedding reception venues. (AA2533, AA2552.) It determined that delivery, too, conveyed a message of support for that event. (AA2552.) But there is neither a legal nor factual basis for this conclusion. No court has determined that delivering goods—particularly goods such as the plain cake at issue here—is itself inherently expressive conduct that readily conveys a message associated with the good to objective observers. And there was no evidence at trial that anyone understood the delivery of Tastries's cakes to convey such a message.

the conduct at issue here is not so inherently expressive that it warrants protection." (*Rumsfeld*, *supra*, 547 U.S. at p. 66.) The very need for explanatory speech reveals that the "expressive component . . . is not created by the conduct itself but by the speech that accompanies it." (*Ibid.*) Were it otherwise, "a regulated party could always transform conduct into 'speech' simply by talking about it." (*Ibid.*)

C. The Supreme Court's recent decision in *303 Creative* is inapposite here

After the trial court entered judgment in this case, the Supreme Court held that a Colorado public accommodations law violated the First Amendment speech rights of a custom website designer who "provides her own expressive services." (*303 Creative LLC*, *supra*, 600 U.S. at p. 597.) The case involved a public accommodation law and a claim of discrimination against a same-sex couple. But nothing in *303 Creative* affects the analysis here.

303 Creative centered on a stipulation between the parties that effectively resolved the question of whether the website designer's services constituted expressive activity. "Doubtless," the Court acknowledged, "determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions." (*303 Creative LLC*, *supra*, 600 at p. 599.) "But," it noted, "this case presents no complication of that kind" because "[t]he parties have *stipulated*" that the website and graphic design services provided by Ms. Smith, the petitioner and website designer, is "expressive activity." (*Ibid.*)

And if there is expressive activity, "First Amendment protections" typically "follow." (*Ibid.*)

303 Creative thus sheds no light whatsoever on the central question in this case—whether Tastries or Ms. Miller were engaged in speech or expressive conduct at all. The Court rebuffed the suggestion that conduct rather than speech was at issue in *303 Creative* not through any analysis, but simply because of "Colorado's stipulation that Ms. Smith's activities are 'expressive.'" (*303 Creative LLC, supra*, 600 U.S. at p. 597, citation omitted.) That in turn led almost inexorably to the conclusion that "'pure speech'" was at issue. (*Ibid.*, citation omitted.) And that conclusion was hardly surprising on the stipulated facts of the case. The parties agreed that "Ms. Smith's websites promise to contain 'images, words, symbols, and other modes of expression'"; that "every website will be her 'original, customized' creation"; and that "Ms. Smith will create these websites to communicate ideas—namely, to 'celebrate and promote the couple's wedding and unique love story.'" (*Id.* at p. 587.)

The facts here are starkly different. There is no stipulation; the product is an unadorned cake, containing no images or words; and it is not original or customized, but rather a predesigned, standardized design used for numerous types of parties. Neither *303 Creative* nor any other precedent suggests that a cake of that kind, or the act of selling it, constitutes expression for First Amendment purposes.

If the trial court's conclusion and rationale were adopted, it would be difficult to identify any wedding vendors whose products or services would not implicate the First Amendment. That raises the prospect that all manner of vendors—insurance companies, shuttle bus operators, event halls, party furniture rental stores, alcohol distributors, and caterers, among many others—could potentially refuse to serve gays and lesbians simply because they disapprove of same-sex weddings. And the harm would not stop there—wedding vendors could seemingly refuse to serve interracial couples and others under the same rationale. (Cf. *303 Creative LLC*, *supra*, 600 U.S. at pp. 638-639 [dis. opn. of Sotomayor, J.].) All of this would be profoundly at odds with the Unruh Act's core purpose of ensuring that Californians enjoy "full and equal" access to business establishments. (Civ. Code, § 51.)

The Department here is not trying to "eliminate disfavored ideas" or to "force an individual to speak in ways that . . . defy her conscience." (*303 Creative LLC, supra*, 600 U.S. at p. 602, alterations omitted.) The Department understands and respects that Ms. Miller and other Californians have a First Amendment right to express opposition to same-sex marriage. And *303 Creative* makes clear that businesses actually engaged in speech or expression may decline to offer their services for events or projects—including same-sex weddings—that do not align with their views. But *303 Creative* is not a blank check for all wedding vendors to refuse to serve same-sex couples based on their opposition to same-sex marriage. The rationale of that case

cannot be extended to the facts here, concerning non-speech and non-expressive conduct, without doing grievous harm to the ability of gays and lesbians—as well as many other Californians—to participate as full and equal members of society.

CONCLUSION

The judgment of the trial court should be reversed, and the case should be remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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October 20, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANT'S OPENING BRIEF uses a 13 point Century Schoolbook and contains 12642 words.

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