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

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

*v.*

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

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

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

# RESPONDENTS' BRIEF

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## CERTIFICATE OF INTERESTED ENTITES OR PERSONS

Pursuant to Rule 8.208, I hereby certify as follows:

Respondent Cathy's Creations, Inc., D/B/A Tastries is a California corporation headquartered in Bakersfield, California. Respondent Catharine Miller is the corporation's sole shareholder.

Respondent Catharine Miller is an individual, and as such there are no further persons or entities that must be listed under Rule 8.208.

January 18, 2024

*/s/Eric Rassbach*

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## INTRODUCTION

At first glance, this appeal might seem difficult. The underlying issues are some of the weightiest in American public life. Conflicting rights of different minorities are at stake. And the case involves core personal commitments that have divided Americans for decades.

But look beneath the surface, and this appeal proves to be much easier. This case reaches this Court after over six years of prosecution and a five-day trial on the merits. At trial, the Superior Court found overwhelming evidence that Cathy Miller routinely serves and employs LGBTQ people in her bakery without discrimination—but that she has a narrow, focused objection to her *own* participation in celebrating a same-sex marriage. These are religious views that the U.S. and California Supreme Courts have long recognized are neither "bigoted" nor "invidious." Accordingly, Miller's religious practices enjoy three important legal protections.

First, Miller's actions do not violate the Unruh Act. As the Superior Court found on the basis of substantial evidence, Miller's *only* reason for declining to bake the custom cake was her religious beliefs. And because she neither intended to discriminate nor acted "because of" a protected characteristic, her activity falls outside the scope of the Act.

Second, the Civil Rights Department's prosecution violates Miller's free speech rights. As the Superior Court found, customizing a cake for a wedding celebration is both pure speech under cases like *303 Creative* and expressive conduct under *Texas v. Johnson*, and therefore protected from government compulsion.

Miller's actions likewise enjoy protections against content and viewpoint discrimination. In fact, as the Department concedes, that is the speech ballgame: if the cake that the Rodriguez-Del Rios asked Miller to make as a centerpiece for their wedding *is* speech, then the Department's rules amount to impermissible viewpoint discrimination.

Third, the Department's prosecution violates Miller's free exercise rights under *Fulton*, *Tandon*, *Lukumi*, and another cake-baking case, *Masterpiece Cakeshop*. Under those precedents, the Unruh Act is anything but neutral and generally applicable, both because it allows the Department and the courts to make case-by-case discretionary decisions about what activities to permit or not, and because it treats comparable secular activity more favorably than Miller's religious exercise. And because the Department has expressed unremitting hostility towards Miller and her religious beliefs, it runs afoul of all three of the restrictions on anti-religious hostility outlined in *Masterpiece*.

In response, the Department offers a grab bag of counterarguments, none availing. It fights the standard of review—substantial evidence—attempting to transmute classic fact issues like intent and "because-of" causation into legal issues. Contrary to decades of free speech precedent, it says a custom-made cake at the center of a wedding—a near-universal symbol of marriage—*can't* be expressive unless it has words or symbols written on it. And as to free exercise, it says Miller misunderstands her own religious beliefs: in fact, baking the cake

is no big deal. But the Department does not get to reimagine Miller's religious beliefs; it must take them as they are.

The Department's fixation on changing or punishing Miller's beliefs is not just unconstitutional—it has had grave consequences outside the courtroom as well. Over the last six years, Miller and her staff have been barraged by rape threats, pornographic emails, and harassing phone calls from men threatening to sexually assault them because of Miller's religious beliefs. On the eve of the preliminary injunction hearing, Miller's laptop was stolen and one of her employees was assaulted behind the bakery by a man who referred to the case during his attack. Although these crimes were reported to the police and made known to the Department, none have resulted in prosecution. Instead, the Department wields its power to enforce one part of the Unruh Act but not another, based solely on its distaste for Miller's beliefs. That is not equal justice under law.

The Superior Court should be affirmed.

## STATEMENT OF FACTS

### A. Miller operates Tastries in accordance with her Christian beliefs.

Cathy Miller is the sole owner and operator of Cathy's Creations, Inc., ("Tastries"), a small bakery in Bakersfield.[1] (1.AA.53; 3.AA.551.) Miller started Tastries in 2013 after retiring from 30 years of teaching. (7.RT.1591:18-19.)

[1] Respondents refer to Miller and Tastries collectively as "Respondents" or "Miller."

Miller is a member of Valley Baptist Church in Bakersfield. Miller believes God calls her to honor him in all aspects of her life, including her work at Tastries. (7.RT.1598:10-25; 7.RT.1600:22-1601:7.) In accordance with her faith, Miller seeks to welcome all who visit Tastries. She has served many LGBTQ customers and has hired, trained, and worked closely with LGBTQ people. (7.RT.1629:11-16; 7.RT.1627:26-1628:13.)

In addition to selling ready-to-eat baked goods and Christian books and gifts to anyone on a first-come, first-serve basis, Miller and her staff also design custom baked goods for special events like birthdays, quinceañeras, and weddings. (7.RT.1601:12-18; 7.RT.1602:6-1608:17; 7.RA.2017-2027.) Custom wedding cakes are a large part of Miller's work, and total revenues from wedding-related orders are about 25-30% of her business. (13.AA.2542; 7.RT.1549:10-27.)

### B. Miller develops design standards to ensure Tastries' custom creations align with her beliefs.

Shortly after she began offering custom baked goods at Tastries in 2013, Miller realized that some of her clients would ask for things that her faith did not allow her to make. (7.RT.1599:23-1600:16.) For example, she received orders for custom-made penis or breast cookies, cakes featuring adult cartoons, and "gory" baked goods. (*Ibid.*) When marijuana was legalized, she received orders for custom-baked goods containing or featuring marijuana. (*Ibid.*)

In consultation with her Baptist pastor, Miller created Tastries' Design Standards, both to set policies for employees and to communicate those policies with customers. (*Ibid.*;

7.RT.1623:25-1624:5.) The Design Standards refer to Miller's mission to create "custom designs that are Creative, Uplifting, Inspirational and Affirming," and that are "lovely, praiseworthy or of good report." (12.AA.2287.) Miller's mission and standards for Tastries stem directly from the Bible. (12.AA.2287 quoting *Philippians* 4:8.)

Tastries' Design Standards explain that Miller will not create certain custom baked goods because they are incompatible with her Christian beliefs. For example, Miller will not design cakes that celebrate divorce, display violence, glorify drunkenness or drug use, contain explicit sexual content, or present gory, demonic, or satanic images. (12.AA.2287.) Miller also will not design cakes that demean any person or group for any reason, or that promote racism, or any other message that conflicts with Christian principles. (*Ibid.*)

Miller has declined several custom orders because they express messages at odds with these standards. For example, Miller learned that a customer planned to surprise his wife at a supposed vow-renewal ceremony by announcing that he wanted a divorce. Miller determined that creating a cake for this ceremony violated Tastries' policy against demeaning and anti-marriage messages, so Miller declined the order. (7.RT.1629:14-1630:19.)

In addition to the Design Standards, Miller also created a Wedding Cake Worksheet to review with wedding cake clients before showing them the custom options that Tastries offers. (8.RA.2009-2011.) Like many Christians, Miller believes that marriage is a sacred covenantal union between one man and one

woman. (7.RT.1600:22-1601:7.) In the Worksheet, Miller included six different Bible passages about love and marriage, and explained her understanding of the specific role that the wedding cake plays in the new couple's life:

> Just as you will offer hospitality to friends and family in your new home together, cutting and serving your cake as husband and wife is the first act of hospitality you will perform together. It is a ceremonial representation of the hospitality you will show to others, together as a new family unit.

(8.RA.2010.) Miller used the Worksheet to encourage the bride and groom to think about the meaning and importance of marriage and the symbolism of their wedding cake. (1.RA.58.)

### C. Miller applied Tastries' Design Standards in declining to create the Rodriguez-Del Rios' custom order and referred them to another bakery.

Tastries typically offers a complimentary cake-tasting party for couples who are interested in ordering a custom wedding cake. On August 26, 2017, Miller welcomed Mireya and Eileen Rodriguez-Del Rio[2] for a tasting that had been scheduled by one of her employees. (5.RT.1063:16-1064:10; 5.RT.1069:23-26.) The Rodriguez-Del Rios came into the shop with an older woman (Eileen's mother) and joined two men who were already there. (7.RT.1641:1-5.) Upon their arrival, Miller believed these five were the bride and groom along with the maid of honor, the best man, and a mother. (7.RT.1639:16-1640:1.)

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[2] The Rodriguez-Del Rios had been legally married in December 2016. (6.RT.1330:24-1331:1.)

A few minutes into the consultation, Miller realized the Rodriguez-Del Rios were requesting a custom cake to celebrate a same-sex wedding. (7.RT.1639:16-1640:1.) At that point, the design consultation had just begun—Miller had not discussed flavors, fillings, or other details, and no one had tasted samples. (7.RT.1641:1-11.) Miller explained that she could not make their wedding cake because doing so would violate her Christian beliefs. (7.RT.1641:12-1642:4.) Miller offered to connect them with a different custom wedding cake designer, Gimme Some Sugar. (*Ibid.*) Miller had a pre-existing arrangement with Gimme Some Sugar to refer customers requesting custom cakes for same-sex weddings, and she had done so before. (7.RT.1632:21-1634:14; 7.RA.1779-1781.) In response, one of the men reached over Miller's shoulder and grabbed the order form, startling her. (7.RT.1642:10-1644:4.) The group then abruptly left the shop. (*Ibid.*)

### D. Miller and her employees were harassed and assaulted.

Shortly after, both the Rodriguez-Del Rios and a member of the wedding party all posted on Facebook, recounting their experience at Tastries and accusing Miller of discrimination. (8.RA.2036-2037; 7.RA.1782; 7.RA.1790.) These posts set off a social media storm that engulfed Tastries in negative Facebook and Yelp reviews along with a call to action by local LGBTQ advocates. (7.RT.1546:23-1548:1; 4.AA.690-8.AA.1505.) Within hours of the Facebook postings, reporters swarmed Tastries' parking lot and began interviewing customers, seeking statements and interviews from Tastries.

In response to the publicity, various wedding professionals offered their services free of charge to the Rodriguez-Del Rios and they had their ceremony in October 2017. (6.RT.1250:6-15.) For their wedding cake, the couple ultimately chose a "cake bar" dessert system, with many more options than a traditional wedding cake. They also chose a three-tiered wedding cake as a centerpiece, primarily made of Styrofoam, with only the top tier made of cake for the cake-cutting ceremony. (6.RT.1256:11-19.)

In the aftermath, Miller lost several corporate contracts. (7.RT.1648:28-1649:5.) During the months following, Miller also received hundreds of messages, some calling her "scum," a "hateful c[**]t" "hiding behind God," and wishing her dreams filled with "men having hot anal sex on a cross."[3] (8.AA.1486.) One woman told Miller that "Jesus himself will condemn you to hell" and that "other religions hate Christians, because they are bigoted, sexist and racist." (7.AA.1214.) Another person told Miller that "[b]igoted scum like you do not deserve to feel safe" and that "[b]ricks through the window can serve as excellent reminders that you are not welcome in our modern society."

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[3] At summary judgment, Miller introduced evidence detailing this harassment. (1.RA.62.) Defendants did not object to this evidence at summary judgment, but later successfully objected to the admission of some of this evidence at trial. (6.RA.1523-1529; 1.AA.137-141; 9.AA.1753-1761; 10.AA.1815-1821; 3.RT.368:2-5.) This evidence is directly relevant to Miller's viewpoint discrimination and non-neutrality theories, and, although the Superior Court found for Miller on other grounds, this court may affirm on any theory supported by the record, which includes summary judgment evidence. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19.)

(6.AA.1135.) Another man repeatedly posted threats, saying "I hope someone violently rapes you. God knows you deserve it." (6.AA.1153.) These messages, which were sent via Facebook Messenger and other similar social media platforms, were not anonymous: the men and women who posted them included their names and sometimes pictures with their messages of hatred for Miller and her beliefs.

The bakery was also inundated with malicious emails and phone calls that included pornographic images and threats to assault or rape Miller and her young, female employees. (See 5.RT.991:5-24.) In one incident, a man called the bakery to order a sheet cake. He told Miller's employee, an 18-year-old woman, that he wanted her to open an email while he was on the phone so he could tell her how to position a photograph on the cake. The photograph was a picture of two naked men having sex. (1.RA.62.)

During the same timeframe, an anonymous man started calling the bakery incessantly. When one of Miller's young female employees answered, he would describe detailed acts of sexual violence he planned to carry out against her. The first time this happened, Miller's employees were so distraught that they fled to the back of the bakery sobbing and shaking. The man continued calling the bakery, so Miller called the police. When a police officer arrived, the calls stopped. But when he left thirty minutes later, the man called back—again and again. (1.RA.62.) Miller concluded that the man threatening to rape her employees was

watching them. Miller lost many employees due to the ongoing harassment. (7.RT.1546:23-1548:1.)

As the prosecution continued, so did the attacks. On the eve of the preliminary injunction hearing, Miller's car, which had a Tastries logo, was broken into and her laptop stolen. (9.AA.1514-1516; 1.RA.62.) That night, one of Miller's employees was assaulted behind the bakery by a man who referred to the Department's prosecution during the attack. (1.RA.62.) Although reported to the police, none of these crimes were ever prosecuted. Miller disclosed these incidents to the Department as early as 2018, (see, *e.g.*, 1.RA.298-299), but at no point has the Department responded to these instances of threatened and actual violence.

### E. The Civil Rights Department investigated and sued Miller.

Shortly after their wedding, the Rodriguez-Del Rios filed a complaint against Respondents with the then-Department of Fair Employment and Housing (now the Civil Rights Department). In October 2017, the Department opened the investigation into Miller, leading to the prosecution before the Court.[4]

During its investigation—and before gathering any information from Respondents—the Department sought a temporary restraining order and a preliminary injunction, which was rebuffed. (*DFEH v. Miller* (Super. Ct. Kern County 2018,

[4] The Department "acts as a public prosecutor when it pursues civil litigation under the FEHA." (*DFEH v. Superior Court of Kern County* (2020) 54 Cal.App.5th 356, 373.)

No. BCV-17-102855) 2018 WL 747835 [Lampe, J.].)[5] The Department filed an enforcement action in October 2018, alleging that Respondents had violated the Unruh Civil Rights Act, Civil Code Section 51 (the "Act").

After cross-motions for summary judgment were denied in December 2021 and January 2022 (7.RA.1570-1575), in July 2022 the Superior Court conducted a week-long bench trial including eight witnesses and 57 exhibits. (1.RT.1930-1931.) In December 2022, the Superior Court entered judgment in Miller's favor. (13.AA.2536-2560.) The court determined that the Department had failed to prove a violation of the Unruh Act for three reasons. First, it determined that the Department did not prove that the defendants intended to discriminate against the Rodriguez-Del Rios because of their sexual orientation. (13.AA.2545.) Rather, the court found that Miller's religious beliefs about marriage were sincere, and that her only motivation at all times was to "observe and practice her own Christian faith," and that "the design standards apply uniformly to all persons, regardless of sexual orientation." (13.AA.2545-2546.)

Second, the court determined that Respondents met their obligations under the Act to provide "full and equal" access to

[5] The Department appealed the order denying a preliminary injunction, but abandoned the appeal. Miller moved to enforce the judgment, arguing that the Superior Court's order collaterally estopped any further investigation into Miller. (See *DFEH v. Superior Court of Kern County* (2020) 54 Cal.App.5th 356, 368-371.)

services by arranging to promptly refer the couple to another, comparable bakery. (13.AA.2546.)

The court also determined that, even assuming that Miller's conduct violated the Act, the Free Speech Clause of the United States Constitution did not allow the Department to compel Miller to create custom cakes for same-sex weddings. (13.AA.2556.) The court determined both that Miller's custom wedding cakes are "are pure speech, designed and intended—genuinely and primarily—as an artistic expression of support for a man and a woman uniting in the 'sacrament' of marriage" (*ibid.*), and "that defendants' participation in the design, creation, delivery and setting up of a wedding cake is expressive conduct, conveying a particular message of support for the marriage that is very likely to be understood by those who view it." (13.AA.2557, italics omitted.) The court held that compelled speech and expressive conduct are subject to strict scrutiny, and that the Department's enforcement effort against Respondents was not supported by a compelling government interest. (13.AA.2559-2560.) The court entered a judgment on behalf of Respondents. (*Ibid.*) The Department appealed.

## STANDARD OF REVIEW

"'In reviewing a judgment based upon a statement of decision following a bench trial," this court "review[s] questions of law de novo" and "appl[ies] a substantial evidence standard of review to the trial court's findings of fact." (*Pearce v. Briggs* (2021) 68 Cal.App.5th 466, 473-474; see also *Escamilla v. Dept. of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514.)

When reviewing a judgment based upon a statement of decision following a bench trial, "any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 969.) The court "may not reweigh the evidence" and is "bound by the trial court's credibility determinations. … The testimony of a single witness may be sufficient to constitute substantial evidence." (*Ibid.*)

Moreover, in First Amendment cases the reviewing court must review the entire record to ensure that there is full protection for First Amendment rights. (See *People v. Jackson* (2005) 128 Cal.App.4th 1009, 1020; *Bose Corporation v. Consumers Union* (1984) 466 U.S. 485, 499.)

## ARGUMENT

### I. Miller did not violate the Unruh Act.

#### A. Miller did not intend to discriminate against the Rodriguez-Del Rios because of their sexual orientation.

Miller declined to create a custom wedding cake celebrating same-sex marriage because of her sincere religious beliefs that marriage is a sacrament joining a man and a woman. She did so pursuant to her policy that she would not sell a cake contradicting the sacred nature of marriage—a policy that applies equally to all customers. Relying on its factual findings, the Superior Court correctly held that the Department failed to prove Miller had intended to discriminate under the Act.

To establish a violation of the Act, the Department must "plead and prove intentional discrimination in public accommodations." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1175.) It must prove that a business "adopted [the challenged] policy *to accomplish* discrimination on the basis of sexual orientation." (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 854, italics added.) The Department was required to prove that, in making any distinction among her customers, Miller specifically intended to discriminate against LGBTQ customers. (See *Martinez v. Cot'n Wash, Inc.* (2022) 81 Cal.App.5th 1026, 1036 [The Act requires "specific intent to accomplish discrimination on the basis of a protected trait"], cleaned up.)

The Department cannot meet this burden simply by showing Miller's policy has a disparate impact on LGBTQ customers. (See *Koebke*, 36 Cal.4th at 854.) "A policy that is neutral on its face is not actionable under the Unruh Act, even when it has a disproportionate impact on a protected class." (*Turner v. Association of American Medical Colleges* (2008) 167 Cal.App.4th 1401, 1408.) This is true where a business makes a distinction that is closely correlated to a protected characteristic, even if it effectively excludes a protected class from a benefit altogether. (See *id.* at 1411 [dismissing claim where standardized testing policy was "facially neutral" and there was no evidence policy was "motivated by an animus" against those with learning disabilities, even though they were disproportionately affected]; *Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal.App.4th

1224, 1237 [policy requiring cable subscribers to purchase television and audio content did not discriminate against blind customers because it "applied equally to sighted and blind subscribers" even though blind subscribers could not use television services]; *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.* (9th Cir. 2014) 742 F.3d 414, 426 ["That hearing-impaired individuals bore the brunt of CNN's neutral policy" was "insufficient to support an Unruh Act claim" absent evidence of intentional discrimination].)

The Supreme Court's decision in *Koebke* illustrates this rule. There, the Court held that a country club did not intend to discriminate on the basis of sexual orientation by extending certain benefits only to married couples. (*Koebke*, 36 Cal.4th at 854.) The court rejected plaintiffs' argument that the club intentionally discriminated because "using marriage as a criterion for allocating benefits necessarily denies such benefits to all of its homosexual members who, like plaintiffs, are unable to marry" because the plaintiffs did not "point to any evidence that [the club] adopted its spousal benefit policy *to accomplish* discrimination on the basis of sexual orientation." (*Id.* at 853-854, italics added.) This was true even though California did not recognize same-sex marriages at the time, and so the policy necessarily excluded *all* LGBTQ members from the same family benefits extended to married couples.[6] (See also *Cohn v.*

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[6] *Koebke*'s separate conclusion that the Act "prohibits discrimination against domestic partners" in favor of married couples (36 Cal.4th at 850), went to the scope of the Act, not

*Corinthian Colleges, Inc.* (2008) 169 Cal.App.4th 523, 528 [no intentional discrimination against males when Mother's Day promotion gave out bags to adult females because "the intended discrimination is not female versus male, but rather mothers versus the rest of the population. … A viable gender discrimination case must be *because of* the group's sex, not merely a resultant correlation."].)

Thus, the Department must make two showings to prove a violation of the Act: First, that Miller *intended* to, and did in fact, treat LGBTQ patrons differently. (See *Belton*, 151 Cal.App.4th at 1237; *Turner*, 167 Cal.App.4th at 1408.) Second, that any distinction between patrons was *because of* sexual orientation. (See *Koebke*, 36 Cal.4th at 854; *Cohn*, 169 Cal.App.4th at 528.) At trial, the Department did neither.

**1. Miller did not "intend" to treat LGBTQ customers differently.**

The Superior Court determined that Miller did not intend to treat LGBTQ patrons differently than any other customer: "Miller and Tastries serve each person—regardless of sexual orientation—who desires to purchase items in the bakery case" and any person "who requests a custom bakery item, the design for which does not violate the design standards." (13.AA.2545; see 7.RT.1629:11-1630:19.) Miller will not create and sell products that "violate fundamental Christian principles," including cakes that "contradict God's sacrament of marriage" in any way *to*

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intent, since the club's policy *facially* discriminated against those in domestic partnerships. (See *id.* at 846-847.)

*anyone*. (13.AA.2545; 12.AA.2287; 7.RT.1629:17-1630:19 [describing incident when Miller declined to make a "divorce cake"].) This is an across-the-board policy that applies to *all customers*, regardless of their sexual orientation. Miller regularly serves LGBTQ customers and employs LGBTQ employees. (7.RT.1629:11-16; 7.RT.1627:26-1628:13.) Miller's policy is thus "facially neutral" because it "applie[s] equally" to customers of all sexual orientations. (*Belton*, 151 Cal.App.4th at 1237.)

The Department claims Miller's policy is "facially discriminatory," and that "discriminating because a wedding is a same-sex wedding" is the same thing as "discriminating on the basis of sexual orientation." (AOB.27, 36.) This is a serious misstatement of Miller's religious beliefs and wholly unsupported by the evidence. (13.AA.2546.) Miller's view that marriage "is by its nature a gender-differentiated union of man and woman" is one that "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." (*Obergefell v. Hodges* (2015) 576 U.S. 644, 657.) And it is a view that continues to be "protected" even after legalization of same-sex marriage. (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) 584 U.S. 617, 631.)

Since *Masterpiece*, other courts have recognized the distinction between declining to express a message of support for same-sex marriage and discriminating on the basis of a protected characteristic. (See *Lexington-Fayette Urban County Human Rights Commission v. Hands On Originals* (Ky. 2019) 592 S.W.3d 291, 303 [conc. opn. of Buckingham, J.] [company that declined to

make Pride t-shirts "was in good faith objecting to the message it was being asked to disseminate," not discriminating on basis of sexual orientation]; cf. *Lee v. Ashers Baking Co. Ltd*. (2018) UKSC 49, ¶ 62 (5.RA.1154) [citing *Masterpiece* for idea that "there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics"].)

**2. Any distinction Miller made between customers was not "because of" their sexual orientation.**

Miller's policy also makes no distinctions *because of* the customer's sexual orientation. As the Superior Court found, any distinction Miller makes is not because of the customer's sexual orientation but because of her sincerely held religious beliefs: "Miller's only motivation, at all relevant times, was to act in a manner consistent with her sincere Christian beliefs about what the Bible teaches regarding marriage." (13.AA.2546.)

That these beliefs might disparately impact same-sex couples is not enough to violate the Act, even if the Design Standards "necessarily den[y]" same-sex couples Miller's custom cakes for their weddings. (*Koebke*, 36 Cal.4th at 853.) Miller's decision not to create custom cakes for same-sex weddings is "*because of*" her sincere religious beliefs regarding the sacrament of marriage, not "*because of*" the purchaser's sexual orientation. (*Cohn*, 169 Cal.App.4th at 528.) Once Miller established that her policy was facially neutral, the burden shifted to the Department to adduce evidence that Miller was "motivated by an animus" against

LGBTQ customers and that the policy was a pretext for discrimination. (*Turner*, 167 Cal.App.4th at 1411.) It has not done so, and indeed, the record demonstrates the opposite. (7.RT.1629:11-16; 7.RT.1627:26-1628:13.) Notably, the Department's brief cites *Koebke* only once, briefly in a parenthetical (AOB.37), and does not cite *Cohn*, *Turner*, or *Belton* at all. The Department's sole argument is to insist that Miller's policy is not facially neutral (which it is); the Department does not explain why *Koebke*'s disparate-impact analysis is not dispositive.

### 3. The Department provides no other reason to reverse the Superior Court's decision regarding lack of intent.

Rather than grapple with *Koebke*'s binding interpretation of the Act, the Department misreads the Superior Court's order and improperly discounts the court's fact-finding in an attempt to manufacture reversible error.

The Department first argues that the Superior Court improperly imported a "malice" requirement into its intent analysis. (AOB.27-28.) But the Superior Court explained that Miller's policy against creating cakes celebrating same-sex marriage was neutral because it applied to all persons and was adopted for legitimate non-discriminatory purposes. (13.AA.2545.) The Department's evidence did not contradict Miller's permissible intent, and it therefore proved no violation of the Act. (See *Koebke*, 36 Cal.4th at 854 ["plaintiffs do not point to any evidence that [the defendant] adopted its spousal benefit

policy to accomplish discrimination on the basis of sexual orientation"].)

Second, the Department attempts to sidestep the applicable standard of review by recasting the *factual* question of Miller's intent as a legal question instead. The Department argues that it has shown that discriminatory intent was a "substantial factor" in Miller's decision. (AOB.24.) That argument ignores the explicit finding of fact that "Miller's *only motivation*, at all relevant times, was to act in a manner consistent with her sincere Christian beliefs." (13.AA.2546, italics added.) Thus, the Superior Court found that discriminatory intent was *not a factor at all* in Miller's decision. This Court must affirm that finding unless it is not supported by "substantial evidence," (*Escamilla*, 141 Cal.App.4th at 514), and the Superior Court's conclusion is well-supported by Tastries' Design Standards and Miller's testimony at trial. (12.AA.2287, 7.RT.1599:23-1601:7, 7.RT.1623:4-1625:5, 7.RT.1629:2-1630:19, 7.RT.1678:7-10.) Indeed, the Department does not even argue that the Superior Court lacked substantial evidence for that finding (presumably because it knows it cannot meet that high bar), instead suggesting this Court should determine Miller's intent as a matter of law. (AOB.22, 24-27.) But the question of intent inherently "presents a question of fact" (*Smith v. Adventist Health System/West*, (2010) 182 Cal.App.4th 729, 745), and this Court accordingly cannot overturn that finding on the record before it.

Third, while ignoring *Koebke*, the Department relies solely on *Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910 and *Hankins*

*v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510. But neither case applies here. In *Liapes*, the defendant Facebook "crafted tools … that expressly rely on users' age and gender" to determine ad targeting. (95 Cal.App.5th at 926.) Facebook thus used criteria that "are not facially neutral" to "exclude women and older people from receiving insurance ads." (*Ibid.*) In *Hankins*, the court held a restaurant impermissibly discriminated when it "allowed patrons who were not physically handicapped to use a restroom … but denied that same service to physically handicapped patrons." (63 Cal.App.4th at 518.) But this differential treatment established discriminatory intent *only* because the defendant failed to present *any* evidence that its policy was motivated by nondiscriminatory reasons like "health, safety and sanitation." (*Id.* at 519.) Here, however, Miller put on substantial evidence that she treated individuals of all sexual orientations the same, and that any impact on LGBTQ customers resulted from non-discriminatory factors—her "decent and honorable" religious beliefs about marriage. (*Obergefell*, 576 U.S. at 657, 672; see also *Greater Los Angeles*, 742 F.3d at 426-427 [distinguishing *Hankins* because CNN did not "intentionally withhold" services "that are otherwise available"].)

### B. Miller provided full and equal service by promptly referring the Rodriguez-Del Rios to another willing bakery.

Miller also did not violate the Act because Miller provided the Rodriguez-Del Rios "full and equal" access by promptly referring them to another bakery that did not have religious objections. The Act requires that no person be denied "the full and equal

accommodations, advantages, facilities, privileges, or services in all business establishments" because of their sexual orientation. (Civ. Code, § 51, subd. (b).) As the Superior Court properly held, an individual or business with religious objections to providing a particular service may still provide "full and equal" access by referring the patron to another willing provider. (13.AA.2546-2548.)

Under the standard set out in *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court* (2008) 44 Cal.4th 1145, Miller's referral meets the twin strictures of the Unruh Act and the First Amendment. In *North Coast*, multiple physicians objected to artificial inseminating a patient for religious reasons, and the patient sued, alleging sexual orientation discrimination. (*Id.* at 1150-1153.) The physician defendants argued that compelling them to provide the service pursuant to the Act, despite their religious objections, would violate their Free Exercise rights. (*Id.* at 1152-1153.) The Court determined that the Act did not violate the physicians' Free Exercise rights because "defendant physicians can avoid such a conflict by ensuring that every patient requiring IUI receives 'full and equal' access to that medical procedure" by referring the patient to a "physician lacking defendants' religious objections." (*Id.* at 1159.) California courts have since applied *North Coast* to determine the Act allows religious objectors to comply with their obligations by "provid[ing] all persons with full and equal medical care at comparable facilities not subject to the same religious restrictions." (*Minton v. Dignity Health* (2019) 39 Cal.App.5th

1155, 1165.) Here, as the Superior Court found, Miller did exactly that.

And since *North Coast* and *Minton* were decided, new United States Supreme Court precedents have reemphasized that under the First Amendment, religious providers *must* be allowed to refer. (See *Fulton v. City of Philadelphia* (2021) 141 S.Ct. 1868, 1875, 1881 [city had no compelling interest in forcing Catholic adoption service to certify same-sex couples where organization "would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples"].)

To hold otherwise would create an unavoidable conflict between Miller's First Amendment rights and the provisions of the Act. (See *infra* at I.C.1.) "Anti-discrimination laws and policies serve undeniably admirable goals, but when those goals collide with the protections of the Constitution, they must yield—no matter how well-intentioned." (*Fellowship of Christian Athletes v. San Jose Unified School District Board of Education* (9th Cir. 2023) 82 F.4th 664, 695 [en banc]["*FCA*"]; see also *303 Creative LLC v. Elenis* (2023) 600 U.S. 570, 592 ["When a state public accommodations law and the Constitution collide, there can be no question which must prevail."]; cf. *Loeffler v. Target Corporation* (2014) 58 Cal.4th 1081, 1131 ["statutes should be interpreted to avoid potential constitutional concerns"].)

The Superior Court properly determined that Miller provided "full and equal" access to her services by immediately referring the Rodriguez-Del Rios to Gimme Some Sugar, a comparable nearby bakery that did not have any religious objections.

(13.AA.2546-2547.) The Superior Court made a factual finding that Miller "offer[ed] to refer Eileen and Mireya to *Gimme Some Sugar*" at the same time she informed the Rodriguez-Del Rios she could not "design a wedding cake at odds with her Christian faith" and that was "not offered under the Tastries design standards." (13.AA.2547.) Further, "Miller arranged, in advance, for *Gimme Some Sugar* to take referrals from Tastries in such circumstances, before Eileen and Mireya ever visited Tastries."[7] (*Ibid.*) That satisfied the Act's requirements.

The Department argues that Miller did not provide "full and equal" access because she referred the Rodriguez-Del Rios to another bakery that she does not own, so she could not "guarantee" service. (AOB.39, 43.) But as the Superior Court noted, *Minton* treated a Methodist hospital as comparable to the Catholic defendant hospital; that Methodist hospital was a "separate and distinct business organization" with "different doctors, nurses and administrative staff." (13.AA.2547.) Further, it makes little practical difference *to the customer* whether they are referred to an affiliated corporation or not. *Minton* likewise makes no mention that the services must be "guaranteed" at the

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[7] The Department claims Gimme Some Sugar was not comparable because the Rodriguez-Del Rios had already rejected that bakery's offerings as "too sweet." (AOB.41, fn.4.) But there is no evidence that the Rodriguez-Del Rios *told Miller* they had already rejected the bakery. (13.AA.2548.) Had they done so, Miller could have referred them to other comparable bakeries. (7.RT.1635:5-22.) Nor can the Department argue that Miller's baking is so "unique" that there are no comparators. (*303 Creative LLC v. Elenis* (2023) 600 U.S. 570, 592.)

time the referral is made. The record demonstrated that Miller's referral was sufficient: Miller believed the referral would be accepted, she had an agreement with Gimme Some Sugar, had referred customers under the agreement previously, and the Department presented no contrary evidence. (7.RT.1632:21-1634:14; 7.RA.1779-1781.)

The Department's reliance on *Rivera v. Crema Coffee Co. LLC* (N.D. Cal. 2020) 438 F.Supp.3d 1068 and *Rolon v. Kulwitzky* (1984) 153 Cal.App.3d 289 (AOB.39), is similarly misplaced. Neither of those cases involved a service provider's religious objection. They accordingly do not implicate the rule, or the same constitutional concerns, requiring religious accommodations to avoid a "conflict between their religious beliefs and the … Act's antidiscrimination provisions." (*North Coast*, 44 Cal.4th at 1159.)

### C. Miller's conduct also comes within the Act's exemptions.

Miller also did not violate the Act because her conduct comes within two recognized exemptions. First, Miller's conduct comes squarely within the statutory exemption for conduct protected by the state and federal constitutions. Second, Miller's conduct comes within the judicially recognized exemption for non-invidious discrimination.

#### 1. Miller's conduct is within the categorical exemption for conduct protected by other law.

Miller's conduct comes within the subdivision (c) exception: "This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law." (Civ. Code, § 51, subd. (c).) The Act cannot confer a right to compel

Respondents to provide services if that would violate their rights under the U.S. and California Constitutions. (See 2 Gaab & Reese, Cal. Practice Guide: Civil Procedure Before Trial, Claims and Defenses (Rutter 2023) ¶¶14:840-14:870 ["First Amendment defense" where business's actions are "permitted by federal or state constitution"]; *Burwell v. Hobby Lobby Stores, Inc.* (2014) 573 U.S. 682, 707 ["protecting the free-exercise rights of corporations" like Tastries "protects the religious liberty of the humans who own and control those companies"].)

As explained below, compelling Miller to provide a custom cake celebrating same-sex weddings would violate those rights (see *infra* Sections II, III), so the exception applies.

**2. Miller's conduct comes within the Act's discretionary exemption for nonarbitrary discrimination.**

Miller's conduct also comes within the "public policy" exception. (*Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386, 1395.) The Act does not prohibit distinctions that do not "emphasize an irrelevant difference, [or] perpetuate an irrational stereotype." (*Cohn*, 169 Cal.App.4th at 528-529.) To determine whether a particular act of discrimination is "reasonable, and not arbitrary," courts must consider "the nature of the enterprise or its facilities, legitimate business interests (maintaining order, complying with legal requirements, and protecting business reputation or investment), and public policy supporting the disparate treatment." (*Javorsky*, 242 Cal.App.4th at 1395.)

California courts have determined facially discriminatory policies are nonetheless nonarbitrary discrimination in a variety of different factual circumstances. (See *Sargoy v. Resolution Trust Corporation* (1992) 8 Cal.App.4th 1039, 1046 [nonarbitrary discrimination to offer higher interest rates to senior citizens]; *Pizarro v. Lamb's Players Theatre* (2006) 135 Cal.App.4th 1171, 1177 [nonarbitrary discrimination to offer "discounted theater admission" to "'baby-boomers' to attend a musical about that generation"']; *Sunrise Country Club Association, Inc. v. Proud* (1987) 190 Cal.App.3d 377, 382 [nonarbitrary discrimination for condominium to exclude families with children from using certain community pools]; *Cohn*, 169 Cal.App.4th 523 [nonarbitrary discrimination to offer Mother's Day gifts to women but not men].)

Miller's adherence to her sincerely held religious beliefs is likewise reasonable and not arbitrary, invidious, unreasonable discrimination. She acted in accordance with those beliefs in declining to make a cake celebrating same-sex marriages, and applied that policy uniformly to all customers that sought her services. The Supreme Court has recognized the traditional understanding of marriage "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world," and these "decent and honorable" beliefs are protected in our pluralistic society. (*Obergefell*, 576 U.S. at 657, 672.) Public policy thus counsels against categorizing a good faith religious belief held by millions of Americans as invidious

discrimination, particularly where, as here, Miller's policy applies to all customers regardless of sexual orientation.

## II. Compelling Miller to bake a wedding cake to celebrate the Rodriguez-Del Rios' marriage would violate the Free Speech Clause.

The Superior Court also correctly held that Miller cannot be compelled to design and create a wedding cake celebrating the Rodriguez-Del Rios' marriage under the Free Speech Clause. The Department seeks to require Miller to speak the government's preferred message—to celebrate same-sex marriage—or cease offering wedding cakes for sale at all. But "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (*West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, 642.) The Superior Court properly recognized that the Department's actions run afoul of this basic principle.

"[T]he Free Speech Clause of the First Amendment … protect[s] the 'freedom to think as you will and to speak as you think.'" (*303 Creative*, 600 U.S. at 584; quoting *Boy Scouts of America v. Dale* (2000) 530 U.S. 640, 660-661.) This protection remains "regardless of whether the government considers [the] speech sensible and well intentioned or deeply misguided" or even if it is "likely to cause anguish or incalculable grief." (*Id.* at 586, cleaned up.) Further, the government may not "compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own

speech that he would prefer not to include." (*Ibid.*) These fundamental principles apply both to "pure speech" (*ibid.*) and "expressive conduct." (*Texas v. Johnson* (1989) 491 U.S. 397, 403.)

The First Amendment also prohibits the government from restricting or preferring certain speech based on its content or viewpoint. (See *Rosenberger v. Rector & Visitors of the University of Virginia* (1995) 515 U.S. 819, 829.) In particular, the government may not treat conscience-based objections differently based on whether it agrees with the objection. (*Masterpiece,* 584 U.S. at 636.) Any violation of these principles—compelling speech or expressive activity or imposing a content- or viewpoint-based restriction—subjects the government's actions to strict scrutiny. (*NIFLA v. Becerra* (2018) 138 S.Ct. 2361, 2371; see also *Telescope Media Group v. Lucero* (8th Cir. 2019) 936 F.3d 740, 753.)

### A. Miller's design and creation of custom wedding cakes is protected as pure speech.

Miller's design and creation of a custom wedding cake is pure speech protected by the First Amendment, which includes protection from the government compelling someone to speak a certain message. The First Amendment protects "[a]ll manner of speech" including "pictures, films, paintings, drawings, and engravings," flags, video games, parades, and music. (*303 Creative*, 600 U.S. at 587.)

*303 Creative* illuminates the components of "pure speech" in the wedding context: where someone creates an "'original, customized' creation" that incorporates "images, words, symbols, and other modes of expression" to "celebrate and promote" the

creator's understanding of marriage, the end product qualifies as pure speech.[8] (600 U.S. at 587; see also *Brush & Nib Studio, LC v. City of Phoenix* (Ariz. 2019) 448 P.3d 890, 908 [custom wedding invitation was protected speech because "Plaintiffs' artwork, calligraphy, and hand-lettering is designed to express a celebratory message about each wedding"].)

The custom cake the Rodriguez-Del Rios requested meets this standard. The Superior Court found that Miller's wedding cakes, including the cake that the Rodriguez-Del Rios requested, are "designed and intended—genuinely and primarily—as an artistic expression of support for a man and a woman uniting in the 'sacrament' of marriage, and a collaboration with them in the celebration of their marriage." (13.AA.2556.) The Superior Court further determined that wedding cakes inherently conveyed the meaning that a particular union is a marriage and that it should be celebrated. (13.AA.2556-2557.) The Rodriguez-Del Rios apparently agreed; they ultimately featured a tiered symbolic styrofoam cake with a small, edible top layer specifically for the traditional cake-cutting ceremony. (6.RT.1256:11-19.) Given the meaning attributed by both Miller and the Rodriguez-Del Rios to the cake, and the surrounding words, images, and symbols employed, the Superior Court did not err in finding that Miller's cakes are pure speech.

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[8] The Department says *303 Creative* is irrelevant because the parties "stipulated" that the website design at issue was "expressive." (AOB.58-59.) But the Supreme Court's analysis gave no dispositive weight to the parties' characterization.

Importantly, the Superior Court came to this conclusion after listening to trial testimony and finding facts. (See 13.AA.2556 [explaining that the "evidence affirmatively showed" Miller's cakes were pure speech].) This Court may only overrule that finding of fact if it is not supported by substantial evidence, (*Escamilla*, 141 Cal.App.4th at 514), and there is such substantial evidence in the record. As expressed in the Design Standards, all of Tastries' cakes are imbued with an artistic intent to celebrate the ideals expressed in Paul's Epistle to the Philippians, Chapter 4.[9] (7.RT.1601:9-25.) And Miller testified that the cake itself, the ceremonies surrounding the cake, and choices made during the design process convey specific messages regarding the marriage. (See 7.RT.1608:13-1610:7 [cutting of wedding cake "is [the] first act of marriage" that expresses specific promises between couple; couple "share[s] the rest of the cake with their guests as their gift to their guests, saying thank you for coming to celebrate our union"]; 7.RT.1664:8-1665:8 [creating a wedding cake is Tastries "putting a stamp of approval on the wedding"].)

The Department insists that this case implicates only a "predesigned cake" that "was bereft of words, imagery, or flourishes that conveyed or even hinted at Ms. Miller's point of view about marriage." (AOB.47, 53.) But just as "[p]arades are … a form of expression, not just motion" because of "the

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[9] "[W]hatever is true, whatever is noble, whatever is right, whatever is pure, whatever is lovely, whatever is of good report, if anything is virtuous or praiseworthy, think about these things. Phil[ippians] 4:8." (12.AA.2287.)

inherent expressiveness of marching" (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 U.S. 557, 568), a wedding cake *inherently* expresses a message of celebration conveying endorsement. The celebration is the point.

Nor can the message of a particular form of speech be severed from its surrounding context—here, the cake's display as a centerpiece at a same-sex wedding celebration. The Department thus seeks to compel Miller to speak in a way that celebrates that marriage as well. The Department simply may not "force[] [Miller] to choose between remaining silent, producing speech that violates [her] beliefs, or speaking [her] mind[] and incurring sanctions for doing so." (*303 Creative*, 600 U.S. at 590.) And that the Rodriguez-Del Rios would be the ones to choose how and where to display the cake does not change Miller's message in creating the cake or transform it into something other than Miller's own speech. (See *ibid.* [concluding that anti-discrimination law compelled wedding website designer's *own* speech].)

The Department tellingly concedes that "[i]f the Rodriguez-Del Rios had wanted a cake with words or with a topper containing symbols, *that* might well have constituted speech, because words and symbols both convey meaning and have traditionally been regarded as speech." (AOB.51.) But the protection of the First Amendment has never turned merely on the presence of words or word-like symbols: it "unquestionably shield[s]" the "painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." (*Comedy III Productions, Inc. v. Gary*

*Saderup, Inc.*, (2001) 25 Cal. 4th 387, 399; quoting *Hurley*, 515 U.S. at 569.) For Miller, the wedding cake *is* the symbol; the presence of an additional label (whether in the form of a written message or bride-and-bride topper) is superfluous.[10]

### B. Designing, creating, and delivering a custom wedding cake is also protected expressive conduct.

Miller's design, creation, and delivery of custom wedding cakes is also expressive conduct, which the First Amendment separately shields from compulsion. Apart from pure speech, the First Amendment protects "conduct" that is "sufficiently imbued with elements of communication." (*Johnson*, 491 U.S. at 404.) Conduct is expressive if (1) there is "'[a]n intent to convey a particularized message" and (2) the "likelihood [is] great that the message would be understood by those who viewed it." (*Ibid.*; see also *Cressman v. Thompson* (10th Cir. 2013) 719 F.3d 1139, 1150-1151 [in some instances a "particularized message" may not be required to merit First Amendment protection if "symbolic acts or displays … are sufficiently imbued with elements of communication"].) Miller's conduct meets both these requirements and is therefore protected speech.

The Superior Court found that Miller intended her cakes to convey a particularized message. It found first, "that *all* of Miller's wedding cake designs are intended as an expression of

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[10] The Department's claim that a topper would change the outcome of this appeal (AOB.51) is risible. At the time they met Miller, the Rodriguez-Del Rios were considering using a cake topper, and had actually ordered two different toppers (which they ultimately did not use). (6.RT.1272:25-27; 6.RT.1361:5-12.)

support for the sacrament of 'marriage,' that is, the marriage of a man and a woman." (13.AA.2557.) And second, that "*[a]ll* of Miller's designs are specifically intended to *answer* the question at the top of the design standard page: 'Is it lovely, praiseworthy, or of good report?'" (*Ibid.*)

The Superior Court's conclusions are supported by substantial evidence. Tastries' Design Standards state that Miller's custom orders convey messages that Miller believes are "noble, lovely, or praiseworthy," through designs that are "[c]reative, [u]plifting, [i]nspirational and [a]ffirming" and intended to be used as a "[c]enterpiece to your [c]elebration." (12.AA.2287; 7.RT.1601:9-25.) And Miller testified extensively regarding the messages she intended to convey with her custom wedding cakes. (7.RT.1608:13-1610:7; 7.RT.1611:4-19; 7.RT.1664:8-1665:8.) The Superior Court found that Miller intended her custom wedding cakes to convey "a particular message of support for the marriage," (13.AA.2557), and substantial record evidence supports that finding.

The Department says that the cake, viewed in isolation, does not convey this particular message. (AOB.55-56.) But that ignores the fact that when viewed in the context of a wedding ceremony, to which Miller and her employees often deliver and set up the cakes,[11] its message is immediately understandable: it

[11] The Department claims the fact that Miller's husband delivers the custom cakes to weddings can have no expressive meaning. (AOB.57, fn.7.) But forcing Respondents to deliver a cake to a same-sex wedding compels them to further participate in and

is one of celebration. "Wedding ceremonies convey important messages about the couple, their beliefs, and their relationship to each other and to their community," and participation or not in such a ceremony is protected expression. (*Kaahumanu v. Hawaii* (9th Cir. 2012) 682 F.3d 789, 799.)

The Department also argues (AOB.55, 57) that Miller's cakes differ from activities held to be expressive activities in *Tinker v. Des Moines Independent Community School District* (1969) 393 U.S. 503 and *Stromberg v. People of State of California* (1931) 283 U.S. 359. The Department simply announces that cakes are *not* inherently expressive, but red flags and black armbands *are*. (AOB.55-56.) But "wearing on their sleeve a band of black cloth, not more than two inches wide," for example, could mean many things in many contexts, and is not an immediately recognizable symbol of anti-war protest. (*Tinker*, 393 U.S. at 514.) Nor does the display of a red flag always or even usually advocate for Communism. (*Stromberg*, 283 U.S. at 363.) When it comes to the First Amendment, "context matters." (*303 Creative*, 600 U.S. at 600, fn.6.) It is impossible to divorce an action's expressive meaning from its context and the speakers' surrounding action, speech, and intent.

The Department also attempts (AOB.57) to paint this case as more like *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (2006) 547 U.S. 47, than *Tinker* or *Stromberg*. That strains credulity. A white three-tiered cake displayed at a

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endorse the celebration, which the First Amendment prohibits. (See *Lee v. Weisman* (1992) 505 U.S. 577, 593.)

wedding and used as the centerpiece of a cake-cutting ceremony is not "plainly incidental" to the regulation of non-expressive conduct. (*Id.* at 62.) Everyone present understands that the cake was commissioned to celebrate the new union; no "explanatory speech" is necessary. (*Id.* at 66*;* see also *303 Creative*, 600 U.S. at 596 ["No government, *FAIR* recognized, may affect a speaker's message by forcing her to accommodate other views"], cleaned up.) The Rodriguez-Del Rios used the custom wedding cake they ultimately obtained in exactly this way. (6.RT.1256:11-19.) The Department's continued insistence that the "unadorned" wedding cake they commissioned from Miller was non-expressive (AOB.57) flies in the face of substantial evidence and common sense.

### C. The Department's compulsion of Miller's speech is not viewpoint neutral.

The Department's attempt to compel Miller to speak in a manner that celebrates same-sex marriage also violates the Free Speech Clause because it is neither content- nor viewpoint-neutral. A regulation is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." (*Reed v. Town of Gilbert* (2015) 576 U.S. 155, 163-165.) In other words, a regulation where the "specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction" is unlawful. (*Rosenberger*, 515 U.S. at 829.) Any regulation that compels the government's preferred speech is necessarily content-based because "compelling individuals to speak a particular message, … alter[s] the content of their speech." (*NIFLA*, 138 S.Ct. at 2371, cleaned up; see also

*Telescope Media*, 936 F.3d at 753 [application of public accommodations law was not content-neutral, and likely not viewpoint neutral, when it treated wedding videographers' "choice to talk about one topic—opposite-sex marriages—as a trigger for compelling them to talk about a topic they would rather avoid—same-sex marriages"].)

The Department has made clear that it seeks to compel Miller to create custom cakes celebrating same-sex weddings *precisely* because it disagrees with her views on marriage. It has told courts that the very existence of Miller and her beliefs "harms the dignity of all Californians." (7.RA.1634.) It has asserted that her limited objection to making custom wedding cakes for same-sex weddings "cannot be meaningfully differentiated" from race discrimination. (7.RA.1627-1628; 7.RA.1641; 7.RA.1677.) And it has proclaimed that Miller seeks "a return to the days when certain individuals could be turned away from businesses based on their innate characteristics." (7.RA.1633.)

While it has not hesitated to denounce Miller's beliefs and falsely compare her to racists, the Department has remained entirely silent about the illegal religious discrimination Miller has suffered. The Department knew that many of Miller's corporate clients had dropped their contracts because of her beliefs—even though the Act specifically forbids businesses from refusing to contract with someone because of their religious beliefs. (Civ. Code, § 51.5, subd. (a); 7.RT.1648:28-1649:5.) It knew of the hundreds of hate-filled messages she received. (1.RA.252; 1.RA.247; 1.RA.235; 1.RA.241.) And it knew of the

criminal conduct against her and her staff. (1.RA.62.) The Department's words and actions—indeed, failure to act—show that it is anything but viewpoint-neutral.

### D. The Department's actions cannot satisfy strict scrutiny.

Because Miller's conduct qualifies as pure speech and expressive activity, and because the Department's compulsion of Miller's speech is not viewpoint-neutral, the burden shifts to the Department to show that its actions satisfy strict scrutiny.

As an initial matter, the Department has forfeited this issue because it makes no attempt to show that it can satisfy strict scrutiny. (See *People v. Bryant, Smith & Wheeler* (2014) 60 Cal.4th 335, 408 [argument "is forfeited by the failure to raise it in the opening brief"].) Instead, the Department reaffirms that "whether Tastries or Ms. Miller were engaged in speech or expressive conduct" is "the central question in this case." (AOB.59.)

But as explained below, (see *infra* Section III.C), even had the Department preserved its argument, it cannot survive strict scrutiny.

## III. Forcing Miller to bake a wedding cake to celebrate the Rodriguez-Del Rios' marriage would violate both federal and state free exercise protections.

The decision below must also be affirmed because punishing Miller for following her sincere religious beliefs regarding marriage would violate both federal and state free exercise protections. The Superior Court assumed for the sake of discussion that the Department had shown a violation of the Act

and concluded that there was no Free Exercise violation because, although Miller's sincere religious exercise was burdened, the Act did not trigger strict scrutiny under *Smith*. (13.AA.2548, 13.AA.2554.) As discussed below, this was error, and this Court ought to affirm on this basis as well. (See *D'Amico,* 11 Cal.3d at 18-19 [trial court may be affirmed on any theory supported by the record].)

The federal Free Exercise Clause states that "Congress shall make no law … prohibiting the free exercise" of religion. (U.S. Const. amend. I.) Laws that burden religious exercise and are neither neutral nor generally applicable are subject to strict scrutiny. (*Tandon v. Newsom* (2021) 593 U.S. 61, 62.) Laws must also be "*applied* in a manner that is neutral toward religion," and officials may not engage in even "subtle departures" from religious neutrality. (*Masterpiece*, 584 U.S. at 638, 640, italics added.)

Under the California Free Exercise Clause, a court must ask first whether the law imposes a burden on Miller's free exercise of religion, and second whether the law is justified by a compelling state interest. (Cal. Const. art. I, § 4; *Smith v. FEHC* (1996) 12 Cal.4th 1143, 1179 [plur. opn.]; *Valov v. DMV* (2005) 132 Cal.App.4th 1113, 1126 & fn.7.) Under both the U.S. and California Constitutions, "religious and philosophical objections to gay marriage"—including Miller's—are "protected views." (*Masterpiece*, 584 U.S. at 631; cf. *In re Marriage Cases* (2008) 43 Cal.4th 757, 856, fn.73.)

In response to the invocation of the Free Exercise Clauses, the Department first tries to redefine Miller's beliefs to claim there is no burden, and second asserts that the Act can brook no departures. Both arguments fail.

**A. Miller acted on sincere religious beliefs.**

The Department concedes that Miller's beliefs are religious and sincere. (AOB.14.) But there is a sharp divide over what exactly Miller's religious beliefs *are*. The Superior Court found—correctly—that Miller sincerely believed that she could not create a custom wedding cake to celebrate a wedding that "contradict[ed] God's sacrament of marriage between a man and a woman," nor direct her employees to do so. (13.AA.2545.) Because of this belief, Miller created a document—the Design Standards—to explain to her customers and employees how making a wedding cake was part of the way that she "practice[d]" her own Christian faith." (*Id.*) The Design Standards governed all her custom bakery work and were "rooted in Miller's Christian beliefs, which are in turn rooted in the Bible." (13.AA.2538.)

As a result of her own religious belief about what she could and could not do, Miller turned down orders for "penis cookies," "breast cookies and cakes," baked goods with marijuana themes, and designs with "adult cartoons." (13.AA.2539.) She declined to make a cake for a man who "requested a custom … cake for a wedding anniversary at which he planned to announce to his wife he was divorcing her." (13.AA.2540.) And for her clients ordering custom wedding cakes, she prepared a lengthy binder displaying dozens of Tastries wedding cakes, with and without toppers,

along with a four-page Wedding Cake Worksheet in which Miller explained her understanding of the history, tradition, and religious significance of the wedding cake, its role in the ceremony, and its importance as a symbol of the new life that the couple is about to embark upon together. (8.RA.2009-2011; 1.RA.76-215.) Miller held these beliefs and shared the Design Standards and the Wedding Cake Worksheet with couples well before she met the Rodriguez-Del Rios in August 2017.

In light of this plentiful evidence, the Superior Court found that "the evidence affirmatively showed that Miller's *only* intent, her only motivation, was fidelity to her sincere Christian beliefs" regarding the nature of marriage and that there was no evidence that Miller's conduct was a "pretext to discriminate or make a distinction based on a person's sexual orientation." (13.AA.2545-2546.) The court found that "[t]he evidence affirmatively showed that Miller and Tastries serve, and employ, persons with same-sex orientations," including by selling "items in the bakery case" and by creating "custom bakery item[s]" whose design "does not violate the design standards" for all customers, "regardless of sexual orientation." (13.AA.2545.)

Miller's religious belief that marriage is limited to the lifelong union of one man and one woman is a "protected view" shared and practiced by the Baptist church she attends. (*Masterpiece*, 584 U.S. at 631.) When the Supreme Court legally recognized same-sex marriage nationwide in *Obergefell*, it "made a commitment. It refused to equate traditional beliefs about marriage, which it termed 'decent and honorable,' with racism,

which is neither." (*Fulton*, 141 S.Ct. at 1925, cleaned up [conc. opn. of Alito, J.]; quoting *Obergefell*, 576 U.S. at 672; contra AOB.37; 7.RA.1627-1628; 7.RA.1677 (comparing Miller's beliefs to racists). *Obergefell* also promised that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." (*Obergefell*, 576 U.S. at 679; contra 7.RA.1634 [asserting that Miller's beliefs "harm[] the dignity of all Californians"]; California Civil Rights Department, *Department Files Appellate Brief in Defense of California's Efforts to Enforce LGBTQ+ Civil Rights Protections* (Oct. 23, 2023) <https://perma.cc/3B28-GMDC> (hereafter Department Oct. 23 Press Release) [asserting that Miller seeks to "roll back the clock on fundamental civil rights protections."].)

When the California Supreme Court decided *In re Marriage Cases* seven years earlier, it made the same promise. The Court held that "affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any … person." (*In re Marriage Cases*, 43 Cal.4th at 854-855; citing Cal. Const. art. I, § 4.) And it emphasized that "th[e] belief that the right to marriage did not extend to same-sex couples" is not "irrational, ignorant or bigoted," nor based on "invidious intent or purpose." (*Id.* at 856, fn.73, cleaned up.)

Thus, both the U.S. Supreme Court and the California Supreme Court have recognized that Miller's sincere religious belief that "same-sex marriage should not be condoned" is neither "bigoted" nor "invidious." (*Obergefell,* 576 U.S. at 679; *In re*

*Marriage Cases,* 43 Cal.4th at 856, fn.73.) Both courts promised that their decisions recognizing same-sex marriage would not strip people like her of their religious freedom. (*Obergefell*, 576 U.S. at 679; *In re Marriage Cases,* 43 Cal.4th at 854-855.)

The Department claims that those courts were wrong because they made a distinction between "status and conduct." (AOB.37; quoting *Christian Legal Society v. Martinez* (2010) 561 U.S. 661, 689.) Before the Superior Court, the Department asserted that the public expression of beliefs like Miller's "harms the dignity of all Californians." (7.RA.1634.) It argued that this case "cannot be meaningfully differentiated" from one concerning racial discrimination, (7.RA.1627-1628; 7.RA.1641; 7.RA.1677), and that Miller seeks "a return to the days when certain individuals could be turned away from businesses based on their innate characteristics." (7.RA.1633; see also (Department Oct. 23 Press Release, *supra* at 53.) The Department likewise asserts that baking a wedding cake "without any words or symbols" does "not implicate the First Amendment," [12] despite Miller's clearly expressed belief that her faith forbids her from doing just that. (7.RT.1600:22-1601:7; 7.RT.1608:25-1611:19; 8.RA.2009-2011;

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[12] AOB.47-48. On appeal, the Department couches these as speech arguments. Below, by contrast, the Department asserted that the Act did not burden Miller's religious exercise, because it gave her three options—she could (1) "sell all [her] goods and services to all customers," (2) "cease offering preordered wedding cakes for sale to anyone," or (3) "step aside" and "allow her willing employees to manage the process." (11.AA.2217-2218.) The Superior Court correctly rejected these arguments, (13.AA.2550), and the Department has not pressed them on appeal.

1.RA.76-215.) And although Miller has repeatedly explained that her religious beliefs do not permit her to direct her employees to do what she cannot do herself, the Department maintained that its proposal that she do just that is the only "reasonable" and "logical" option for her. (7.RA.1683; 7.RA.1690.) In effect, the Department is trying to redefine Miller's beliefs.

The Department's bias is clear—and, under *Lukumi* and *Masterpiece*, fatal. (See *infra* Section III.B.) But its effort to redefine her religious beliefs to make them easier to dismiss is not new. In *Fulton*, Philadelphia tried to characterize a Catholic foster care agency's longstanding policy of only certifying opposite-sex married couples as mere "discrimination … under the guise of religious freedom." (*Fulton*, 141 S.Ct. at 1875.) It also argued that the religious agency should not be bothered by certifying same-sex couples for adoption, because in the city's view "certification reflects only that foster parents satisfy the statutory criteria." (*Id.* at 1876.) The Supreme Court unanimously rejected Philadelphia's attempt to rewrite the agency's religious beliefs. (*Ibid.*) It accepted that the agency, which certified gays and lesbians as single foster parents and placed gay and lesbian foster children in homes, was sincerely expressing its own religious beliefs about marriage, and not discriminating against LGBTQ people generally. (*Ibid.*) And it held that it was the religious foster care agency's view of the certification process—not the city's—that mattered. (*Ibid.*; see also *Hobby Lobby*, 573 U.S. at 724 [noting that over many years and in many different kinds of cases, the Supreme Court has

"repeatedly refused" to tell plaintiffs that their understanding of "difficult and important question[s] of religion and moral philosophy" is "flawed."]; *Thomas v. Review Board* (1981) 450 U.S. 707, 714 ["religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."].)

In sum: Miller's "religious … objections to gay marriage are protected views." (*Masterpiece*, 584 U.S. at 631.) They are based on "decent and honorable" religious premises and they are neither "bigoted" nor "invidious." (*Obergefell*, 576 U.S. at 672; *In re Marriage Cases*, 43 Cal.4th at 856, fn.73.) After six years of litigation and a full trial on the merits, there is no evidence that they are pretextual. (13.AA.2545-2546.) And, after carefully considering her own religious obligations under these beliefs, Miller has concluded that she may not create a custom wedding cake to celebrate a wedding that "contradict[s] God's sacrament of marriage between a man and a woman," nor direct her employees to do so. (13.AA.2545.) Neither the Department nor this Court are entitled to second-guess Miller's beliefs.

### B. The Act is neither neutral nor generally applicable, and it has been applied with hostility in this case.

"Distilled, Supreme Court authority sets forth three bedrock requirements of the Free Exercise Clause that the government may not transgress, absent a showing that satisfies strict scrutiny."[13] (*FCA*, 82 F.4th at 686.) First, "a purportedly neutral

[13] California's Free Exercise Clause may employ a lower standard of scrutiny, somewhere between *Smith* rational basis

'generally applicable' policy may not have 'a mechanism for individualized exemptions.'" (*Ibid.*; quoting *Fulton*, 141 S.Ct. at 1877; see also *Employment Division v. Smith* (1990) 494 U.S. 872, 884.) Second, "the government may not 'treat … comparable secular activity more favorably than religious exercise.'" (*Ibid.*; quoting *Tandon*, 141 S.Ct. at 1296.) Third, "the government may not act in a manner 'hostile to … religious beliefs' or inconsistent with the Free Exercise Clause's bar on even 'subtle departures from neutrality.'" (*Ibid.*; citing *Masterpiece*, 584 U.S. at 638; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 534.) "The failure to meet any one of these requirements subjects a governmental regulation to review under strict scrutiny." (*Ibid.*) The Department's application of the Act to Miller fails to meet all three.

Normally, a law could still be upheld if it passes strict scrutiny. But where, as here, a government acts with hostility towards particular religious beliefs, the law must be "set aside … without further inquiry." (*Kennedy v. Bremerton School District* (2022) 597 U.S. 507, 525, fn.1, cleaned up.)

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review and strict scrutiny in pre-*Smith* cases like *Sherbert*. (See *North Coast*, 44 Cal.4th at 1158 ["[T]his court has not determined the appropriate standard of review" for a challenge to a "valid and neutral law of general applicability" under California Constitution].) That discussion is entirely academic here, both because the Act is not a "valid and neutral law of general applicability" under binding U.S. Supreme Court caselaw, and because the Department has proceeded in this case without the strict religious neutrality that the federal Free Exercise Clause requires. Therefore, regardless of what California law may require, strict scrutiny applies under federal law.

### 1. The Department's application of the Act to Miller is not generally applicable under *Fulton* because it includes discretionary exemptions.

"A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." (*Fulton*, 141 S.Ct. at 1877, cleaned up; quoting *Smith*, 494 U.S. at 884.) Thus, in *Sherbert*, a state unemployment benefits law "was not generally applicable because the 'good cause' standard" for receiving benefits "permitted the government to grant exemptions based on the circumstances underlying each application." (*Id.*; citing *Sherbert v. Verner* (1963) 374 U.S. 398.) In *Fulton*, the agency's policy was not generally applicable because it allowed officials to grant exceptions—even though the city had no intention of granting one to the religious foster care agency. (*Id.* at 1879.) And in *FCA*, the school district's "broad" and "comprehensive" nondiscrimination policies were not generally applicable because the district exempted many of its own equity programs from the general policy. (*FCA*, 82 F.4th at 687.)

This kind of discretion—the obligation to consider the "circumstances underlying" each facially discriminatory policy and to decide whether it is "reasonable" and supported by "public policy"—is baked into the Act. (See *supra* at I.C.2.) "[O]nly *arbitrary, invidious or unreasonable discrimination*" is banned by the Act. (*Javorsky*, 242 Cal.App.4th at 1395, original italics.) Thus, California courts have upheld facially discriminatory policies offering "higher interest rates to senior citizens," (*Sargoy*,

8 Cal.App.4th at 1046); "discounted theater admission" to "'baby-boomers' to attend a musical about that generation," (*Pizarro*, 135 Cal.App.4th at 1177); condominium policies excluding families with children from using certain community pools, (*Sunrise*, 190 Cal.App.3d at 382); and Mother's Day gifts offered to women but not men (*Cohn*, 169 Cal.App.4th 523). The Supreme Court has held that entrepreneurs may "promulgate reasonable … regulations that are rationally related to the services performed and the facilities provided." (*In re Cox* (1970) 3 Cal.3d 205, 217.) It has also held that a country club may draw distinctions between married and unmarried couples and individuals, so long as those distinctions are "supported by legitimate business reasons." (*Koebke*, 36 Cal.4th at 831.)

With respect to general applicability, it is no answer to argue that California courts have never found actions like Miller's to be "reasonable" (though they are, see *supra* I.C.2). It did not matter in *Fulton* that the city had "no intention of granting an exception" to the religious agency. (*Fulton*, 141 S.Ct. at 1878.) What mattered for general applicability, was that the city had *any* discretion to grant exemptions. Indeed, under *Smith*, where a law allows exemptions based on the reasons for a particular action, it "may not refuse to extend that … system to cases of 'religious hardship' without compelling reason." (*Ibid.*; quoting *Smith*, 494 U.S. at 884.) The Act's focus on "arbitrary" discrimination seems wise. But because it asks courts to consider on a case-by-case basis whether a particular discriminatory act is "reasonable," it is

the antithesis of general applicability and must therefore pass strict scrutiny.

### 2. The Department's application of the Act to Miller is also not neutral and generally applicable under *Tandon* because it treats comparable secular activity more favorably than Miller's religious exercise.

"[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." (*Tandon*, 593 U.S. at 62.) Thus, a law that "contains myriad exceptions and accommodations for comparable activities" will "requir[e] the application of strict scrutiny." (*Id.* at 64.) The Act does just that: it provides categorical exemptions for certain kinds of age discrimination in housing. (Civ. Code, §§ 51.2-51.4, 51.10-51.12.) And it includes a categorical exemption for actions that conflict with other laws. (Civ. Code, § 51, subd. (c) [the Act "shall not be construed to confer any right or privilege on a person that is conditioned or limited by law"].)

In practice, the exemption for actions that conflict with other laws leads to "myriad exceptions." (*Tandon*, 593 U.S. at 64.) While the insurance industry is subject to the Act, the many facially discriminatory distinctions made by insurers are permitted as long as they are based on "sound actuarial principles" or related to "actual and reasonably anticipated experience," as allowed by California insurance laws. (*Chabner v. United of Omaha Life Insurance Co.* (9th Cir. 2000) 225 F.3d 1042, 1050.) The Act cannot be used to force car rental companies

to stop engaging in age discrimination, because the Vehicle Code allows them to do so. (See *Lazar v. Hertz Corporation* (1999) 69 Cal.App.4th 1494, 1505; citing Vehicle Code.) And, of course, the Act cannot be used to force Miller to bake a wedding cake in violation of her "decent and honorable" beliefs regarding the nature of marriage, in violation of the Free Exercise Clause. Under *Tandon*, the Act's categorical exemptions for certain kinds of age discrimination and for all discriminatory distinctions that comply with other laws require strict scrutiny as well.

### 3. The Department's application of the Act to Miller is not neutral under *Lukumi* and *Masterpiece* because the Department treated Miller's religious beliefs with hostility.

The Department is "obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of [Miller's] religious beliefs." (*Masterpiece*, 584 U.S. at 638.) *Masterpiece* identified three examples of "clear and impermissible hostility" towards the Colorado baker's beliefs that showed a lack of neutrality (*Id.* at 634.) Any one is enough to show non-neutrality. The presence of all three makes this a simple case.

*First*, the Colorado commissioners remarked that the Christian baker "can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.'" (*Masterpiece*, 584 U.S. at 634.) *Masterpiece* held that these were "dismissive comments showing lack of due consideration for [the baker's] free exercise rights and the dilemma he faced" and that in context, this dismissive attitude showed a lack of neutrality. (*Ibid.*)

The Department has made similar comments. (See, *e.g.*, AOB.14.) But its dismissiveness goes much deeper. It has prosecuted Miller for six years, seeking punitive fines and other relief. (13.AA.2550.) Yet in its trial brief, the Department asserted that there is *no burden* on Miller's religious exercise because she has the "options" of baking the wedding cake, telling her employees to bake the wedding cake, or never baking another wedding cake again. (11.AA.2217-2218; see also 13.AA.2550.) The Superior Court rightly rejected the Department's "options," calling them "sophistry" that "buried and paved over" Miller's sincere religious beliefs. (13.AA.2550.) Indeed, the Department "lack[ed] any sensitivity to the rational, reasonable, sincere religious beliefs" held by Miller. (*Ibid*.) The Department's sophistic dismissal of the burden on Miller, after six years of prosecution, itself shows a lack of neutrality under *Masterpiece*.

*Second*, *Masterpiece* found that the Colorado baker was not treated neutrally because one commissioner opined that "religion has been used to justify all kinds of discrimination throughout history," including slavery and the Holocaust, and described using religious freedom to justify discrimination as "despicable … rhetoric." (*Masterpiece*, 584 U.S. at 635.) The Supreme Court held that this language was "inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation." (*Ibid.*)

The Act protects against discrimination on the basis of religion, and the Department, which describes itself as the "institutional centerpiece of California's broad commitment to civil rights," is charged with "neutral" enforcement of this part of the Act as well.[14] But that is not what Miller received. Instead, the Department asserted, in public court filings, that the very existence of Miller and her beliefs "harms the dignity of all Californians." (7.RA.1634.) Although Miller conclusively demonstrated throughout six years of discovery that she willingly served and employed all without regard to race or sexual orientation, the Department repeatedly asserted that her limited objection to making custom wedding cakes for same-sex weddings "cannot be meaningfully differentiated" from race discrimination. (7.RA.1627-1628; 7.RA.1641; 7.RA.1677.) And it proclaimed, despite all evidence, that Miller sought "a return to the days when certain individuals could be turned away from businesses based on their innate characteristics." (7.RA.1633.) The Department continues to make these claims: its press release in this case asserts that Miller seeks to "roll back the clock on fundamental civil rights protections." (Department Oct. 23 Press Release, *supra* at 53.) These are grave distortions of Miller's sincere beliefs. The Department's persistent and public

[14] (See About Civil Rights Department (CRD) <https://perma.cc/7GBH-HSPM>; 7.RA.1605.)

mischaracterizations of Miller and her beliefs demonstrate a complete lack of neutrality.[15]

*Third*, *Masterpiece* held that Colorado showed hostility because of "the difference in treatment between Phillips' case and the cases of other bakers." (*Masterpiece*, 584 U.S. at 636.) The difference in treatment between the Rodriguez-del Rios and Miller also demonstrates the Department's hostility.

The Department has spent six years prosecuting Miller for a ten-minute interaction during which she remained, by all accounts, completely civil. Yet the Department has done nothing to address the rampant, ongoing religious discrimination against Miller. The Department knew that many of Miller's corporate clients had dropped their contracts because of her beliefs—an express violation of the Act. (Civ. Code, § 51.5, subd. (a);

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[15] The Department's conduct towards Miller during the litigation also demonstrated lack of neutrality. During depositions, Department attorneys asked Miller to explain how she was different from people who used religious reasons to justify race discrimination, whether she read the Bible in Hebrew and Greek, and how she could justify following some rules in the Bible—like those concerning marriage—while not following others—like the Torah prohibition on eating shellfish. The Superior Court was troubled by these tactics, calling the Department "insensitive" and rebuking it for engaging in "irrelevant discovery that can reasonably be interpreted as a lack of respect for Miller's beliefs." (13.AA.2554.) The court found that this behavior "may have stepped on the line at times" but was not enough by itself to establish non-neutrality. (*Ibid.*) But taken together with the Department's public distortions and failure to support or protect Miller and her staff from the pervasive *religious* discrimination that they experienced during this case, the case for non-neutrality is overwhelming.

7.RT.1648:28-1649:5.) The Department knew about the pornographic images and detailed rape threats Miller received via email and social media. (1.RA.252; 1.RA.247; 1.RA.235; 1.RA.241.) It knew about the repeated harassing phone calls, including by a man describing in detail the sexual violence he intended to carry out against Miller and her staff, as well as crimes committed against Tastries staff. (1.RA.62; 1.RA.298-299.)

Miller disclosed these incidents as early as 2018, during the Department's initial investigation (see, *e.g.*, 1.RA.298-299), but at no time has the Department offered Miller and her staff the resources that it provides to other victims. Instead, it continues to distort her beliefs in court and attack her in public. This is far from the neutral treatment that the Constitution requires.

The Department's hostility towards Miller ends the analysis. When religious exercise is the object of government action, that at least requires strict scrutiny. (*Lukumi*, 508 U.S. at 546.) But in the face of government hostility, a policy must be "'set aside' … without further inquiry"—that is, without a strict scrutiny justification. (*Kennedy*, 597 U.S. at 525, fn.1.)

### C. The Department's actions cannot survive strict scrutiny.

The Department's actions cannot pass strict scrutiny in any event. Because the Act is neither generally applicable, nor applied neutrally in this case, strict scrutiny is triggered. (*FCA,* 82 F.4th at 693.) Thus, the Department must show that prosecuting Miller under the Act is necessary to advance a compelling interest, and that it has no less-restrictive means of doing so. The Department "essentially concedes that it cannot

meet this standard as it has offered no arguments to the contrary." (*Id.* at 694.) Because the Department "has failed to offer any showing that it has even considered less restrictive measures … it fails at least the tailoring prong of the strict scrutiny test." (*Ibid.*)

The Superior Court concluded that *North Coast* settled the Act's validity as applied to all religious liberty litigants, no matter the situation. (13.AA.2552-2554.) But strict scrutiny justifications are not dispensed in gross but are instead measured "to the person." (*Gonzales v. O Centro Espírita Beneficente União do Vegetal* (2006) 546 U.S. 418, 430-431.) This Court must "scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants"—in this case, Miller. (*Fulton*, 141 S.Ct. at 1881; citing *O Centro*, 546 U.S. at 431.) For purposes of strict scrutiny analysis, "[t]he question … is not whether the [Department] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception" specifically to Miller. (*Fulton*, 141 S.Ct. at 1881.)

Thus in *O Centro*, the Court held that the federal government had to allow members of the UDV religious group to import the hallucinogenic tea hoasca, but the Controlled Substances Act remained valid and enforceable against all others. (546 U.S. at 439.) In *Holt v. Hobbs,* the Court held that Arkansas had to allow a Muslim inmate to grow a half-inch beard, but it could continue to enforce its grooming policy generally. (*Holt v. Hobbs* (2015) 574 U.S. 352, 365.) And in *Fulton* the Court held that the city had to

allow an exemption for Catholic Social Services' religious exercise, while continuing its efforts to ensure the equal treatment of foster parents and foster children. All three of these unanimous decisions "looked beyond broadly formulated interests" to decide how the government's interests intersected with the specific case. (*O Centro*, 546 U.S. at 431.)

The Department cannot not meet strict scrutiny here. First, discretion is baked into the Act, requiring courts to determine whether the facially discriminatory actions are "arbitrary" and "invidious," and "unreasonable." (*Javorsky*, 242 Cal.App.4th at 1395, italics omitted.) A law does not advance "an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." (*Espinoza v. Montana Depart. of Revenue* (2020) 140 S.Ct. 2246, 2261.) This threshold determination "undermines" any "contention that its non-discrimination policies can brook no departures." (*Fulton*, 141 S.Ct. at 1882.)

Second, the Act categorically exempts certain kinds of facially discriminatory actions—namely, age discrimination as well as discrimination permitted under other laws. (See *supra* at I.C.1.) And "[w]here the government permits other activities to proceed with precautions," such as authorization in other laws, "it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too." (*Tandon*, 593 U.S. at 63.) Having already left appreciable harm to its assumed interests unprotected

through this exemption, the Department cannot claim that it is unable to accommodate Miller.

Third, the Department has also failed to show that requiring religious objectors to provide custom cakes for same-sex weddings is a narrowly tailored policy. As explained above, the Department could adopt a policy, consistent with the Act itself, that allows religious objectors to meet their obligations to provide "full and equal" access to their services by referring patrons to comparable service providers, which Miller did here. (See *supra* at I.B; 7.RT.1633:14-1634:17; 7.RT.1641:20-25.) Further, the Department could create tailored exemptions. (See, *e.g.*, *Brush & Nib*, 448 P.3d at 923.) Multiple federal statutes provide tailored exemptions for religious people while still advancing anti-discrimination interests. (See, *e.g.*, 42 U.S.C. § 2000e-1(a) and 42 U.S.C. § 2000e-2(e)(2) [Title VII]; 20 U.S.C. § 1681(a)(3) [Title IX]; 42 U.S.C. § 12113(d) [ADA].)

The Department rejected options like these, insisting that Miller must design and create the cake the Rodriguez-Del Rios wanted. (AOB.39.) Colorado made a similar argument when seeking to compel a particular wedding website designer to create custom wedding websites to celebrate same-sex marriages. (*303 Creative*, 600 U.S. at 592.) The Supreme Court rejected this argument, finding that compelling the provision of "unique" services "would not respect the First Amendment; more nearly, it would spell its demise." (*Ibid.*)

* * *

"[P]ublic accommodations laws" have played a "vital role" "in realizing the civil rights of all Americans" but "no public accommodations law is immune from the demands of the Constitution." (*303 Creative*, 600 U.S. at 590, 592.) Having retained the discretion to determine whether a particular act of discrimination is "arbitrary," "invidious," or "unreasonable," and having exempted discrimination by everyone from insurance companies to car rental agencies, the Department cannot refuse to extend the same consideration to Miller here. During the Department's six-year-long prosecution, it has engaged in repeated mischaracterizations of Miller's beliefs and publicly compared her to vile racists, while turning a blind eye to the hate crimes that she and her staff have suffered. The Department's bias is another reason its appeal should fail.

## CONCLUSION

The judgment of the Superior Court should be affirmed.

Respectfully submitted,

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January 18, 2024

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by California Rules of Court rule 8.204(c)(1). The brief is 13,994 words, excluding the portions exempted by California Rules of Court rule 8.204(c)(3). The brief's type size and type face comply with California Rules of Court rule 8.204(b), because it uses a 13-point Century Schoolbook font.

*/s/ Eric C. Rassbach*
Eric C. Rassbach

## PROOF OF SERVICE

At the time of service, I was over 18 years old and not a party to this action. My business address is 1919 Pennsylvania Ave. NW, Suite 400, Washington, DC 20006. My electronic service address is mkrauter@becketlaw.org. On January 18, 2024, I served true copies of the following documents described as **RESPONDENTS' BRIEF, RESPONDENTS' APPENDIX, AND RESPONDENTS' SEALED APPENDIX** on the interested parties in this action as follows:

****SEE ATTACHED SERVICE LIST**

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am familiar with the Becket Fund's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list.

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

Executed on January 18, 2024.

Matthew Krauter

**SERVICE LIST**

***Civil Rights Department v. Cathy's Creations, Inc., D/B/A Tastries, And Catharine Miller***
**California Court of Appeal, Fifth Appellate District**
**Case No. F085800**

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| Gary David Rowe<br>California Department of Justice<br>300 S Spring St Ste 1702<br>Los Angeles, CA 90013 | Plaintiff and Appellant: Civil Rights Department, formerly Department of Fair Employment and Housing<br><br>*Electronic Copy*<br>via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) |
| Kern County Superior Court Clerk<br>Superior Court of California, County of Kern, Metropolitan Division, Justice Building<br>1215 Truxtun Ave<br>Bakersfield, CA 93301 | Trial Court, Case No. CASE No. BCV-18-102633<br><br>Copy (Brief only) via U.S. Mail |
| Clerk of the Court<br>Supreme Court of California<br>350 McAllister Street<br>San Francisco, California 94102-3600 | Electronic Copy (CRC, Rule 8.44(b)(1))<br><br>*Electronic Copy*<br>via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) |