

1 NELSON CHAN, Assistant Chief Counsel (#109272)
2 GREGORY J. MANN, Associate Chief Counsel (#200578)
3 KENDRA TANACEA, Associate Chief Counsel (#154843)
4 SOYEON C. MESINAS, Staff Counsel (#324046)
5 DEPARTMENT OF FAIR EMPLOYMENT
6 AND HOUSING
7 320 West 4th Street, Suite # 1000, 10th Floor
8 Los Angeles, California 90013
9 Telephone: (213) 439-6799
10 Facsimile: (888) 382-5293

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

ELECTRONICALLY FILED
7/21/2022 5:03 PM
Kern County Superior Court
By Maribel Villalon, Deputy

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

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

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

20 vs.

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

26 EILEEN RODRIGUEZ-DEL RIO and MIREYA
27 RODRIGUEZ-DEL RIO,
28
29 Real Parties in Interest.

Case No. BCV-18-102633

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

Date: July 25, 2022

Time: 9:00 a.m.

Dept.: J

Location: 1215 Truxtun Ave, Bakersfield,
CA 93301

Judge: Hon. J. Eric Bradshaw

Action Filed: October 17, 2018

Trial Date: July 25, 2022

Table of Contents

1

2 I. INTRODUCTION 1

3 II. PARTIES AND REPRESENTATION 4

4 A. Plaintiff DFEH and Real Parties in Interest Eileen and Mireya Rodriguez-Del Rio 4

5 B. Defendants Cathy’s Creations, Inc. and Catharine Miller 4

6 III. PROCEDURAL BACKGROUND 4

7 A. DFEH’s Investigation of Real Parties’ Administrative Complaint..... 5

8 B. DFEH’s Government Code Section 12974 Preliminary Injunction Action..... 5

9 C. Civil Action..... 5

10 IV. ANALYTICAL FRAMEWORK FOR FACTUAL AND LEGAL QUESTIONS TO BE

11 RESOLVED AT TRIAL 6

12 A. Unruh Act Violation..... 6

13 B. Free Exercise of Religion Defense..... 7

14 C. Free Speech Defense 7

15 V. STATEMENT OF FACTS 8

16 A. Defendants Violated the Unruh Act by Intentionally Making a Distinction Based on Sexual

17 Orientation..... 8

18 1. Cathy’s Creations, Inc. dba “Tastries” Is a For-Profit Corporation with No Official

19 Religious Affiliation 8

20 2. Tastries’ Design Standards Policy Makes a Facial Distinction Between Gay and Straight

21 Couples Purchasing Preordered Baked Goods to Celebrate Events Related to Their Marriage

22 9

23 3. Eileen and Mireya Rodriguez-Del Rio Visit Tastries in Search of Wedding Cakes and are

24 Invited to Return for a Cake Tasting..... 10

25 4. Tastries Makes a Distinction Based on Sexual Orientation to Deny Eileen and Mireya’s

26 Wedding Cakes Order 11

27 5. The Rodriguez-Del Rios Exchange Vows and Host Reception with Family and Friends.... 12

28

1	VI. LEGAL ARGUMENT	12
2	A. The Evidence Establishes a Violation of the Unruh Act.....	13
3	1. Defendants Intended to Make a Distinction Between Their Gay and Straight Customers	
4	Seeking Marriage-Related Preordered Baked Goods	15
5	a. There is No Distinction Between Gay Status and Conduct Closely Associated with that	
6	Status	15
7	2. Referral to An Unaffiliated Bakery is Not Full and Equal Services.....	17
8	B. Miller’s First Amendment Rights Do Not Exempt Tastries from Complying with the Unruh	
9	Act.....	19
10	1. Free Exercise of Religion: the Unruh Act is a Neutral and Generally Applicable Public	
11	Accommodations Law that Satisfies Deferential Review Under <i>Smith</i> and California Law	19
12	a. Substantial Burden Analysis: The Burden Upon Miller’s Religious Practice Does Not	
13	Outweigh the Burden Upon Tastries’ Customers and Employees.....	22
14	2. Free Speech: Miller’s Free Speech Rights Do Not Exempt Tastries from Complying with	
15	the Unruh Act.....	23
16	a. The Sale of Baked Goods is at Most Symbolic Expression.....	24
17	i. Baking and Selling Preordered Baked Goods Is Not Expressive.....	25
18	ii. There Is No Message From Tastries.....	25
19	b. The Unruh Act Governs Tastries Business Conduct; It Does Not Compel Miller’s Speech	
20	26
21	C. Where Does It End?	28
22	VII. RELIEF	28
23	A. Actual Damages, Including Emotional Distress Damages	28
24	B. Statutory Damages	28
25	C. Injunctive Relief.....	29
26	D. Attorney’s Fees	30
27	VIII. CONCLUSION	30
28		

Table of Authorities

Page(s)

Federal Cases

Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez,
(2010) 561 U.S. 661..... 16

Church of Lukumi Babalu Aye, Inc. v. Hialeah, (1993) 508 U.S. 520..... 2, 22

Clark v. Cmty. for Creative Non-Violence, (1984) 468 U.S. 288 25

Employment Div., Dept. of Human Resources of Oregon v. Smith (1988) 485 U.S. 660..... 14

Employment Div., Ore. Dept. of Human Res. v. Smith, (1990) 494 U.S. 872..... 2, 19, 20, 22

Fulton v. City of Philadelphia, Pennsylvania, (2021) 141 S.Ct. 1868..... 2, 20, 21

Giboney v. Empire Storage & Ice Co., (1949) 336 U.S. 490..... 27

Gutierrez v. Gonzalez (C.D. Cal. 2017) WL 1520419..... 14

Hishon v. King & Spalding, (1984) 467 U.S. 69 24

Hollingsworth v. Perry, (2013) 570 U.S. 693 17

Lawrence v. Texas, (2003) 539 U.S. 558 16

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n (2018) 138 S.Ct. 1719..... 3, 17, 20

Nevada Comm’n on Ethics v. Carrigan, 564 U.S. 117 25, 26

Newman v. Piggie Park Enters., Inc., (1968) 390 U.S. 400 3, 17, 20

Obergefell v. Hodges, 576 U.S. 30

Roberts v. U.S. Jaycees, (1984) 468 U.S. 609 21, 24

Rumsfeld v. Forum for Academic and Institutional Rights, Inc., (2006) 547 U.S. 47 Passim

Spence v. Washington, (1974) 418 U.S. 405..... 25

United States v. Lee, (1982) 455 U.S. 252..... 19

United States v. O’Brien, (1968) 391 U.S. 367..... 25

West Virginia Bd. of Ed. v. Barnette, (1943) 319 U.S. 624 27

Wilkins-Jones v. County of Alameda, (N.D. Cal. 2012) 859 F.Supp.2d 1039 14

Wooley v. Maynard, (1977) 430 U.S. 705..... 27

1	State Cases	
2	<i>Catholic Charities of Sacramento v. Superior Court</i> , (2004) 32 Cal.4th 527	12, 14, 22
3	<i>Curran v. Mount Diablo Council of the Boy Scouts</i> , (1983) 147 Cal.App.3d 712	13
4	<i>Elane Photography, LLC v. Willock</i> , (2013) 309 P.3d 53.....	27
5	<i>Harris v. City of Santa Monica</i> , (2013) 56 Cal.4th 203.....	14
6	<i>In re Marriage Cases</i> , (2008) 43 Cal.4th 757	16, 17
7	<i>Johnson Controls, Inc. v. Fair Emp. & Hous. Com.</i> , (1990) 218 Cal.App.3d 517.....	17
8	<i>Koebke v. Bernardo Heights Country Club</i> , (2005) 36 Cal.4th 824.....	17
9	<i>Koire v. Metro Car Wash</i> , (1985) 40 Cal.3d 24.....	14
10	<i>Minton v. Dignity Health</i> , (2019) 39 Cal.App.5th 1155	17, 18
11	<i>North Coast Women’s Care Medical Group v. Super. Ct.</i> , (2008) 44 Cal.4th 1145	Passim
12	<i>People v. Montes</i> , (2014) 58 Cal.4th 809.....	5
13	<i>Rescue Army v. Municipal Ct.</i> , (1946) 28 Cal.2d 460.....	22
14	<i>Smith v. Fair Empl. & Hous. Com.</i> , (1996) 12 Cal.4th 1143.....	3, 23
15	<i>State v. Arlene’s Flowers, Inc.</i> , (2019) 193 Wash.2d 469	23, 27
16	<i>Turner v. Assoc. of Am. Med. Colleges</i> , (2008) 167 Cal.App.4th 1401.....	14
17	<i>White v. Square, Inc.</i> , (2019) 7 Cal.5th 1019.....	15
18		
19	California Codes	
20	Civil Code § 51	4, 13, 17, 21, 22
21	Civil Code § 52	4, 30
22	Evidence Code § 350	12
23	Government Code § 11139.8	13, 19
24	Government Code § 12926	4
25	Government Code § 12930	4
26	Government Code § 12948	4
27	Other Authorities	
28	Judicial Council of California Civil Jury Instructions (2022) No. 3060.....	6, 14

1 **I. INTRODUCTION**

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

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

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

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

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

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

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

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

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

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

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

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

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

4 **II. PARTIES AND REPRESENTATION**

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

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

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

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

22 **III. PROCEDURAL BACKGROUND**

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

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

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

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

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

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

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

17 **C. Civil Action**

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

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

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

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

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

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

8 **A. Unruh Act Violation**

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

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

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

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

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

19
20
21 _____
22 ⁴ There is no evidence that DFEH was biased during the investigation or litigation. (See DFEH’s MIL
23 No. 3; Defendants’ Opposition to DFEH’s MIL No. 3; Defendants’ MILs No. 7 and 8.) As shown by
24 the highlighted exhibits supporting defendants’ arguments of alleged bias, defendants seek to prevent
25 DFEH from citing to relevant precedent and arguing by analogy to other civil rights cases. This is
26 mere legal analysis, not bias. (See Trissell Decl. (Third) ISO of Defendants’ Oppositions to Plaintiff’s
27 Motions in Limine, Ex. 21 [Notice of Filing Discrimination Complaint; Ex. 22C [DFEH legal brief
28 quoting *North Coast*]; Ex. 22D [DFEH legal brief quoting and discussing relevant precedent, *Piggie
Park* and *Hobby Lobby*]; Ex. 22E [legal arguments based on controlling case law]; Ex. 25F [DFEH
counsel arguing analogy to *Piggie Park* during oral argument]; Ex. 23 [DFEH notice of cause finding
and mandatory dispute resolution]; Ex. 24B [DFEH counsel’s oral argument]; Ex. 25A [DFEH legal
brief citing to *Piggie Park* and *North Coast* as precedent]; and Ex. 25B [DFEH legal brief relying
upon *North Coast*]; Ex. 25C [DFEH legal brief citing to *North Coast*]. None of these cited instances
are evidence of bias or non-neutrality. These are legal arguments properly made under existing law. It
is clear that defendants are seeking to exclude DFEH’s legal arguments based on relevant legal
precedent. As the court should rule, this is wholly improper.

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

3 **B. Free Exercise of Religion Defense**

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

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

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

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

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

17 **C. Free Speech Defense**

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

21 Tastries bears the burden of proof on this affirmative defense:

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

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

26
27
28 ⁵ See DFEH's MIL No. 1 (no distinction between status and conduct) and DFEH's Opposition to
Defendants' MIL No. 4 (referral to another bakery does not cure an Unruh Act violation).

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

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

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

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

11 V. STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25
26
27 ⁷ On August 22, 2017, Mireya emailed Tastries to sign up for the August 26, 2017 cake tasting. The
28 next day, August 23, 2017, Natalie from Tastries replied that she scheduled the Rodriguez-Del Rios’
tasting at 12:15 p.m. (Ex. 516, 8/23/2017 emails.) This was a second invitation from Tastries to
return, sample the cake flavors, and complete their order.

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

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

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

9 **VI. LEGAL ARGUMENT**

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

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

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

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

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

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

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

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

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

23 ⁸ DFEH need only prove sexual orientation was a *motivating* reason. “Whether the FEHA standard
24 applies under the Unruh Act has not been addressed by the courts.” (CACI No. 3060, Directions for
25 Use). In adjudicating Unruh Act cases before and after *Harris v. City of Santa Monica* (2013) 56
26 Cal.4th 203, courts have articulated that plaintiff must only show that a protected characteristic was
27 only a motivating reason for defendant’s unlawful conduct. (See, *Turner v. Assoc. of Am. Med.*
28 *Colleges* (2008) 167 Cal.App.4th 1401, 1411; *Wilkins-Jones v. County of Alameda* (N.D. Cal. 2012)
859 F.Supp.2d 1039, 1048; *Gutierrez v. Gonzalez* (C.D. Cal. Apr. 26, 2017, No. 2:17-cv-01906-
CAS(Ex)) 2017 WL 1520419, at p. 5.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21
22 ¹² Because the nondiscrimination clause in the parties’ contract permitted discretionary exemptions,
23 the Court applied a reframed strict scrutiny analysis to such situations, stating that it “must
24 ‘scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.’
25 [Citation.]” (*Fulton, supra*, 141 S.Ct. at p. 1881.) CSS asserted that it sought an exemption to allow it
26 to continuing serving children “in a manner consistent with its religious beliefs; it [did] not seek to
27 impose those beliefs on anyone else.” (*Id.* at p. 1882) The Court held that the City’s refusal to
28 contract with CSS did not survive strict scrutiny review because the “City offer[ed] no compelling
reason why it ha[d] a particular interest *in denying an exception to CSS while making them available
to others.*” (*Ibid.* [italics added].)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25
26
27 ¹⁴ See, e.g., *Roberts v. U.S. Jaycees* (1984) 468 U.S. 609, 625-29 (private, commercial association
28 had no free speech right to exclude women from full membership); *Hishon v. King & Spalding*
(1984) 467 U.S. 69, 78 (prohibiting law firm from discriminating on the basis of gender in making
partnership decisions did not violate members’ free speech or association rights).

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

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

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

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

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

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

1 17 So yeah. I'm sorry. I was going to -- the
2 18 event is selected by the host. I mean, they choose to
3 19 have the event, whatever it is, and they choose the
4 20 theme. And while we assist in helping them achieve
5 21 their design and their vision within certain budgets,
6 22 they are choosing what elements are going to go into the
7 23 design of the cake, the way they want it to look.
8 24 And so it's a collaborative process, but it's
9 25 directed at what they're wanting, not what Cathy wants
10 1 or any of our designers think is best. It's about what
11 2 do they want? What's the image? What's the message?
12 3 What's the theme? What's the purpose? All of those are
13 4 factored into the selection of the ultimate design. And
14 5 that's finally agreed on and set by the person who's the
15 6 host or who's ordering the cake, which is usually the same.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 **VII. RELIEF**

22 Civil Code section 52 provides for the following relief:

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

24 The Rodriguez-Del Rios suffered significant emotional distress.

25 **B. Statutory Damages**

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

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

3 **C. Injunctive Relief**

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

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

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

4 **D. Attorney’s Fees**

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

7 **VIII. CONCLUSION**

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

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

24 ///

25 ///

26 ///

27 ///


28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

Dated: July 21, 2022

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

By: 

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

EXHIBIT 1



1 **PROOF OF SERVICE BY ELECTRONIC MAIL**

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

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

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

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

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

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

14 Charles S. LiMandri – Email: climandri@limandri.com
15 Jeffrey M. Trissell – Email: jtrissell@limandri.com
16 Paul Jonna – pjonna@limandri.com
17 Kathy Denworth – Kdenworth@limandri.com
18 LiMANDRI & JONNA, LLP
19 16236 San Dieguito Road, Building 3, Suite # 3-15
20 P.O. Box # 9120
21 Rancho Santa Fe, California 92067
22 Thomas Brejcha – Email: tbrejcha@thomasmoresociety.org
23 Peter Breen – Email: pbreen@thomasmoresociety.org
24 THOMAS MORE SOCIETY
25 309 West Washington Street, Suite # 1250
26 Chicago, Illinois 60606

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

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

