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 REPLY BRIEF

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INTRODUCTION

Respondents Cathy's Creations, Inc. and owner Catharine Miller (collectively "Tastries") do not contest that, consistent with Tastries's own policy, Tastries refused to sell wedding cakes to same-sex couples like Real Parties in Interest Eileen and Mireya Rodriguez-Del Rio that it offered to opposite-sex couples. Instead, Tastries argues that the trial court was correct to conclude that it did not violate the Unruh Civil Rights Act ("Unruh Act" or "the Act") because: (1) it employed a "facially neutral" policy that discriminated against the *act* of same-sex marriage, not sexual orientation, and merely had a disparate impact on same-sex couples; (2) its policy is motivated by Ms. Miller's religious belief that marriage is reserved for unions between a man and a woman, rather than a malicious intent towards gay and lesbian couples; and (3) it provided full and equal service by referring the Rodriguez Del-Rios to a separate business.

None of these arguments has merit. Discrimination against individuals participating in a same-sex wedding is *necessarily* discrimination on the basis of sexual orientation. California law rightly recognizes that there is an inextricable link between a same-sex marriage and the sexual orientation of the individuals who form such a union. Tastries's policy of refusing to serve those celebrating same-sex marriages—as expressed in its written "Design Standards"—is, therefore, a facially discriminatory policy of denying select goods and services to gay and lesbian couples on the basis of sexual orientation and violates the Unruh Act. And because the Act also prohibits

discrimination based on association with a person with a protected trait, it does not matter that Tastries applies this policy "equally" to any customer seeking to purchase a cake for a same-sex marriage. Finally, neither Ms. Miller's lack of malice nor Tastries's referral of the Rodriguez-Del Rios to another bakery negates its unlawful conduct and harm to the Rodriguez-Del Rios. Whether Ms. Miller was motivated by her religious beliefs is immaterial under the Act because the Rodriguez-Del Rios' sexual orientation was a substantial motivating factor in denying service.

Tastries also argues that the trial court correctly concluded that the First Amendment protected Tastries's discriminatory conduct because the predesigned, plain white cake it refused to sell to the Rodriguez Del-Rios for their wedding celebration was pure speech and expressive conduct that embodied Ms. Miller's support for marriage. In Tastries's view, the California Civil Rights Department's ("the Department") enforcement action sought to force Ms. Miller to adopt a message with which she disagrees in violation of her right to free speech. But the plain, predesigned white cake at issue—which contained no indicia of speech such as writing, images, or symbols—did not express Ms. Miller's intended message that marriage may exist only between one man and one woman. The undisputed factual record established that the cake at issue was used for a variety of different types of celebrations, from baby showers to quinceañeras. A reasonable observer viewing the cake at the Rodriguez-Del Rios' wedding would be very unlikely to perceive it as conveying any message at all regarding the nature of marriage.

Finally, Tastries urges this Court to reverse the trial court's ruling that the Department's enforcement of the Unruh Act violated its rights to the free exercise of religion. But—as the California Supreme Court has squarely held in *North Coast Women's Care Medical Group, Inc. v. Super. Ct.*—the Unruh Act is a valid and neutral law of general applicability which "requires business establishments to provide 'full and equal accommodations . . .' to all persons notwithstanding their sexual orientation." (*North Coast Women's Care Medical Group, Inc. v. Super. Ct.* (2008) 44 Cal.4th 1145, 1156.) It neither treats secular conduct more favorably than religious conduct, nor contains any discretionary exemptions. Thus, even if enforcement of the Unruh Act burdened religious exercise, that would not trigger strict scrutiny under the Free Exercise Clause. Tastries's contention that the Department has acted with hostility toward religion in violation of the First Amendment also fails as the record does not support that serious allegation, and the trial court correctly rejected it.

As the Department has emphasized (Appellant's Opening Brief (AOB) 14), it does not seek to force Ms. Miller or Tastries to endorse or speak in support of same-sex marriage; the Department acknowledges and respects that Ms. Miller opposes same-sex marriage on account of her religious faith. But there is no constitutional justification that allows businesses in California to discriminate based on sexual orientation, and Tastries's refusal to serve the Rodriguez-Del Rios did just that.

ARGUMENT

I. TASTRIES'S REFUSAL TO SELL A CAKE TO THE RODRIGUEZ-DEL RIOS FOR THEIR MARRIAGE CELEBRATION VIOLATED THE UNRUH ACT

A. Tastries's refusal to sell wedding cakes to same-sex couples or people associated with them constitutes intentional discrimination based on sexual orientation

It is undisputed that Tastries, in accordance with its Design Standards, refused to sell the Rodriguez-Del Rios a wedding cake because they were a same-sex couple. (4 Appellant's Appendix (AA) 1012-1013, 1015; 5 Reporter's Transcript (RT) 1073.) By denying them a cake offered to opposite-sex couples to celebrate an opposite-sex union, Tastries discriminated based on sexual orientation in violation of the Unruh Act. (See AOB 23-38.)

Tastries argues that the Department failed to prove intentional discrimination based on sexual orientation because its Design Standards constituted a "facially neutral" policy targeting same-sex marriage rather than gay or lesbian couples, and that the policy had, at most, a disparate impact on those couples. (Respondent's Brief (RB) 27-30.) Tastries further contends that it lacked the requisite intent to discriminate under the Act because its differential treatment of gay and lesbian couples was motivated by Ms. Miller's religious beliefs rather than intentional malice towards those couples. (RB 30-32.) These arguments lack merit.

First, Tastries's Design Standards are not facially neutral. They are facially discriminatory: they allow the sale of wedding cakes for opposite-sex unions, but prohibit the sale of the same items for same-sex unions. (12 AA 2282-2285 [Design Standards

state bakery will provide service only to celebrate a marriage of "one man and one woman"].) That *is* discrimination based on sexual orientation.

As the California Supreme Court has explained, prohibitions related to same-sex marriage "must be understood" as "discriminating on the basis of sexual orientation." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 783-784.) Limiting service to "opposite-sex couples" "operate[s] clearly and directly to impose different treatment on gay individuals because of their sexual orientation." (*Id.* at p. 839.) This is because "[b]y definition, gay individuals are persons who are sexually attracted to persons of the same sex and thus, if inclined to enter into a marriage relationship, would choose to marry a person of their own sex or gender." (*Ibid.*) Like marriage, limiting wedding services to those entering into a "union of persons of opposite sexes, thereby placing [them] outside of the reach of couples of the same sex, unquestionably imposes different treatment on the basis of sexual orientation." (*Id.* at pp. 839-840.)

Thus, even if provisions restricting marriage to a man and a woman "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." (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 839.) The U.S. Supreme Court's decisions likewise "have declined to distinguish between status and conduct in this

context." (*Christian Legal Society v. Martinez* (2010) 561 U.S. 661, 689.)[1]

In fact, Ms. Miller has *admitted* that Tastries's Design Standards treat customers differently because of their sexual orientation:

> Q: "If a straight couple came in, you would have taken their order and Tastries would have provided that cake, right?"
>
> A: "Correct."

(8 RT 1826.) She separately explained that the Design Standards were drafted in part to exclude "homosexual marriage." (7 RT 1600.) Thus, by Ms. Miller's own admission, the Design Standards are intended "to accomplish discrimination on the basis of a protected trait" (*Martinez v. Cot'n Wash, Inc.* (2022) 81 Cal.App.5th 1026, 1036, brackets omitted) by providing service to "straight couple[s]" that Tastries refuses to those entering a "homosexual marriage." (7 RT 1600, 8 RT 1826.) This is intentional discrimination on the basis of a protected trait—sexual orientation.

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[1] To support its argument that discrimination against same-sex unions is distinguishable from discrimination on the basis of sexual orientation under the Unruh Act, Tastries also cites to a concurring opinion from a Kentucky state court case—decided on standing grounds—that solely discusses First Amendment arguments, and a foreign opinion that United Kingdom law did not require writing "Support Gay Marriage" on a cake. (RB 28-29.) Neither case applies to the facts here, nor overrides California and U.S. Supreme Court precedent.

Tastries further contends that its Design Standards are not facially discriminatory because Tastries offers *other* baked goods to gay and lesbian customers, and it refuses to sell a cake for a same-sex wedding to *any* customer. (RB 28.) These arguments too are fatally flawed. Tastries ignores that the Unruh Act applies to all provided services, requiring "equal treatment of patrons in *all* aspects of the business." (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 29, italics added; see AOB 34-35.) Thus, willingness to sell *some* goods to gay and lesbian customers does not insulate a business from liability for refusing to sell them *other* goods that a straight couple can buy. Tastries's theory also overlooks the fact that the Unruh Act *separately* prohibits refusals of service to anyone associated with members of the protected class. (Civ. Code, § 51, subd. (e)(6) [defining "sexual orientation" to include people "associated with" someone of that sexual orientation].) A heterosexual customer seeking to purchase a cake for use at a same-sex wedding is undoubtedly "associated with" the participants in the wedding. Thus, refusing to sell a cake for use at a gay or lesbian wedding violates the Unruh Act regardless of the purchaser's sexual orientation. Such a policy violates that customer's "right to associate with members of the protected class, as a class." (*Hubert v. Williams* (1982) 133 Cal.App.3d Supp. 1, 5 [plaintiff who was evicted for hiring a lesbian assistant stated cognizable Unruh Act claim for sexual orientation discrimination, even though the plaintiff was not gay].)

Tastries also argues its "facially neutral" policy merely disparately impacted gay and lesbian couples, which alone cannot demonstrate an intent to discriminate based on sexual orientation. (RB 29-30, citing *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824.) But as explained above, Tastries's Design Standards are not facially neutral. They discriminate on the basis of sexual orientation by expressly excluding same-sex couples from being able to purchase wedding cakes Tastries offers to heterosexual couples, which is facially discriminatory. Thus, *Koebke* and other cases addressing policies that *were*, *in fact*, facially neutral with respect to sexual orientation are easily distinguishable. *Koebke*, for example, held that a country club's restriction of certain club benefits to married members' spouses, at a time when same-sex couples could not legally marry, was not facially discriminatory based on sexual orientation because it excluded all unmarried couples. (*Koebke*, *supra*, 36 Cal.4th at pp. 853-854.) Tastries's Design Standards, by contrast, deny a product (wedding cakes) *only* to same-sex couples, and provide that same product to heterosexual couples, and in so doing facially discriminate on the basis of sexual orientation. (See, e.g., *In re Marriage Cases*, *supra*, 43 Cal.4th at p. 839.)[2]

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[2] The other cases Tastries cites (RB 25-27) likewise make the unexceptional point that disparate impact from a facially neutral policy is not enough to sustain an Unruh Act claim. For instance, in *Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal.App.4th 1224, the court rejected a blind person's Unruh Act claim premised on a cable television company's failure to offer a

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Second, Tastries contends that the Department failed to establish intent to discriminate because the Department did not disprove that Ms. Miller was motivated by her "sincere Christian beliefs." (RB 30-31, quoting 13 AA 2546.) But the Design Standards are facially discriminatory, and therefore, it is irrelevant whether malice or some other belief was the motive for that policy. (See *Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910, 924-926 [holding that a marketing product that expressly relied on users' age and gender was not facially neutral, and a "defendant who pursues discriminatory practices" even if in pursuit of other goals "nonetheless violates the Unruh Civil Rights Act"].) Thus, Ms. Miller's religious motivation for purposefully discriminating against a protected class does not shield Tastries from liability for discrimination on the basis of sexual orientation under the Unruh Act. (See AOB 27-34.)

Rather, the trial court should have considered Ms. Miller's religious beliefs only in the context of an affirmative defense under the Free Exercise Clause. (See *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1155-1161 [holding that

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stand-alone FM radio or music package. (*Id.* at pp. 1237-1238, and fn. 9.) Similarly, in *Turner v. Assn. of Am. Medical Colleges* (2008) 167 Cal.App.4th 1401, the court rejected a claim that a standardized test administrator's failure to offer accommodations for individuals with attention deficit hyperactivity disorder (ADHD) violated the Act. (*Id.* at p. 1409.) As Tastries's Design Standards are facially discriminatory rather than facially neutral, these cases are inapposite.

denying service on the basis of marital status violated antidiscrimination law and considering underlying religious motivations only in the subsequent analysis of defendant's First Amendment defense].) The trial court erred by conflating the issue of whether Tastries's refusal to sell a same-sex couple a wedding cake constituted discrimination based on sexual orientation with the separate issue of whether Ms. Miller's sincerely held religious beliefs constitute a valid affirmative defense under the Unruh Act. (See 13 AA 2545-2554.) This was legal error because Ms. Miller's religious motivations are immaterial to the question of whether Tastries's intentional denial of service constituted discrimination based on sexual orientation. As discussed above, it clearly did. By comparison, when the trial court considered Ms. Miller's religious motivations in their proper context—as an affirmative defense—it correctly observed that her free exercise rights did not provide a valid defense under these circumstances. (13 AA 2554; see *post*, pp. 29-43.)

Thus, the Department has not "improperly discount[ed] the court's fact-finding" regarding Ms. Miller's intent (RB 30), but rather is highlighting a legal error in the trial court's analysis of whether Tastries had the requisite intent to discriminate under the Unruh Act. While Ms. Miller's religious beliefs are relevant to her First Amendment defenses (which fail for the reasons discussed below), they do not negate Tastries's facially discriminatory Design Standards or intent to discriminate on the basis of sexual orientation.

B. Tastries's referral to a separate business did not insulate it from liability for failing to provide full and equal service under the Unruh Act

To say that customers may go elsewhere to be served "endorse[s] the 'separate but equal'" theory, which courts have refused to do. (*Rivera v. Crema Coffee Co., LLC* (N.D. Cal. 2020) 438 F.Supp.3d 1068, 1076.) Tastries's flawed, contrary argument that referring the Rodriguez-Del Rios to an entirely different bakery was the equivalent of providing the full and equal service required under the Unruh Act (RB 33-34) misconstrues the holdings of *North Coast Women's Care Medical Group, Inc.*, *supra*, 44 Cal.4th 1145 and *Minton v. Dignity Health* (2019) 39 Cal.App.5th 1155. (See AOB 38-44.)

At most, *North Coast* suggests that an individual employee or contractor who has a religious objection to a customer's request for service may refer the customer to a different employee or contractor at the *same* business, not a *separate* business. In dicta, the court speculated that a medical practice might avoid a conflict between an individual physician's religious beliefs and the Unruh Act's antidiscrimination provisions: the medical practice could either choose not to offer the procedure to anyone or it could provide access to that medical procedure through a "North Coast physician lacking defendants' religious objections"—i.e., by referring the patient to a doctor *within* North Coast, the same defendant business establishment. (*North Coast, supra,* 44 Cal.4th at p. 1159.)

Similarly, Tastries erroneously claims that *Minton* allowed religious objectors to meet Unruh Act obligations by "provid[ing] all persons with full and equal medical care at comparable

facilities not subject to the same religious restrictions." (RB 33-34.) But *Minton* expressly did *not* decide this question, and its discussion of comparable facilities was limited to contemplation of a potential referral to "a different nearby Dignity Health hospital"—a hospital within the same defendant business establishment. (*Minton, supra,* 39 Cal.App.5th at pp. 1158, 1164-1165; see AOB 39-44.)[3] Thus, *Minton*—like *North Coast*—does not establish that a business provides full and equal service by referring a customer to a separate business. Rather, *Minton* and *North Coast* at most hold that a business may substitute one professional for another professional within the same business in order to effectively comply with the Unruh Act and accommodate the professional's religious objections.

Tastries also argues that *Fulton v. City of Philadelphia* (2021) 593 U.S. 522 requires that service providers with certain religious beliefs *must* be allowed to refer customers to separate businesses. (RB 34.) But *Fulton* has no bearing on the analysis of whether Tastries's conduct constituted intentional discrimination on the basis of a protected classification under the Unruh Act. First, *Fulton* was not a public accommodations case, and thus sheds no light on how public accommodations laws in general or the Unruh Act in particular apply to service providers

[3] Tastries incorrectly describes the two *Minton* hospitals as "separate and distinct business organization[s]." (RB 35, citing 13 AA 2547 [trial court decision].) In fact, both hospitals were subsidiaries of one defendant entity: Dignity Health. (*Minton, supra,* 39 Cal.App.5th at pp. 1164-65.)

with religious objections to serving certain customers. (See *Fulton*, *supra*, 593 U.S. at p. 538.) Second, *Fulton* did not address the legal issues now before this Court. It did not discuss whether religious foster care service provider Catholic Social Services (CSS)'s refusal to certify same-sex couples as foster parents was facially discriminatory, nor did it address whether CSS's referral of these couples to other agencies negated the intentional discrimination. (See *id*. at pp. 529, 540.) *Fulton* instead held that Philadelphia's refusal to refer foster children to CSS violated CSS's rights under the Free Exercise Clause. (*Ibid.*) For the reasons discussed below, *Fulton* does not aid Tastries in its First Amendment defense given the significant differences between the factual and legal context of the two cases. (See *post*, pp. 32-36.)

Finally, Tastries's claim that "it makes little practical difference *to the customer* whether they are referred to an affiliated corporation or not" (RB 35, italics in original) ignores the Unruh Act's text and purpose, as well as the specific facts of this case. The Unruh Act mandates that *all* businesses provide full and equal service to ensure "the equality of all persons in the right to the particular service offered." (*Curran v. Mount Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712, 733.) That is partly, though not solely, because the Act and other public accommodations laws seek to protect individuals from the "stigmatizing injury" "that surely accompanies" discrimination. (*Roberts v. U.S. Jaycees* (1984) 468 U.S. 609, 625.) And the record clearly shows that the customers here *did* care. When the

Rodriguez-Del Rios disclosed they were a lesbian couple and Tastries refused them service, they were "in shock" from the "discrimination." (5 RT 1073.) The Rodriguez-Del Rios had already visited the "referral" bakery, and decided the cake there was too sweet. (13 AA 2540; 5 RT 1061, 6 RT 1332.) As Eileen testified, it was a mystery how Ms. Miller "felt like she was offering . . . equal services, when it's not equal." (6 RT 1346-1347.)

C. Ms. Miller's religious beliefs do not exempt Tastries from the Unruh Act's antidiscrimination provisions

Finally, Tastries argues it is exempt from the Unruh Act's requirements because Ms. Miller's refusal of service is protected under the First Amendment, and public policy supports exempting Tastries to accommodate Ms. Miller's religious beliefs. (RB 36-37.) Tastries's First Amendment argument is not an "exemption" under the Unruh Act's text, which has no explicit exemptions; its First Amendment defenses must be considered separately from whether its conduct violated the Unruh Act. (See AOB 31-34; *Smith v. Fair Employment & Housing Com., supra,* 12 Cal.4th at pp. 1155, 1161.) As discussed in Sections II and III below, those defenses fail.

Tastries mischaracterizes as "public policy exemptions" a handful of court decisions which upheld certain types of differential treatment. (RB 37-38.) The Unruh Act does not have explicit statutory "public policy exemptions"—courts have occasionally approved of differential treatment by businesses based on certain categories that are not enumerated in the

Unruh Act, such as age, when there are compelling social reasons to permit the differential treatment, and that differential treatment applies to customers regardless of their membership in enumerated protected classifications. (See AOB 28-31; e.g., *Koire*, *supra*, 40 Cal.3d at p. 31 [discussing cases "upholding a discriminatory practice *only* when there is a strong public policy in favor of such treatment," such as excluding children from bars because it is illegal to serve alcoholic beverages to minors and age is not an enumerated classification under the Unruh Act].) Likewise, courts have approved of discount pricing for senior citizens, for example, because, among other considerations, the discount was available to seniors regardless of sex, race, or color. (*Pizarro v. Lamb's Players Theatre* (2006) 135 Cal.App.4th 1171, 1173, 1176 [observing that the senior discount "was given to all persons born between 1946 and 1964, *regardless of the personal characteristics enumerated in the Act*," italics added].) But Tastries can cite no examples of California courts ever allowing discrimination in Unruh Act cases based on sexual orientation.

Moreover, public policy compels *equal* treatment. The Legislature has enumerated sexual orientation in the Act, and courts have determined that eliminating disparities between same-sex and opposite-sex couples, including in access to marriage, serves a compelling societal interest because such discrimination relies on biased and improperly stereotypical treatment. (See, e.g., *In re Marriage Cases*, *supra*, 43 Cal.4th at p. 844.) And the Legislature has emphasized that "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 code to define marriage as between "two persons" rather than "a man and a woman"].)

II. THE FIRST AMENDMENT'S FREE SPEECH CLAUSE DOES NOT PROTECT TASTRIES'S REFUSAL TO SERVE THE RODRIGUEZ-DEL RIOS

Tastries argues that it cannot be compelled to create a cake for a same-sex union under the Unruh Act because the Free Speech Clause of the First Amendment shields it from having to express support for same-sex marriage. (RB 39-49.) But the predesigned, plain white cake at issue—which contained none of the hallmarks traditionally associated with speech, such as writing, images, or symbols—would not inherently express any message about marriage between same- or opposite-sex couples. That is why Tastries is willing to sell *that precise cake* for use in a wide variety of ceremonies, from baby showers to quinceañeras. And there is no indication that a reasonable observer viewing the cake at the Rodriguez-Del Rios' wedding would have perceived the cake as conveying a message approving of same-sex marriage, or indeed any message at all. The cake and conduct at issue here are not protected speech under the First Amendment.

A. The wedding cake the Rodriguez-Del Rios selected—but were denied—was not protected pure speech because it was not inherently expressive

Tastries contends that the plain, predesigned white cake that the Rodriguez-Del Rios tried to purchase is inherently expressive of Ms. Miller's beliefs about marriage and thus

protected as pure speech under the First Amendment. (RB 39-47.) It is not. (See AOB 46-54.)

1. Ms. Miller's subjective intent did not make the plain white cake inherently expressive

Tastries argues that Ms. Miller's intent that Tastries's wedding cakes represent "artistic expression of support for a man and a woman uniting in the 'sacrament' of marriage" transformed these cakes from mere confections into protected pure speech. (RB 41, citing 13 AA 2556.) But there is no legal basis to conclude that the cake at issue—an objectively neutral and commercial good that lacked the traditional indicia of protected speech—was imbued with hidden meaning and transformed into protected speech simply because the maker or vendor subjectively intended it to be so. (See *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (2006) 547 U.S. 47, 69 ["saying conduct is undertaken for expressive purposes cannot make it symbolic speech"].)

As discussed in the Department's Opening Brief (AOB 49-54), the proper question is 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.) And the nature of this inquiry is context driven. (*Id.* at p. 952.) Thus, courts have deemed art, literature, and music to be speech despite their lack of "narrow, succinctly articulable message," but have found that items that are primarily goods exchanged via the stream of commerce—such as license plates, playing cards, and t-shirts—do not constitute protected pure speech, even if they contain images or design elements. (*Hurley*

v. Irish-American Gay, Lesbian and Bisexual Group of Boston (1995) 515 U.S. 557, 569; see also *Mastrovincenzo v. City of N.Y.* (2d Cir. 2006) 435 F.3d 78, 94; *Cressman*, *supra*, 798 F.3d at pp. 952-954.) The predesigned, white cake at issue here is one of many consumable items regularly sold by a commercial bakery to customers celebrating not just weddings but other occasions as well. (5 RT 942-943 and 1022, 8 RT 1825.)

As Tastries conceded at trial, the "wispy cake" with "'wavy' frosting" and "flowers . . . but no writing or 'cake topper'" (13 AA 2541; see also 12 AA 2306-2307; 5 RT 1065, 6 RT 1272-1273 and 1336; AOB 50-54) that the Rodriguez-Del Rios chose was indistinguishable from cakes sold by Tastries for a wide array of events, ranging from baby showers to quinceañeras. (5 RT 942-943 and 1022, 8 RT 1825.) That feature distinguishes this cake from a cake that is actually expressive—for instance, one inscribed with the message "Support Gay Marriage"—which, presumably, Tastries would be unwilling to sell for use in *any* kind of ceremony. Thus, viewed on its own, the cake is neither inherently expressive nor contains any discernible message, let alone a message of Ms. Miller's particular viewpoint about marriage being between a man and a woman. Even if designed to be generally visually appealing, the cake falls squarely in the category of commercial goods offered for sale and consumption, not created primarily for its maker's self-expression. (See AOB 50-52.)

Tastries nonetheless claims that the cake at issue here is analogous to the website addressed in the U.S. Supreme Court's

recent decision in *303 Creative LLC v. Elenis* (2023) 600 U.S. 570, because Tastries's cakes "celebrate and promote" Ms. Miller's understanding of marriage. (RB 40-41.) But *303 Creative* does not support Tastries's argument that the cake at issue is pure speech. (See AOB 58-61.)

First, *303 Creative* did not hold that any product that may be used in conjunction with a wedding is inherently expressive of the creator's views about marriage and thus is pure speech. Such a rule would make no sense, given the wide variety of non-expressive items commonly used in wedding celebrations, such as tables, chairs, dining utensils, and sound systems. Rather, the Court determined that a particular service—a custom-designed wedding website—was entitled to First Amendment protection because it would contain "images, words, symbols and other modes of expression" that would "communicate ideas—namely to 'celebrate and promote the couple's wedding and unique love story' and to 'celebrate[e] and promot[e]' what Ms. Smith understands to be a true marriage." (*303 Creative*, *supra*, 600 U.S. at p. 587.) The website design was therefore speech, and the website's creator could not be compelled to create sites that conveyed a message about marriage that was antithetical to her beliefs. (*Id.* at pp. 583-603.)

Second, a wedding website is qualitatively different from the predesigned, unadorned cake the Rodriguez-Del Rios sought to purchase, which lacked any of the expressive hallmarks present in the website at issue in *303 Creative*. (Compare 13 AA 2541 ["wispy cake" with "'wavy' frosting" and "flowers . . . but no

writing or 'cake topper'"] with *303 Creative*, *supra*, 600 U.S. at p. 587; see also 12 AA 2306-2307 [intended purpose for three-tier white cakes indeterminable but for toppers]; 5 RT 942-943 and 1022, 8 RT 1825.) As discussed above, such a cake—one that could take on almost any meaning depending on the purchaser's ultimate use and presentation of it—is incapable of inherently communicating *any* particularized message about marriage, let alone the cake maker's personal beliefs. And the Rodriguez-Del Rios did not seek any customizations to Tastries's standard cake that would imbue it with such clear meaning. (13 AA 2541; 5 RT 1065.)

2. The cake at issue here did not objectively convey Ms. Miller's viewpoint about marriage

Tastries also contends that a wedding cake itself—even one without words, images, or symbols—is pure speech because it is a symbol of the baker's or bakery's celebration or endorsement of the particular union. (RB 42-43.) That argument is far too broad, and unpersuasive in the factual context of this case. In some circumstances, a cake may contain expressive elements—such as writing or symbols—that a reasonable observer would perceive to be the baker's speech. Or a baker may convey a message through acts outside the stream of commerce, such as by personally presenting a cake to the couple during the wedding ceremony itself. The facts of *this* case, however, involve a same-sex couple's attempt to purchase a predesigned, plain white cake through an ordinary, arm's-length commercial transaction. On that factual record, Tastries' attempt to equate that cake with its own speech fails.

When a good that is not inherently expressive such as the cake at issue in this case—or, to take examples from other well-known cases, a black armband or red flag—is put into the regular stream of commerce, no reasonable observer would perceive the item to constitute the speech of the manufacturer or seller of the item. Although that item may later take on meaning by virtue of the conduct of the person who acquires it—for example, when the black armband is worn at an anti-war protest (see *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 505-506) or the red flag waved at an event supporting Communism (see *Stromberg v. People of Cal.* (1931) 283 U.S. 359, 361-365)—it is the consumer's ultimate use of the object that gives it meaning and *not* the original manufacturer's personal beliefs or intent. Indeed, Tastries acknowledges that wearing arm bands and carrying red flags "could mean many things in many contexts and is not immediately recognizable as a symbol of anti-war protest" or "advoca[cy] for Communism." (RB 46, citing *303 Creative*, *supra*, 60 U.S. at p. 600, fn. 6.) Like the arm bands in *Tinker* and the red flags in *Stromberg*, the plain, predesigned cake at issue here would not have expressed a celebratory message about the Rodriguez Del-Rios' marriage on the part Tastries, as the baker. The cake could only have conveyed a celebratory message by virtue of the Rodriguez-Del Rios' act of using it as part of their marriage celebration, and the message would have been their own. Thus, requiring Ms. Miller to sell such a wedding cake to heterosexual and gay and lesbian couples

alike, would not have placed her in peril of having to "speak" a message with which she did not agree.

3. Because the cake was not inherently expressive, enforcing the Unruh Act against Ms. Miller would not compel speech celebrating same-sex marriage

Tastries contends that the Department's action to enforce the Unruh Act's antidiscrimination provisions is the equivalent of compelling Ms. Miller to "speak in a manner that celebrates same-sex marriage." (RB 47.) But Tastries misapprehends and mischaracterizes the Department's efforts, and its reliance on *Reed v. Town of Gilbert* (2015) 576 U.S. 155, and *National Inst. of Family & Life Advocates v. Becerra* (2018) 585 U.S. 755, are equally misplaced. (See RB 47-48.) The Department has never asked Tastries to speak against or in support of any form of marriage, and Tastries has not—and cannot—point to evidence of such a request. (See RB 47-49; see also 1 AA 49-63.) The Department has not, for example, asked Tastries to inscribe cakes with written messages celebrating same-sex marriage, or to stock cake toppers that depict same-sex couples. And, contrary to Tastries's claims otherwise (see RB 48), the Department has not expressed a view regarding Ms. Miller's *beliefs* about marriage. As the state agency charged with enforcing antidiscrimination laws, including the Unruh Act, the Department seeks only to require Tastries to stop engaging in discriminatory *conduct*. (1 AA 61-63.)

The trial court's extension of speech protections to the maker of a commercial good sold in the ordinary stream of commerce that does not otherwise clearly and objectively present the

creator's intended message is without precedent. If upheld, the court's decision risks severely eroding public accommodations laws—both in the context of same-sex marriages and more broadly, including with respect to interracial couples. (See AOB 60.)

B. The act of preparing, selling, or delivering a plain, predesigned cake is not expressive conduct

Preparing and selling a plain, predesigned wedding cake also falls well short of expressive conduct protected under the First Amendment. (AOB 54-58.) The First Amendment protects "conduct" that is "'sufficiently imbued with elements of communication.'" (*Texas v. Johnson* (1989) 491 U.S. 397, 404, quoting *Spence v. Wash.* (1974) 418 U.S. 405, 409.) Under the *Spence-Johnson* test, protected expressive conduct or symbolic speech must meet two conditions.

First, there must be evidence of "'[a]n intent to convey a particularized message.'" (*Johnson*, *supra*, 491 U.S. at p. 404, quoting *Spence*, *supra*, 418 U.S. at p. 410-411.) Tastries argues that Ms. Miller herself clearly intends to convey such a message, as evidenced by her Design Standards and the way she operates her business in accordance with her Christian values. (RB 44-45.) But as discussed above, the cake selected by the Rodriguez-Del Rios itself bore no evidence of that intent—e.g., no hallmarks of speech that conveyed a particular message about marriage, let alone Ms. Miller's intended message. (See *ante*, pp. 20-25.) And, although the cake could have been viewed as a general symbol of celebration once displayed within the wedding venue's tableau, it could not have been viewed by a reasonable observer as

conveying its *maker's* celebration of the Rodriguez-Del Rios' marriage. (See *ibid*.)

Second, the "'likelihood'" must be "'*great*'" "that the [particularized] message would be understood by those who viewed it.'" (*Johnson*, *supra*, 491 U.S. at p. 404, italics added, quoting *Spence*, *supra*, 418 U.S. at pp. 410-411.) And that particularized message must itself be *inherently* expressive—that is able to be readily understood based on the conduct or symbol alone, without any accompanying speech or explanation. (*Rumsfeld*, *supra*, 547 U.S. at p. 66.)

As discussed above, the plain, predesigned cake at issue here does not inherently express Ms. Miller's message of support for marriage between one man and one woman, thus it *cannot* communicate that message to a reasonable observer. (See *ante*, pp. 20-25.) And Tastries has provided no evidence that there is any likelihood, let alone a *great* likelihood, that a reasonable person would have interpreted Tastries's sale of a plain, predesigned cake to the Rodriguez-Del Rios as an expression of Ms. Miller's personal support for or endorsement of that union. Ms. Miller's intent alone cannot imbue the cake with her particularized message in the absence of hallmarks such as words, images, or symbols that would convey her message to the viewer. An object cannot become symbolic speech just because its creator says it is, or else the concept of symbolic speech is diluted to the point of losing all meaning.

Finally, Tastries suggests that the act of delivering and setting up a cake is itself expressive conduct protected by the

First Amendment. (See RB 45-46, fn. 11.) Although *participation* in a wedding ceremony may constitute protected expression (*Kaahumanu v. Hawai'i* (9th Cir. 2012) 682 F.3d 789, 799), there is no evidence that the Rodriguez-Del Rios asked Ms. Miller to participate in their wedding ceremony, for example by publicly presenting the cake to the couple. And Tastries provides no legal support for its assertion that the commercial delivery of goods to a venue *before* a ceremony takes place is the equivalent of such "participation" under the First Amendment. (See RB 45-46.) Such commercial deliveries of goods outside of the ceremonies themselves bear none of the hallmarks of expressive conduct under the *Spence-Johnson* test. In any case, Tastries's arguments about delivery and set-up are speculative, at best, given that Tastries refused to sell a cake to the Rodriguez-Del Rios at all; Tastries did not offer to sell a cake on the condition that it be picked up at the bakery.

III. THE DEPARTMENT'S ENFORCEMENT OF THE UNRUH ACT DID NOT VIOLATE TASTRIES'S FREE EXERCISE RIGHTS UNDER THE FIRST AMENDMENT

The First Amendment forbids the government from prohibiting the free exercise of religion. However, as the U.S. Supreme Court has made clear, "the right of free exercise 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)." (*Employment Div., Dept. of Human Resources of Or. v. Smith* (1990) 494 U.S. 872, 879, italics added, superseded by statute on other grounds.) Laws that are neutral and

generally applicable "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." (*Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520, 531.) Applying this test, the trial court correctly found that the Department's enforcement of the Unruh Act did not violate the Free Exercise Clause. (13 AA 2552-2554.)

Tastries now urges this Court to hold that the Free Exercise Clause excused its discrimination against the Rodriguez-Del Rios because Ms. Miller has religious objections to same-sex marriage and requiring her to sell the cake to the Rodriguez-Del Rios would have burdened her religious beliefs. (RB 49-64.) Disregarding binding precedent, Tastries contends that the Unruh Act is not a valid and neutral law of general applicability because it allows for so-called "discretionary exemptions." Tastries is mistaken. Although courts have determined that certain conduct falls outside of the Act's prohibitions when it is reasonable and supported by strong public policy, the Act itself does not provide a mechanism for individual, discretionary exemptions from its requirements. And neither the Unruh Act nor the Department's instant enforcement action treated comparable secular activity more favorably than religious activity, nor treated Ms. Miller's specific religious beliefs with hostility.

A. The Unruh Act is a valid and neutral law of general applicability

Ignoring *North Coast*, Tastries contends that the Unruh Act is not a valid and neutral law of general applicability. (RB 56-

58.) Yet *North Coast* holds the opposite, concluding that the Unruh Act *is* a neutral law of general applicability and making clear that, under the U.S. Constitution, "the First Amendment's right to the free exercise of religion does *not* exempt" defendants such as Tastries "from conforming their conduct to the Act's antidiscrimination requirements even if compliance poses an incidental conflict with defendants' religious beliefs." (*North Coast*, *supra*, 44 Cal.4th at p. 1156, italics added, citing *Lukumi*, *supra*, 508 U.S. at p. 531 and *Employment Div. v. Smith*, *supra*, 494 U.S. at p. 879.)

Indeed, "a religious objector has *no federal constitutional right* to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious beliefs." (*North Coast*, *supra*, 44 Cal.4th at p. 1155.)[4] And as the California Supreme Court resolved in *North Coast*, the Unruh Act is one such law. (*Id.* at p. 1156.)

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[4] Tastries notes that *North Coast* did not resolve what level of scrutiny is appropriate when considering a challenge to the Unruh Act under California's own Free Exercise Clause. (RB 56, fn. 13.) In fact, the *North Coast* Court held that this standard of review did not matter because the Unruh Act's protection of sexual orientation *survives strict scrutiny* in the face of a free exercise defense: California has a compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation and there are no less restrictive means for the state to achieve this goal. (*North Coast*, *supra*, 44 Cal.4th at p. 1158.) The same is true here.

1. The Unruh Act does not contain individualized discretionary exemptions

Disregarding *North Coast*, Tastries argues that the Unruh Act is not a generally applicable law because it allows for "discretionary exemptions." (RB 58-59.) Tastries is wrong.

A law is not generally applicable if it "'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for *individualized* exemptions.'" (*Fulton*, *supra*, 593 U.S. at p. 533, italics added, quoting *Employment Div. v. Smith*, *supra*, 494 U.S. at p. 884.) For example, in *Fulton*, the Court determined that "the inclusion of a formal system of entirely discretionary exceptions in [the contract] render[ed] the contractual non-discrimination requirement not generally applicable." (*Fulton*, *supra*, 593 U.S. at p. 536.)[5] Likewise, many cases arising in the context of "unemployment compensation programs" involved "individualized government assessment of the reasons for the relevant conduct"—i.e., a system of discretionary, case-by-case exemptions. (*Employment Div. v. Smith*, *supra*, 494 U.S. at p. 884, citing *Bowen v. Roy* (1986) 476 U.S. 673, 708, and *Sherbert v.*

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[5] Tastries also relies on *Fellowship Christian Athletes v. San Jose Unified School Dist. Bd. of Educ.* (9th Cir. 2023) 82 F.4th 664. But, like the contract language in *Fulton*, the policies at issue in *Fellowship Christian Athletes* allowed the school district "significant discretion in applying exceptions to its own programs, as well as to student programs" on an "ad hoc basis." (*Id.* at p. 687.) Here, by contrast, the Unruh Act allows no such discretionary exceptions to its prohibition against discrimination based on the enumerated classification of sexual orientation.

Verner (1963) 374 U.S. 398, 401, fn. 4.) By contrast, the Unruh Act contains nothing like a "formal system of entirely discretionary exceptions" nor any other process for obtaining individualized exemptions on a case-by-case basis. (See Civ. Code, § 51, et seq.)

Tastries contends that California courts have, in effect, created such exemptions, for example by upholding policies allowing discounted pricing for senior citizens or limiting children's access to certain community pools. (RB 58-59.) But Tastries misapprehends the cases it cites. California courts have neither created statutory "exemptions," nor endorsed a judicial process for individuals to seek individualized discretionary exemptions from the Act on the basis of their personal beliefs. Rather, the cases Tastries cites reflect efforts by California courts to define the contours of when differential treatment based on characteristics *not expressly protected* by the Act—such as age and parental status—violates the statute in the first place.

The Unruh Act prohibits business establishments from discriminating on the basis of enumerated characteristics, including "sexual orientation," as well as others like "race, color, religion, ancestry, [and] national origin." (Civ. Code, § 51, subd. (b).) Courts have interpreted the Act to also prohibit discrimination based on categories that are not expressly mentioned in the statute where the differential treatment is deemed "arbitrary, invidious, or unreasonable." (*Sargoy v. Resolution Trust Corp.* (1992) 8 Cal.App.4th 1039, 1043; see also *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 736; *In re Cox*

(1970) 3 Cal.3d 205, 216-217.) But in each of these decisions the courts have determined that differential treatment based on unenumerated characteristics is "reasonable, and thus nonarbitrary, *where a strong public policy exists in favor of such treatment*." (*Sargoy*, *supra*, 8 Cal.App.4th at p. 1043, citing, inter alia, *Koire*, *supra*, 40 Cal.3d 24.)

As the California Supreme Court has observed, the "public policy considerations applicable to" certain groups defined by unenumerated characteristics such as age—for example, populations with distinct needs such as "children [and] senior citizens"—are often "very different from those applicable" to other enumerated protected classes under the Unruh Act. (*Koire*, *supra*, 40 Cal.3d at pp. 37-38.) Accordingly, reasonable policies that promote the welfare of children and seniors do not violate the Unruh Act, whereas policies that discriminate on other bases—for example, a pricing policy that discriminates on the enumerated basis of sex—certainly do. (*Ibid.*) These are not "exemptions" in any meaningful sense—and certainly not "individualized exemptions." (*Fulton*, *supra*, 593 U.S. at p. 533.) Rather, these cases reflect the Legislature's understanding that differential treatment on the basis of unenumerated characteristics such as age may not always be harmful or invalid in every context, whereas discrimination based on a "personal characteristic[] enumerated in the Act" (*Pizarro*, *supra*, 135 Cal.App.4th at p. 1176) such as race is categorically harmful and prohibited.

The cases Tastries cites (RB 58-60) reflect this approach. For example, courts have concluded that differential treatment that benefits senior citizens is permissible in many contexts. (See, e.g., *Pizarro*, *supra*, 135 Cal.App.4th at p. 1173 [upholding age-based discounted theater tickets]; *Sargoy*, *supra*, 8 Cal.App.4th at p. 1043 [upholding higher interest rates for seniors].) Similarly, courts have upheld differential treatment that benefits children or sets reasonable limits on their access to certain facilities, but not treatment that penalizes their families. (See, e.g., *Sunrise County Club Assn. v. Proud* (1987) 190 Cal.App.3d 377, 382-383 [upholding policy limiting children's access to certain pools for safety reasons but invalidating policy prohibiting condominium sales to families with children younger than 16]; *Marina Point*, *supra*, 30 Cal.3d at p. 726 [landlord's policy of excluding all families with minor children from apartment complex was arbitrary and violated the Act].) Here, unlike the cases Tastries cites, the differential treatment had the effect of denying service to and harming—not protecting—same-sex couples based on their sexual orientation.

Like age, parental status and motherhood are not enumerated in the Unruh Act. (Civ. Code, § 51.) Thus, courts have found it is permissible for businesses to limit Mother's Day giveaways to women over the age of 18 where there are legitimate policy reasons to do so—for example, the infeasibility of asking every person whether they individually celebrate Mother's Day—though any preferential treatment for women has otherwise been held unlawful under the Act. (Compare *Cohn v.*

Corinthian Colleges, Inc. (2008) 169 Cal.App.4th 523, 526-530, with *Koire*, *supra*, 40 Cal.3d at pp. 37-38.) And, at the time *Koebke* was decided, marital status—married versus unmarried—was not an enumerated protected classification, the Court turned to public policy to determine whether differential treatment based on marriage was arbitrary and unreasonable. (*Koebke, supra,* 36 Cal.4th at pp. 853-854; see *ante*, p. 12)

By contrast, where the differential treatment is based on a clearly enumerated classification—such as sex or gender—and the policy in question facially discriminates on such grounds, courts uniformly have held that such discrimination violates the Unruh Act. (See, e.g., *Koire, supra,* 40 Cal.3d at pp. 37-38; *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 165.)[6] None of the cases Tastries cite involve an exemption from the Unruh Act's prohibition of discrimination based on the enumerated characteristics. Here, sexual orientation is a clearly

[6] Tastries also cites *Chabner v. United of Omaha Life Insurance Co.* (9th Cir. 2000) 225 F.3d 1042, and suggests courts allow an exception to the Unruh Act for facially different insurance pricing based on disability, which is an enumerated classification. (RB 60.) But *Chabner* applied an insurance-specific statutory exception to the Unruh Act expressly enacted by the Legislature, allowing for differential insurance pricing based on "a physical or mental impairment" so long as the "rate differential is based on sound actuarial principles or is related to actual and reasonably anticipated experience." (*Chabner*, *supra*, 225 F.3d at p. 1050, citing Ins. Code, § 10144.) There is no remotely analogous statutory provision that would allow a business to deny services to gays and lesbians, or based on other protected classifications such as race or religion.

enumerated protected classification. (Civ. Code, § 51.) There is, therefore, no basis in the statute or in case law for an exemption allowing Tastries—or anyone else—to discriminate on that basis.

2. The Unruh Act does not treat comparable secular activity more favorably than religious activity

Tastries next argues that the Unruh Act is not neutral and generally applicable under *Tandon v. Newsom* (2021) 593 U.S. 61, because the Act contains "myriad exceptions" that treat secular activity more favorably than religious activity. (RB 60-61.) That is not correct either.

When reviewing a free exercise challenge to the restriction on the size of in-home religious gatherings during the Covid-19 pandemic, the U.S. Supreme Court held in *Tandon* that government regulations that treat any comparable secular activity more favorably than religious exercise are not neutral and generally applicable under *Smith* and are thus subject to strict scrutiny. (*Tandon*, *supra*, 593 U.S. at p. 62.) "Whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue," for example "the risks various activities pose, not the reasons why people gather." (*Ibid.*) *Tandon* is inapplicable to the instant case.

First, the Unruh Act does not draw *any* distinctions between secular and religious activities, thus there are no "comparable" activities to consider. On the contrary, it provides protection from discrimination by *all* business establishments in California,

including housing and public accommodations, because of any protected characteristic. (Civ. Code, § 51.)

Moreover, the Unruh Act itself does not contain "myriad" exceptions. (See Civ. Code, § 51 et seq.) Rather, as discussed above, there are *no* exceptions allowing for differential treatment based on enumerated protected traits such as race, religion, national origin, or sexual orientation. (*Ante*, pp. 32-33.) And with respect to unenumerated traits such as age, the Legislature and California courts have permitted differential treatment in a religion-neutral way in carefully defined circumstances to ensure that other important and compelling state interests—such as providing appropriately accessible housing for California's senior citizens—can be met without violating the Unruh Act. (See *ante*, pp. 33-36; Civ. Code §§ 51.2-51.4, 51.10-51.12.) *Tandon* does not suggest that the Legislature's codification of one select, religion-neutral provision pertaining to an unrelated characteristic, such as age, in the specific context of housing access, has any bearing on proper analysis of a free exercise claim in the context of discrimination in the provision of commercial goods and services based on sexual orientation. Requiring Tastries to sell all of its goods equally and without differentiation based on a customer's protected traits would not treat secular activity more favorably than comparable religious activity.

B. The Legislature has neither created a religious exemption to the Unruh Act nor empowered the Department to do so

Tastries argues that the Unruh Act as applied in this case is not sufficiently narrowly tailored because the Department "could

create tailored exemptions" for religious objectors but did not do so in this case. (RB 68.) This argument too lacks merit.

"The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" (*Employment Div. v. Smith*, *supra*, 494 U.S. at p. 885, quoting *Lyng v. Northwest Indian Cemetery Protective Assn.* (1988) 485 U.S. 439, 451.) Any exceptions to religiously neutral and generally applicable laws, therefore, must come from the "political process," and not courts. (*Id.* at p. 890.) The California Legislature has created no such exceptions to the Unruh Act. (See *ante*, pp. 32-36, 38; *North Coast*, *supra*, 44 Cal.4th at p. 1156.)

Here, the Legislature has given the Department the "duty and power to receive, investigate, conciliate, mediate, and prosecute complaints alleging a violation" of the Unruh Act. (Gov. Code, § 12930, subd. (f)(2).) The Department is not empowered to rewrite the Act to create individualized "tailored exemptions." (See Gov. Code, § 12930; Civ. Code, § 51 et seq.) Tastries offers no legal authority suggesting that it can. (See RB 68.)

Tastries instead cites *Brush & Nib Studio, LC v. Phoenix* (2019) 448 P.3d 890, 923, in which the Arizona Supreme Court held that the state's religious freedom statute created a religious exemption to its public accommodations law. (RB 68.) But California has no such statute exempting religious objectors from

the neutral application of public accommodation laws. Tastries also cites federal anti-discrimination statutes. (*Ibid.*) These too are inapposite. None apply to the facts at hand. And in each of these statutes, Congress has explicitly codified an exception for religious institutions. (See, e.g., 42 U.S.C. § 2000e-1(a) ["This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society . . ."]; 20 U.S.C. § 1681(a)(3) ["This section shall not apply to an educational institution which is controlled by a religious organization . . ."].) Again, the Unruh Act contains no such provision. (See Civ. Code, § 51 et seq.)

The Legislature's policy choice not to include a religious exemption in the Unruh Act was a reasonable one. Unlike religious accommodations in other contexts—such as employment (see, e.g., *Groff v. DeJoy* (2023) 600 U.S. 447, 468-473)—a religious exemption to a public accommodations law would threaten to cause substantial harm to blameless, often vulnerable individuals. In this case, for example, it would have burdened the ability of the Rodriguez-Del Rios to celebrate their marriage, which they have a fundamental right to do. (See *Obergefell v. Hodges* (2015) 576 U.S. 644, 680; *In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 783-784.) The Legislature permissibly opted to maintain the Unruh Act's broad protections in order to prevent that outcome.

C. The Department has not acted with hostility towards Ms. Miller or her religious beliefs

Finally, Tastries argues that, even if the Unruh Act is neutral and generally applicable, the Department's enforcement

action somehow undermined or transformed that neutrality into bias and hostility, altering the resulting legal analysis. (RB 61-65.)[7] This misconstrues both the Department's actions and its role as the state's civil rights agency.

First, this matter is not analogous to *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Com.* (2018) 584 U.S. 617. The Free Exercise Clause requires neutrality of the arbiter of disputes. (*Id.* at pp. 634-635.) Here, the neutral arbiter was the trial court, *not* the Department. When the Department brings a civil suit to enforce the Unruh Act, it does so as a plaintiff standing in the shoes of the real parties in interest and on behalf of the public (Gov. Code, § 12965), and its counsel have a professional duty to provide effective advocacy and representation as a party to the action. The Colorado Civil Rights Commission's role, by contrast, was to serve as a neutral arbiter between conflicting parties, rather than a party to the dispute. (*Masterpiece*, *supra*, 584 U.S. at pp. 634-635.) Accordingly, the Court was troubled by the commissioners' comments and attitude that reflected a lack of neutrality. (*Id.* at p. 635.) But in bringing an enforcement action, the Department is unlike the Commission and does not serve as a neutral arbiter. (See Gov. Code, § 12965.)

Second, Tastries's complaints about the Department's alleged "hostility" are not supported by the record. For example,

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[7] Tastries similarly argues within its free speech defense that the Department's actions were not "viewpoint neutral." (RB 47-49.) For the reasons discussed herein, this argument also lacks merit.

Tastries claims that the Department did not open or investigate civil complaints on its behalf, and that this demonstrates the Department's bias and hostility against them and their religious beliefs. (RB 62-65.)[8] However, Tastries does not claim to have filed any complaints with the Department. (See *ibid.*) There is no evidence in the record showing that the Department ever received—let alone ignored—complaints filed by Tastries or its employees.[9] And unlike in *Masterpiece*, here the Department has *not* made exceptions for similarly situated businesses who sought to deny service to customers based on "their secular

[8] In support of its argument, Tastries also refers to third-party social media threats, vandalism, and violent conduct (see, e.g., RB 19-21) that the trial court properly excluded as irrelevant. (3 RT 368-373, 4 RT 695-697.) Tastries provides no reason to disturb the trial court's exclusion of this evidence. (RB 19-21.) Instead, Tastries cites *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 18-19 for the proposition that an appellate court may rely on summary judgment evidence that was later excluded at trial to affirm the court's ruling after trial. This is incorrect. *D'Amico* holds only that an appellate court may affirm a ruling on summary judgment on any legal basis supported by the record, even if the trial court applied the wrong legal standard. (*D'Amico*, *supra*, 11 Cal.3d at pp. 18-19.)

[9] In a similar vein, Tastries argues that the Department demonstrated its animus toward Ms. Miller's religion through its failure to remedy criminal acts directed at Tastries and Ms. Miller. (RB 64-65.) But the Department is not a law enforcement agency. (See generally Gov. Code, § 12900 et seq.) Accordingly, the Department was not empowered to initiate or provide support in any matters properly referred to local law enforcement, such as vandalism, threats of violence, or harassing phone calls.

commitments." (*Masterpiece*, *supra*, 584 U.S. at p. 644 [conc. opn. of Gorsuch, J.].)

Tastries also contends that the Department demeaned Ms. Miller in its litigation conduct and court filings—for example, by ostensibly "assert[ing], in public court filings, that the very existence of Miller and her beliefs 'harms the dignity of all Californians.'" (RB 63.) That is a blatant mischaracterization; the Department has never said any such thing.[10] The Department has never criticized or faulted Ms. Miller for her religious beliefs, which the Department acknowledges and respects. All it has done is argue that Ms. Miller's *conduct*—her refusal to serve the Rodriguez-Del Rios—has caused serious harm not only to them, but to the public at large and to the interests the Unruh Act seeks to protect. That reflects the Department's good-faith effort to carry out its statutory mandate as the state's civil rights enforcement agency, not any animus toward Ms. Miller or her religious beliefs.

[10] Tastries also references certain questions asked by counsel for the Department at Ms. Miller's deposition that the trial court found to be insensitive. (RB 64, fn.15.) But the trial court correctly recognized—particularly given the Department's role as an adversarial litigant, not a neutral arbiter—that those questions did not rise to the level of animus or non-neutrality, and Tastries offers no reason to disturb that conclusion. (13 AA 2554.)

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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March 28, 2024

CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANT'S REPLY BRIEF uses a 13-point Century Schoolbook font and contains 9,868 words.

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March 28, 2024