Charles S. LiMandri, SBN 110841
cslimandri@limandri.com
Paul M. Jonna, SBN 265389
pjonna@limandri.com
Jeffrey M. Trissell, SBN 292480
jtrissell@limandri.com
Milan L. Brandon II, SBN 326953
mbrandon@limandri.com
LiMANDRI & JONNA LLP
P.O. Box 9120
Rancho Santa Fe, California 92067
Telephone: (858) 759-9948
Facsimile: (858) 759-9938

Thomas Brejcha, *pro hac vice**
tbrejcha@thomasmoresociety.org
Peter Breen, *pro hac vice**
pbreen@thomasmoresociety.org
THOMAS MORE SOCIETY
309 W. Washington St., Ste. 1250
Chicago, IL 60606
Tel: (312) 782-1680
*Application forthcoming

Attorneys for Defendants Cathy's Creations, Inc. and Catharine Miller

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF KERN

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

Plaintiff,

v.

CATHY'S CREATIONS, INC. d/b/a TASTRIES, a California Corporation; and CATHARINE MILLER, an individual,

Defendants.

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

Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

DEFENDANTS' TRIAL BRIEF

Date: July 25, 2022
Time: 9:00 a.m.
Dept: J
Judge: Hon. J. Eric Bradshaw

Action Filed: Oct. 17, 2018

TABLE OF CONTENTS

///

///

///

TABLE OF CONTENTS—CONTINUED

TABLE OF AUTHORITIES

United States Supreme Court Cases:

TABLE OF AUTHORITIES—Continued

United States Supreme Court Cases:

California Cases:

TABLE OF AUTHORITIES—Continued

California Cases:

TABLE OF AUTHORITIES—Continued

California Cases:

Non-Precedential California Orders:

Other Federal Cases:

TABLE OF AUTHORITIES—Continued

Other Federal Cases:

Other State Cases:

International Cases:

Constitutional Provisions:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Jury Instructions:

INTRODUCTION & HISTORY

On Saturday, August 26, 2017, Real Parties in Interest Eileen and Mireya Rodriguez-Del Rio visited Tastries Bakery, allegedly to commission Defendants Cathy Miller and Tastries Bakery to create a custom wedding cake for their forthcoming same-sex wedding ceremony. (Jud. Adm. Doc. 1, FAC ¶¶ 36-38.)[1] Tastries Bakery is a Christian boutique and bakery, 100% owned by Cathy Miller. (*Id.* at ¶ 4.) The Real Parties were already legally married, but stated that they wanted to also host a traditional wedding ceremony. (FAC ¶ 34.) Although Defendants generally provide services to LGBT customers, they object to creating custom cakes that express messages that violate their sincere religious beliefs about marriage; therefore, Defendants instead offered to assist the Real Parties to arrange comparable service from another local bakery, Gimmee Some Sugar, an offer the Real Parties then rejected of their own volition. (FAC ¶¶ 26-30, 41-42.)

After their wedding ceremony, on October 18, 2017, the Real Parties filed an administrative complaint with Plaintiff the Department of Fair Employment & Housing ("DFEH")—the California agency tasked with enforcing California's non-discrimination statute, the Unruh Civil Rights Act. (FAC ¶¶ 1, 8.) Plaintiff DFEH then began an administrative investigation, which included a temporary foray into Superior Court (via a petition proceeding) and a denied motion for a preliminary injunction. (See *DFEH v. Miller* (2018) Cal.Super. No. BCV-17-102855, 2018 WL 747835.) On October 17, 2018, having completed its investigation, Plaintiff DFEH brought the present action, alleging one claim: violation of the Unruh Civil Rights Act, and seeking damages and injunctive relief. (FAC ¶¶ 45-54; FAC Prayer ¶¶ 1-14.) Following summary judgment, only statutory damages of $4,000 for each of the Real Parties has survived, as well as Plaintiff DFEH's request for broad injunctive relief. Beyond relief for the Real Parties specifically, Plaintiff DFEH seeks an order that Defendants "[i]mmediately cease and desist from selling to anyone any item they are unwilling to sell, on an equal basis, to members of any protected group under the Unruh Act." (FAC Prayer ¶ 2.)

[1] Judicial Admission Document Nos. 1 and 2, and MIL Exhibit Nos. 1-14 are attached to the first declaration of Jeffrey M. Trissell, dated July 8, 2022. MIL Exhibit Nos. 15-22 are attached to the second declaration of Jeffrey M. Trissell, dated July 11, 2022. MIL Exhibit Nos. 23-30 are attached to the third declaration of Jeffrey M. Trissell, dated July 18, 2022.

In this Court's summary judgment order, the main issue discussed was intent. Specifically, this Court held as follows: "The plaintiff has not demonstrated the requisite intent. The plaintiff bases its motion on unsupported conclusions and what the Court views as a skewed view of the facts such as the nature of the defendant's business and how to characterize its output." (MIL Ex. 14, Minute Order (Dec. 15, 2021) p.2.) In this respect, in Plaintiff DFEH's responses to requests for admission, Plaintiff DFEH stated unequivocally that it "is not disputing the sincerity of defendant Miller's religious beliefs." Thus, that issue—the sincere religious motivations of Defendants in this matter—has been conclusively established for purposes of this case. (Code Civ. Proc., § 2033.410(a); see Defendants' Motions in Limine, Nos. 1, 9 (July 8, 2022).)

Per the Court's comments at the May 24, 2022 hearing, in this trial brief Defendants have endeavored to not repeat the voluminous summary judgment briefing. Where appropriate, Defendants also refer the Court to the parties' motions in limine. But due to the complexity and importance of the issues, even a summary of the applicable law requires significant briefing.

ARGUMENT

1. THERE IS NO MERIT TO PLAINTIFF'S CAUSE OF ACTION

In relevant part, the Unruh Act states as follows:

> (b) All persons within the jurisdiction of this state are free and equal, and no matter what their … sexual orientation … are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.
>
> (c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every … sexual orientation….

(Civ. Code, § 51.)

> Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51 … is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51….

(Civ. Code, § 52(a).)

From this, both CACI and BAJI have developed form jury instructions and verdict forms. (CACI No. 3060; BAJI No. 7.92.) The CACI instruction is more streamlined, identifying two relevant elements whereas BAJI identifies three. BAJI also includes an instruction on an affirmative defense that CACI does not include. Although the parties have stipulated to a bench trial, Defendants believe that the jury instructions are helpful in guiding the analysis, and base the below sections on BAJI, with its three elements and affirmative defense. (See Attch., BAJI No. 7.92.)

1.1. Defendants did not intentionally discriminate against the Real Parties because Defendants' religious beliefs regarding marriage, not the Real Parties' sexual orientation, motivated Defendants decision not to supply a custom wedding cake.

The second element under BAJI of an Unruh Act claim is that a substantial motivating factor for Defendants' conduct was the Real Parties' sexual orientation. (See Attch., BAJI No. 7.92(2).) This element is briefed extensively in the parties' motions in limine, and so Defendants refer the Court to that briefing, and do not repeat it here. (See Defendants' Opposition to Plaintiff DFEH's Motion in Limine, No. 1 (July 18, 2022) § III.A, pp.4:4-13:6.)[2] In summary, the Unruh Act does not "confer any right or privilege on a person that is … applicable alike to persons of every … sexual orientation[.]" (Civ. Code, § 51(c).) Thus, to establish an Unruh Act violation, the plaintiff must prove that the Defendant engaged in "intentional discrimination." (*Cohn v. Corinthian Colleges, Inc*. (2008) 169 Cal.App.4th 523, 527 & fn.3 [citing *Bray v. Alexandria Women's Health Clinic* (1993) 506 U.S. 263, 270].)

Cohn shows that the penultimate issue is whether Defendants *intended* to discriminate against Real Parties *because* of their sexual orientation. Even when the conduct is extremely closely correlated with the protected characteristic, the plaintiff has to show that the discrimination was *because* of the protected characteristic itself. (Cf. *Dobbs v. Jackson Women's Health Organization* (2022) 142 S.Ct. 2228, 2245-2246 & fn.17 [citing *Bray*: "'The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.'"].)

[2] See also Memorandum of Points & Authorities ISO Defendants' Motion for Summary Judgment or Adjudication (Sep. 8, 2021) § 1.2, pp.14:1-15:18 [hereafter "Def. MSJ"].

In contrast, Plaintiff DFEH argues that making a distinction based on conduct closely related with a protected characteristic is per se making a distinction based on the protected characteristic. (See Plaintiff DFEH's Motion in Limine, No. 1 (July 8, 2022) p.4:14 ["A tax on wearing yarmulkes is a tax on Jews."].) But Plaintiff DFEH's argument ignores the facts of this case, and relevant case law, because Defendants did not make a distinction based on conduct closely related with a protected characteristic. For example, if Defendants refused to serve LGBT customers, at all, on the basis that they had engaged in homosexual sexual activity or entered into a same-sex marriage, that would presumably be per se evidence of discrimination on the basis of homosexuality.

But Plaintiff DFEH's argument does not apply in the context of refusing to create specific *messages* that people of *all protected characteristics* could favor or not, and could request or not. In other words, it is not discrimination on the basis of sexual orientation to refuse to create any product or provide any service, *for anybody*, that sends a message in favor of the political and philosophical view that marriage can be defined as something other than a conjugal union between one man and one woman. (See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) 138 S.Ct. 1719, 1728 ["*Masterpiece I*"]; *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 U.S. 557, 572; accord *Brush & Nib Studio, LC v. City of Phoenix* (2019) 247 Ariz. 269, 304; *Masterpiece Cakeshop Inc. v. Elenis* (D. Colo. 2019) 445 F.Supp.3d 1226, 1241 ["*Masterpiece II*"]; *Lexington-Fayette Urban County Human Rights Commission v. Hands On Originals* (Ky. 2019) 592 S.W.3d 291, 298-305 [Buckingham, J., concurring]; *Lee v. Ashers Baking Co. Ltd.* [2018] UKSC 49, ¶ 62.)

Plaintiff DFEH also argues that it needs to merely prove that Defendants intended to make a distinction that had *the effect* of providing unequal services to LGBT customers. (See Plaintiff DFEH's Opposition to Motion in Limine, No. 9 (July 18, 2022) pp.2:23-5:19.) Beyond the fact that this argument is squarely foreclosed by the California Supreme Court (see *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 853-854), it is equally unsupported by Plaintiff's key case: *Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510. Contrary to Plaintiff DFEH's gloss, *Hankins* does not stand for the proposition that the "intent to discriminate" element of an Unruh Act claim can be established by "intent to engage in certain action." Rather, *Hankins* stands for the unremarkable proposition that "intent to engage in certain action," coupled with knowledge of

disparate impact, can be *evidence* of "intent to discriminate." However, at the end of the day, Plaintiff DFEH must prove that Defendants intended to make a distinction on the basis of sexual orientation, *not* that Defendants intended to make any distinction (even one not based around sexual orientation), and that the distinction had the effect of disparate impact for members of the LGBT community.

Here, Defendants' policies are not triggered by any customer's sexual orientation, or by the customer engaging in conduct closely associated with a homosexual orientation (*i.e.*, that individual having personally entered into a same-sex marriage). Tastries will sell any pre-made case cakes or other baked goods to anyone for any purpose regardless of their sexual orientation or marital status. But Tastries Bakery's written policies state that "[a]ll custom orders must follow Tastries Design Standards," which in turn elaborate that custom orders that do not meet Tastries Design Standards include: "Designs that violate fundamental Christian principles; wedding cakes must not *contradict* God's sacrament of marriage between a man and a woman." (See Trial Ex. 8, Design Standards.) To "contradict" means "to assert or speak the contrary or opposite of" some proposition.

Tastries Bakery's policy is thus a facially neutral policy concerning sending messages about marriage. It has nothing to do with any individual's sexual orientation. Defendants' policy applies to writing political slogans on cakes for political events regarding marital issues (divorce, same-sex marriage, etc.); it applies to engaging in the symbolic speech of creating a traditional wedding cake (white with three or more tiers) for events that would demean and de-sacramentalize marriage (such as ironically using it to announce a divorce); and it applies to engaging in the symbolic speech of creating a traditional wedding cake for use as the celebratory centerpiece at an event that calls itself a wedding yet involves anything other than a lifelong union of one man and one woman. This would include heterosexual unions of three or more people, unions not intended to be lifelong, and unions involving members of the same sex. As applied here, Tastries will not sell any specially made custom cakes, that have to be ordered in advance, for any same-sex wedding related event, *to any person*. This includes a homosexual couple seeking a wedding cake for their own same-sex wedding, or a corporation and its heterosexual agent seeking a wedding cake for a film or play in which there is a same-sex wedding.

///

For its Unruh Act claim, Plaintiff DFEH must prove that Defendants declined Real Parties' order *because* of the Real Parties' sexual orientation, not the message of the cake. In contrast, Defendants will prove that they did not do so, that they have gladly worked with LGBT business owners and served LGBT customers—without regard to their marital status—and merely applied here their neutral policy regarding not sending *messages* contrary to a Biblical view of marriage.

1.2. The Real Parties were not denied full and equal services because providing a referral to a competent third party baker satisfies the "Full and Equal" services requirement.[3]

The third element under BAJI of an Unruh Act violation is that Defendants denied "full and equal services" to the Real Parties. (See Attch., BAJI No. 7.92(3).) In *Minton*, the court was tasked with adjudicating whether a Catholic hospital violated the Unruh Act when it declined to perform a hysterectomy on a female-to-male transgender patient. (*Minton v. Dignity Health* (2019) 39 Cal.App.5th 1155.) The patient had obtained a diagnosis of gender dysphoria, along with a professional medical opinion that a hysterectomy was necessary to treat the gender dysphoria. As a result, the patient's doctor scheduled a hysterectomy at the Catholic hospital for August 30, 2016. (*Id.* at 1159.) Due to its religious beliefs, the Catholic hospital performs hysterectomies for diagnoses such as "chronic pelvic pain and uterine fibroids," but not gender dysphoria. As a result, the hospital cancelled the operation. (*Id.*)

According to the patient, in response to the cancellation, there was a "flurry of advocacy on Minton's behalf," which led the hospital's President to suggest that the patient could have the operation done at a nearby Methodist hospital. (*Id.* at 1159-1160.) Following this suggestion, three days later on September 2 at the nearby hospital, the patient had the hysterectomy. (*Id.* at 1159.) The patient then sued under the Unruh Act, contending a denial of "full and equal access to medical care." (*Id.* at 1158.) The trial court sustained the hospital's demurrer without leave to amend, holding that the patient cannot contend that "receiving the procedure he desired from the physician he selected to perform that procedure three days later than he had planned and at a different hospital than he desired deprived him of full and equal access to the procedure." (*Id.* at 1161 [quoting trial court].)

[3] See Def. MSJ, § 1.1, pp.12:21-13:28; see also Def. MIL No. 4.

The court of appeal saw things different and reversed the trial court. But in sending the case back down, the court state:

> To be clear, we do not question the observation in *North Coast* that "to avoid any conflict between their religious beliefs and the state Unruh Civil Rights Act's antidiscrimination provisions, defendant physicians can avoid such a conflict by ensuring that every patient requiring a procedure receives 'full and equal' access to that medical procedure through a hospital physician lacking defendants' religious objections." [citation] But the … facts alleged in the amended complaint are that Dignity Health *initially* did not ensure that Minton had "full and equal" access to a facility for the hysterectomy.… Dignity Health's *subsequent* reactive offer to arrange treatment elsewhere was not the implementation of a policy to provide full and equal care to all…. [I]t cannot constitute full equality under the Act to cancel his procedure for a discriminatory purpose, wait to see if his doctor complains, and only then attempt to reschedule the procedure at a different hospital. "Full and equal" access requires avoiding discrimination, not merely remedying it after it has occurred.

(*Id*. at 1164-1165 [quoting *North Coast Women's Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145, 1159] ["*North Coast*"] [cleaned up; italics added].)

In distinguishing *Minton* and *North Coast*, and their holding that the provision of "full and equal" services can be accomplished through a referral to another physician or hospital, Plaintiff DFEH argues that they only concern arranging the provision of services by a non-objector within the same business, *i.e.*, another employee or another bakery owned by Defendants. Anything else, Plaintiff DFEH argues, is simply a reversion to the discredited "separate but equal" views of the early Twentieth Century. (See Plaintiff's Opposition to Defendants' Motion in Limine, No. 4 (Jul. 18, 2022) pp.3:12-4:23.) However, this rule is not explicit in the cases and makes no logical sense. There is no reason why an actual business agreement for referrals between bakeries is insufficient without the two bakeries being under the same corporate umbrella. Moreover, Plaintiff DFEH's argument is logically inconsistent as it is not clear how segregating customers within a business would be any less "separate but equal." If Defendants hired a decorator to make cakes for same-sex weddings, completely independent of Cathy Miller, Plaintiff DFEH could then argue that Defendants' policy is akin to a restaurant segregating customers based on race. Same-sex couples would not be entitled to a "Cathy Miller" cake, but an inferior and separate "Decorator X" cake.

///

In the motion in limine briefing, Plaintiff DFEH also cites *Rivera v. Crema Coffee Company LLC* (N.D. Cal. 2020) 438 F.Supp.3d 1068, 1074, for its inflammatory use of the phrase "separate but equal." *Rivera* was an Unruh Act case, but in the cited section it was not analyzing "full and equal" services. Rather, it was analyzing "alternative methods" of providing services under 42 U.S.C. § 12182(b). It also did not involve any constitutional defenses. The disparate context, with disparate lines of precedent, make it irrelevant except as an opportunity for Plaintiff DFEH to again compare Defendants to racists through reference to the odious "separate but equal" doctrine.

For its Unruh Act claim, Plaintiff DFEH must prove that Defendants' offer to connect the Real Parties with the bakery Gimmee Some Sugar was not the provision of full and equal services. In contrast, Defendants intend to prove that they made this offer, which constituted full and equal services, and which was rejected by the Real Parties on their own volition.

1.3. The Real Parties also cannot establish discrimination because they cannot establish that theirs was a genuine business inquiry, instead of a "shake down" strategy designed to destroy Defendant Miller's business due to her religious beliefs and obtain free wedding services.

The first element under BAJI for an Unruh Act claim is that the plaintiff was discriminated against, depriving the plaintiff of the full and equal services in a business establishment. (See Attch., BAJI No. 7.92(1).) This element is also briefed extensively in the parties' motions in limine, and so Defendants refer the Court to that briefing. (See Defendants' Opposition to Plaintiff DFEH's Motion in Limine, No. 4 (July 18, 2022) § II.A, pp.1:14-3:22; see also Plaintiff's Opposition to Defendants' Motion in Limine, No. 12 (July 18, 2022) pp.3:3-4:1.) In summary, to be "discriminated against," a plaintiff must show that he "actually possess[ed] a bona fide intent to sign up for or use [the defendant's] services." (*White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1032 [Unruh claim for occupation discrimination].) Thus, in cases where the plaintiff "never intended" to use the defendant's services, but instead had a "shakedown strategy," there can be no Unruh Act violation. (*Thurston v. Omni Hotels Management Corporation* (2021) 69 Cal.App.5th 299, 305.)

For its Unruh Act claim, Plaintiff DFEH must prove that Real Parties actually intended to purchase a wedding cake from Defendants, like any other patron, and were not seeking to instead be denied services and engage in a "shakedown strategy."

1.4. Defendants' decision not to provide a custom wedding cake was not arbitrary because the decision was motivated by constitutionally protected religious beliefs, not by irrational stereotypes or ill will towards LGBT individuals who are in fact regularly served by the bakery.

The fourth element of an Unruh Act claim under BAJI is that the discrimination was "arbitrary." (See Attch., BAJI No. 7.92(4).) Here too, this element is also briefed extensively in the parties' motions in limine, and so Defendants refer the Court to that briefing. (See Defendants' Opposition to Plaintiff DFEH's Motion in Limine, No. 1 (July 18, 2022) § III.B, pp.13:7-17:22.)[4]

In summary, the operative language of the Unruh Act only prohibits "arbitrary" discrimination. Thus, "a business generally open to the public may not *arbitrarily* exclude a would-be customer from its premises." (*In re Cox* (1970) 3 Cal.3d 205, 216 & fn.11 [citing Civ. Code, § 51(b)] [italics added].) Although the Unruh Act lists certain enumerated protected characteristics, these are merely "illustrative" (*id.*) and "the mere fact that [a characteristic] is listed as a prohibited ground of discrimination does not give it a special 'arbitrary per se' status[.]" (*Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 87-90 & fn.20.) Prohibited arbitrary discrimination "'emphasizes irrelevant differences' or 'perpetuates irrational stereotypes.'" (*Georges v. Bank of America, N.A.* (9th Cir. 2021) 845 Fed.Appx. 490, 491 [cleaned up].) Discrimination is not arbitrary where supported by "public policy." (*Sargoy v. Resolution Trust Corp.* (1992) 8 Cal.App.4th 1039, 1043.) In the context of the Unruh Act, public policy supports protection of constitutional rights. (*Howe v. Bank of America N.A.* (2009) 179 Cal.App.4th 1443, 1451.)

Here, under both the U.S. Constitution and the California Constitution, religion is protected. (U.S. Const., amend. I; Cal. Const., art. I, § 4.) Religion is also protected in numerous California statutes. (Civ. Code, §§ 51(b), 51.5(a); Gov. Code, § 12940(a); Lab. Code, § 511(d).) Religious views on marriage are also protected views. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 854-855; *Obergefell v. Hodges* (2015) 576 U.S. 644, 672; *Masterpiece I*, *supra*, 138 S.Ct. at 1727.) And the view that one can support protecting the rights of LGBT individuals, and support maintaining marriage as solely an institution between one man and one woman, is the explicit view of the California Constitution. (See

[4] See also Defendants' Memorandum of Points & Authorities in Opposition to Plaintiff's Motion for Summary Judgment or Adjudication (Oct. 6, 2021) pp.15:20-16:3.

Cal. Const., art. I, § 7.5; *Strauss v. Horton* (2009) 46 Cal.4th 364, 408-411 & fn.8-10.)

Defendant Cathy Miller is a devout Christian whose faith requires her to treat marriage as a uniquely important sacrament. It also instructs her that marriage is only the union of one man and one woman. Despite the law discussed above in Sections 1.1 through 1.3, Plaintiff DFEH argues that the facts here establish discrimination on the basis of sexual orientation, and presumably that the Real Parties' sexual orientation was still a "substantial motivating" reason for the denial of service. (See *Department of Corrections & Rehabilitation v. State Personnel Bd.* (2022) 74 Cal.App.5th 908, 927-928; CACI No. 2507 [defining a "substantial motivating reason" as "a reason that actually contributed to the [the adverse action]. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the [adverse action]"].)[5]

But Defendants will prove that even if the facts of this case constituted sexual orientation "discrimination," the distinction made here by Defendants was not arbitrary because: (1) the view that marriage can only be between one man and one woman is a belief enshrined in the California Constitution and protected by both the California and U.S. Constitutions, and therefore cannot be considered invidious or perpetuating irrational stereotypes; (2) the distinction that Defendants made here was not based upon the Real Parties' sexual orientation, but rather concerned protecting Defendants' own religious rights to support a fundamental tenet of their faith; (3) Defendants' offer to connect the Real Parties with another bakery ensured that they would have actually received services, thus confirming that Defendants made a distinction concerning their reasonable and protected religious beliefs, and not with any intent to harm the Real Parties, and in a manner that would have reasonably protected all parties' rights; and (4) Defendants do serve LGBT customers in other custom order requests and have employed members of the LGBT community.

///

[5] Plaintiff DFEH continues to dispute whether a "substantial" motivating reason is required. (See Plt. Opp. to MIL No. 2, p.4, fn.1; Plt. Opp. to MIL No. 9, pp.2:24-3:21.) But California cases generally require this, even in Unruh Act cases. (See *Minton*, *supra*, 39 Cal.App.5th at 1161; *Thurston*, *supra*, 69 Cal.App.5th at 304, fn.5.) Plaintiff DFEH cites older federal cases that in turn relied on the 2009 version of BAJI No. 7.92. In 2017, BAJI No. 7.92 was amended to add the "substantial" descriptor. (See Reply Memorandum ISO Defendants' Motion for Summary Judgment or Adjudication (Oct. 20, 2021) § 1.2, pp.9:1-10:4 & fn.2-3 [hereafter "Def. MSJ Reply"].)

2. Defendants' Constitutional Rights of Free Exercise of Religion and Free Speech Require the Government Regulation of Their Activity to Satisfy Strict Scrutiny, Which it Does not.

Even if the Court determines that there was a technical Unruh Act violation, this Court should also determine that Defendants are protected by their constitutional rights under: (1) the Free Exercise Clause of the California Constitution; (2) the Free Exercise Clause of the U.S. Constitution; and (3) the Free Speech Clause of the U.S. Constitution.

With respect to Tastries Bakery itself, a for-profit corporation, whether viewed through the lens "that for-profit corporations possess such rights" themselves, or through the lens that the owners of corporations can exercise their constitutional rights when running their businesses, Tastries Bakery can assert these constitutional defenses. (*Burwell v. Hobby Lobby Stores, Inc.* (2014) 573 U.S. 682, 708-719 & fn.19-22, 28 [federal Free Exercise clause]; *Minton*, *supra*, 39 Cal.App.5th at 1165 [California Free Exercise clause]; *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310, 365 [federal Free Speech clause].)

This precedent, beyond being reaffirmed by the U.S. Supreme Court in *Burwell*, is longstanding. (See, e.g., *Gallagher v. Crown Kosher Super Market of Mass., Inc.* (1961) 366 U.S. 617, 618-619 [corporation managing kosher market challenging Sunday closing laws]; *Braunfeld v. Brown* (1961) 366 U.S. 599, 601 [Jewish "merchants … engage[d] in the retail sale of clothing and home furnishings" challenging Sunday closing laws]; *U.S. v. Lee* (1982) 455 U.S. 252, 257 [Amish carpenter who argued that "payment and receipt of social security benefits [on behalf of his employees] is forbidden by the Amish faith"].) Although the corporations in *Gallagher*, *Braunfeld*, and *Lee* lost on the merits, the Supreme Court relied on them when it reaffirmed, unequivocally, that "for-profit corporations possess" "free-exercise rights" under the First Amendment. (*Burwell*, *supra*, 573 U.S. at 714-715.)

In the prior petition proceeding, Judge Lampe unequivocally and rightly found that the Free Speech clause of the First Amendment protected Defendants. (See *DFEH v. Miller* (2018) Cal.Super. No. BCV-17-102855, 2018 WL 747835, at *3-5.) However, Judge Lampe struggled with the Free Exercise analysis, noting that "[i]t is difficult to say what standard of scrutiny the court should use to evaluate the application of the Free Exercise clause to the circumstances of this case

after *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)." (*Id.* at *5.) Since that time, however, the law has become much clearer. In the intervening four years, the U.S. Supreme Court has issued its opinions in *Fulton v. City of Philadelphia* (2021) 141 S.Ct. 1868, *Tandon v. Newsom* (2021) 141 S.Ct. 1294, and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) 138 S.Ct. 1719, each of which applied strict scrutiny, controls this case, and disposes of this case in Defendants' favor.

The division between Free Exercise and Free Speech rights has also recently been revealed by the U.S. Supreme Court as a false one. Those rights were discussed by the High Court in reversing a decision barring a high school football coach from engaging in private prayer during his work duties. As the Supreme Court explained:

> Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's. ... The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike. ...
>
> [T]he District's conduct violated both the Free Exercise and Free Speech Clauses of the First Amendment. These Clauses work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent. In Anglo–American history, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince. …
>
> The [Free Exercise] Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through "the performance of (or abstention from) physical acts."

(*Kennedy v. Bremerton School District* (2022) 142 S.Ct. 2407, 2416, 2421 [cleaned up].)

For the reasons discussed below, this is quintessentially a case of government overreach where the First Amendment should stop the government in its tracks. The trend in recent religious liberty jurisprudence at the U.S. Supreme Court has been to uniformly restrain the government especially where, as here, the State's actions "appear[] to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake." (*South Bay United*

Pentecostal Church v. Newsom (2021) 141 S.Ct. 716, 717 [Roberts, C.J., concurring].)

2.1. The Free Exercise Clause of the California Constitution[6]

For its Free Exercise clause (Cal. Const., art. I, § 4), California uses a pre-1990 federal test. (*Smith v. FEHC* (1996) 12 Cal.4th 1143, 1179 [plur. opn.]; *Valov v. DMV* (2005) 132 Cal.App.4th 1113, 1126 & fn.7; see also *Burfitt v. Newsom* (2021) Cal.Super. No. BCV-20-102267, 2021 WL 2152961, at *3 [Pulskamp, J.].) Under this standard, there is "a two-fold analysis which calls for a determination of, first, whether the application of the statute imposes any burden upon the free exercise of the defendant's religion, and second, if it does, whether some compelling state interest justifies the infringement." (*Montgomery v. Board of Retirement* (1973) 33 Cal.App.3d 447, 451 [quoting *People v. Woody* (1964) 61 Cal.2d 716, 719].)

2.1.1. Religious Sincerity is Not Disputed and a Burden on Defendants' Religious Beliefs is Imposed Because Defendants Must Choose Between Shutting Down their Business or Honoring Their Religious Beliefs.

"The first step … requires two determinations, *i.e.*, [A] whether the statute imposes any burden upon the free exercise of the … religious beliefs the defendant asserts he embraces and [B] whether the defendant actually [believes] in good faith in that religion." (*People v. Mullins* (1975) 50 Cal.App.3d 61, 70.) As a general rule, "tort liability … imposes a[] burden" because "its very purpose is to discourage [the adherent] from putting such belief into practice by subjecting the [adherent] to possible monetary loss for doing so." (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1117; see *North Coast*, *supra*, 44 Cal.4th at 1158 [applying the Unruh Act constituted a burden]; *Walker v. First Orthodox Presbyterian Church of San Francisco* (1980) 22 Fair Empl.Prac.Cas. (BNA) 762, Cal.Super. No. 760-028, 1980 WL 4657, *3 & fn.3 [same as to similar nondiscrimination ordinance]; cf. also *Carson v. Makin* (2022) 142 S.Ct. 1987, 1996 ["'The Free Exercise Clause … protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'"].)

Under the sincerity analysis, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." (*Fulton v. City of Philadelphia* (2021) 141 S.Ct. 1868, 1876.) Under the second step, "when the [party] has made a

[6] See Def. MSJ, § 2.1, pp.15:25-18:18; Def. MSJ Reply, § 2.1, pp.10:23-12:15.

sufficient showing to trigger strict scrutiny review, the burden of justification is both demanding and entirely upon the government." (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 43 [equal protection context]; see also *id.* at 35-38 [discussing strict scrutiny test].) "Government 'justification[s]' for interfering with First Amendment rights 'must be genuine, not hypothesized or invented post hoc in response to litigation.'" (*Kennedy*, *supra*, 142 S.Ct. at 2432, fn.8.)

As noted above, Plaintiff DFEH does not contest the sincerity of Defendants' religious beliefs. (See Defendants' Motions in Limine, Nos. 1, 9 (July 8, 2022) [citing Jud. Adm. Doc. 1, DFEH Supp. Responses to RFAs (Feb. 25, 2022) Nos. 8, 9, 13-16].) Still, Plaintiff DFEH opposes Defendants' first and ninth motions in limine. The opposition is based around Plaintiff DFEH's fear that granting the motions will inhibit its Free Speech argument. This fear is unfounded. What is at issue in those motions, and what the Court should find as a binding judicial admission, concerns *the sincerity of Defendants' beliefs*, not how others will perceive those beliefs or perceive Defendants' actions.

Despite the absence of a dispute over sincerity, Plaintiff DFEH argues that under the California Constitution, Defendants' free exercise rights are not substantially burdened because Defendants could: (1) restructure their business and cease offering wedding cakes for sale to anyone; or (2) have an employee who does not have any contrary moral views on same-sex marriage make the wedding cake. Yet, both of these options would continue to violate Defendants' religious beliefs and are simply untenable:

(1) Defendants' religious beliefs require them to honor and promote covenantal marriage through their wedding services. Defendants also earnestly believe that shutting down their wedding-related services would make Tastries Bakery insolvent. (See Declaration of Catharine Miller in Support of Defendants' Motion for Summary Judgment (Sep. 8, 2021) ¶ 52 [hereafter "Miller MSJ Decl."]; Tastries 2d Amend. Responses to SROGs (Apr. 14, 2022) No. 26.)

(2) Tastries Bakery is 100% owned by Cathy Miller such that anything it does is directly using her art, recipes, and talent and is a direct reflection on her. Further, the wedding cake design consultation includes a presentation created by Cathy on the meaning and religious significance of the wedding cake. Thus, it would violate Defendants' religious beliefs to have Cathy's art, recipes,

and talent used to send a message promoting same-sex marriage. (See Miller MSJ Decl., ¶¶ 1, 25.)

2.1.2. Strict Scrutiny is not Satisfied Because Defendants Offered to Connect Real Parties with Another Bakery.

Turning to strict scrutiny, the government has the burden of showing that applying the law is "the least restrictive means of achieving a compelling interest." (*North Coast*, *supra*, 44 Cal.4th at 1158.) Both the California Supreme Court and the U.S. Supreme Court believe that the government's interest is in ensuring that the client actually receives "full and equal" services, such that Defendants' offer to connect the Real Parties with another bakery should satisfy strict scrutiny. (See *Fulton*, *supra*, 141 S.Ct. at 1882; *North Coast*, *supra*, 44 Cal.4th at 1159; *Minton*, *supra*, 39 Cal.App.5th at 1164-1165.)

Plaintiff DFEH disputes this, contending that either a Tastries Bakery employee must make the cake or Tastries Bakery must cease operations. In this respect, Plaintiff DFEH argues that this principle comes from the California Supreme Court's application of the Unruh Act in *North Coast*, a case which Plaintiff DFEH accuses Defendants of ignoring. (See Plaintiff's Opposition to Defendants' Motion in Limine, No. 8 (July 18, 2022) p.3:7-19 ["Defendants want to ignore longstanding caselaw"]; Plaintiff's Opposition to Defendants' Motion in Limine, No. 1 (July 18, 2022) p.5:9 ["defendants disregard *North Coast*"].)

But *North Coast* says no such thing. There, North Coast Women's Medical Group, Inc., located in San Diego County, employed various physicians, some with devout religious faith, others without. Ms. Benitez, a lesbian woman, sought to become pregnant through donated sperm. She was referred to North Coast and was initially treated by Dr. Brody. However, as the treatment progressed, Ms. Benitez ultimately needed to undergo physician-assisted insemination, which Dr. Brody could not do for an unmarried woman because of her religious beliefs. But no other North Coast physician was licensed for the procedure. (*Id.* at 1151-1152.) Ms. Benitez then sued North Coast and Dr. Brody for violation of the Unruh Act. As part of its strict scrutiny analysis, and in that context only, the California Supreme Court looked to the facts and held that holding North Coast Women's Medical Group liable for a violation of the Unruh Act was the least restrictive means of achieving a compelling government interest. (*Id.* at 1159.)

On its relevant facts, and its application of those facts to the law, *North Coast* is very different. It involved the congruence of: (1) a religious objection by a limited number of employees, not the entity itself; (2) where the doctors acted independently of each other, and did not supervise each other; and (3) the special, confidential and fiduciary relationship that exists between a physician and patient, along with the concomitant constitutional privacy interests of a patient seeking to become pregnant. (See *North Coast*, *supra*, 44 Cal.4th at 1162-1163 [Baxter, J., concurring] [noting unique medical and pregnancy context, and fact of group medical practice, not sole practitioner]; see also *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 63 [Kennard, J., concurring] ["The relationship of doctor to patient is a fiduciary one. A doctor has not only a legal obligation, grounded in the doctor-patient privilege and the constitutional right of privacy, but also a professional obligation to maintain the secrecy of patient confidences."] [cleaned up].)

None of that exists here. This case is more akin to the many cases wherein corporations asserted their own First Amendment rights to justify instructions to their employees that none of them may perform certain activities. The main problem with comparing this case to *North Coast*, and Plaintiff DFEH's attempt to create a "compromise" position, is that there is no practical difference here between issuing an order saying: (1) Either Defendant Miller has to design and create wedding cakes for same-sex weddings, or Tastries Bakery has to shut down; or (2) Either a Tastries employee has to design and create wedding cakes for same-sex weddings, or Tastries has to shut down. *In both cases, Tastries Bakery shuts down*.

Defendant Miller's religious beliefs are not disputed in this case, they are sincere. They sincerely require her to shut Tastries Bakery down rather than have her, or her employees, make wedding cakes for same-sex weddings. The most significant difference between here and *North Coast*, was that the doctors there really were independent professionals, where the North Coast Medical Group itself did not have any religious objections. As part of the strict scrutiny analysis, this is what the Court really has to weigh: Is the Real Parties' dignitary interests in being free from any hint of discrimination significant enough to require Tastries Bakery to close? No California or U.S. Supreme Court case has held that to be the required result on similar facts, especially when there are full and equal services widely available in the community.

Plaintiff DFEH can only make *North Coast* fit this case through stretching it and ignoring parts of it. When *North Coast* is properly analyzed, it supports Defendants' arguments. (See *North Coast*, *supra*, 44 Cal.4th at 1162-1163 [Baxter, J., concurring] [noting the majority's opinion only applies in context of a group practice (independent professionals); otherwise, the government's interest would be satisfied "where the patient could be referred with relative ease and convenience to another practice"]; Oral Argument Transcript at 62:12-64:18, *Masterpiece I*, *supra*, 138 S.Ct. 1719[7] [Justices Kennedy and Breyer asking why a referral is not sufficient].)

Plaintiff DFEH's purported State interest is also not justifiable on "dignity" grounds. Citing *Smith v. FEHC* (1996) 12 Cal.4th 1143 [plur. opn.], Plaintiff DFEH argues that the protection of Defendants' Free Exercise rights will harm the Real Parties sufficiently to justify overruling Defendants' rights. (Plaintiff's Opposition to Defendants' Motion in Limine, No. 3 (July 18, 2022) pp.2:10-4:28.) In *FEHC*, a plurality of the California Supreme Court held that an unmarried couple's "dignity interests in freedom from discrimination based on personal characteristics" justified overruling a religious objection by a Christian landlord to renting to unmarried couples. (*Id.* at 1170 [plur. opn.].) But like Plaintiff DFEH's appeal to *North Coast*, the different factual contexts of these cases is important. Property is not fungible and widespread housing discrimination can cause real harm. (See *Burks v. Poppy Const. Co.* (1962) 57 Cal.2d 463, 471 ["Discrimination in housing leads to lack of adequate housing for minority groups [citation], and inadequate housing conditions contribute to disease, crime, and immorality."].)

Here, the Real Parties had no difficulty actually obtaining a wedding cake, so their dignitary interests lie solely in forcing Defendants to give up their own constitutionally protected religious beliefs. (*Masterpiece I*, *supra*, 138 S.Ct. at 1727 ["religious and philosophical objections to gay marriage are protected views"].) In this context, "learning how to tolerate [religious activity] of all kinds is 'part of learning how to live in a pluralistic society,' a trait of character essential to 'a tolerant citizenry.'" (*Kennedy*, *supra*, 142 S.Ct. at 2430.) Thus, whether Plaintiff DFEH or private

[7] Transcript available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf; see also audio recording at 0:50:29-0:52:35, available at https://youtu.be/YO5WPCUh_MY?t=3029.

individuals "take offense" at such conduct, is not a significantly relevant inquiry. (*Id.*)

Further, forcing Tastries Bakery to suspend wedding services (and consequently all business operations) would reduce services to all persons, including to LGBT individuals who are routinely served by Defendants. (See *Fulton*, *supra*, 141 S.Ct. at 1882 [noting that exempting Catholic foster agency from nondiscrimination policy, and allowing it to refuse to certify same-sex couples as foster parents, would have the benefit of "increase[ing], not reduc[ing], the number of available foster parents," not the opposite].) Thus, Plaintiff DFEH's legal argument and interests are actually not in line with the State's interests.

Plaintiff DFEH attempts to distinguish *Fulton* because it involved a "faith-based nonprofit." (Plaintiff's Opposition to Defendants' Motion in Limine, No. 12 (July 18, 2022) pp.5:20-6:9.) But faith-based corporations are subject to the Unruh Act like any other. (See *Minton*, *supra*, 39 Cal.App.5th 1155.) And a party's constitutional rights have never depended on its corporate form. (See *Burwell*, *supra*, 573 U.S. at 709 [rejecting a for-profit/non-profit, distinction].) Plaintiff DFEH also misconstrues Defendants' motion in limine seeking to exclude evidence of Real Parties' emotional distress. Defendants argued that Plaintiff DFEH should be judicially estopped from contradicting its own, prior position (asserted in discovery proceedings) that such evidence is irrelevant. Since Plaintiff DFEH thought the evidence was irrelevant before, it should be held to that position. (See Defendants' Motion in Limine, No. 3 (July 8, 2022).)

Defendants will prove that they offered to connect the Real Parties with a comparable bakery and ask this Court to rule that this satisfied strict scrutiny by meeting the State's interest in ensuring the provision of "full and equal" services.

2.2. The Free Exercise Clause of the U.S. Constitution

When looking at the federal Free Exercise clause (U.S. Const., amend. I), the analysis is similar to the California Free Exercise clause, except that strict scrutiny is only triggered if the law is not "neutral and generally applicable." (*Fulton*, *supra*, 141 S.Ct. at 1876.) For the same reasons as discussed above, strict scrutiny cannot be satisfied. (See Section 2.1.2.)[8]

[8] See Def. MSJ, § 2.2, pp.18:18-24:17; Def. MSJ Reply, § 2.2, pp.12:15-15:11. The factual predicates which support Defendants' arguments in this section on neutrality and general applicability also

2.2.1. The Unruh Act is Not Generally Applicable Per the Non-Arbitrary Exemption of Civil Code, § 51(b).

First, "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" (*Fulton*, *supra*, 141 S.Ct. at 1877.) For example, permitting "the government to grant exemptions based on the circumstances underlying each" situation, *i.e.*, a "good cause" exemption, makes the law not generally applicable. (*Id.*) In that context, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." (*Id.*; see also *Dahl v. Board of Trustees of Western Michigan University* (6th Cir. 2021) 15 F.4th 728, 733.) As noted above, California cases have interpreted the text of the Unruh Act (Civil Code, § 51(b)) as only prohibiting "arbitrary" discrimination, regardless of whether an enumerated protected characteristic is implicated. (Section 1.4, *supra* [citing *Cox*, *supra*, 3 Cal.3d at 216-217 & fn.11; *Isbister*, *supra*, 40 Cal.3d at 87-90 & fn.20].) This is definitionally a "good cause" system of individualized exemptions that triggers strict scrutiny.

2.2.2. The Unruh Act is Not Neutral and Generally Applicable Per the Exemption for Other Statutes of Civil Code, § 51(c).

Second, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." (*Tandon v. Newsom* (2021) 141 S.Ct. 1294, 1296 [original italics].) Stated differently, "[a] government policy will fail the general applicability requirement if it 'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.'" (*Kennedy*, *supra*, 142 S.Ct. at 2423 [quoting *Fulton*, *supra*, 141 S.Ct. at 1877].)

Here, the Unruh Act states that it "shall not be construed to confer any right or privilege on a person that is conditioned or limited by law." (Civ. Code, § 51(c).) This provision essentially

---

support Defendants' arguments under the federal Due Process and Equal Protection clauses. (See Def. Opp. to MIL Nos. 2, 3.) Defendants wish to preserve those legal arguments for appeal, but present these same facts through the lens of the Free Exercise clause in light of the applicability of recent Supreme Court precedent.

provides that whenever there is a conflict between the Unruh Act and other law, the Unruh Act must necessarily give way. Thus, it writes into the Unruh Act itself an explicit system whereby any activity can be legally exempted at any time, and for any reason. This system, *by itself*, makes the Unruh Act not generally applicable. However, a review of the exemptions that have been passed into law also reinforces that the Unruh Act is not generally applicable.

The Unruh Act itself provides explicit exemptions for age discrimination in housing. (Civ. Code, §§ 51.2-51.4, 51.10-51.12.) And subdivision (c) has been interpreted to allow age discrimination in car rentals (see *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1505 [citing Vehicle Code]), and sex discrimination by international organizations subject to international treaties. (*Martin v. International Olympic Committee* (9th Cir. 1984) 740 F.2d 670, 677.) Beyond the fact that governmental institutions are not "business establishments" under the Unruh Act (see *Brennon B. v. Superior Court of Contra Costa County* (2020) 57 Cal.App.5th 367, 390 [school districts exempted]; *White v. City and County of West Sacramento* (E.D. Cal. 2021) No. 2:20-CV-02383-MCE-AC, 2021 WL 4068009, at *4 [police departments exempted]), cities and counties are per se exempted because their conduct can be ratified through ordinances exempting themselves from the Act. (*Harrison v. City of Rancho Mirage* (2015) 243 Cal.App.4th 162, 176.)

California also provides other conscience protections for employees who might otherwise be liable for discrimination (Gov. Code, § 12940(l); Lab. Code, § 511(d); see also Gov. Code, § 12926(q)), including specifically in the healthcare context, where medical personnel might otherwise be liable for sex discrimination. (See Health & Saf. Code, § 123420 [protection against assisting in abortion]; Bus. & Prof. Code, § 733(b)(3) [pharmacist may refuse on religious grounds to dispense a drug so long as employer makes accommodation]; see also Prob. Code §§ 4734, 4736 [medical personnel may decline to effectuate advanced healthcare directives on conscience grounds].) As noted above, with respect to the Unruh Act, the interests of the State are "generally [] preventing arbitrary discrimination." (See *FEHC*, *supra*, 12 Cal.4th at 1176, fn.21.) This interest is undermined by any and all secular exemptions to the Unruh Act, regardless of the protected characteristic involved.

Plaintiff DFEH responds that these categorical exemptions cannot make the Unruh Act not generally applicable because the California Supreme Court already found that the Act is generally

applicable. (See *North Coast*, *supra*, 44 Cal.4th at 1156.) But in *North Coast*, general applicability was not a primary issue. At the trial court level, the defendant relied solely on the hybrid rights doctrine. (*Benitez v. North Coast Women's Care Medical Group* (2004) Cal.Super. No. GIC770165, 2004 WL 5047112.) Before the California Supreme Court the defendant briefly stated that the Unruh Act was not generally applicable, but only cited the provisions allowing senior housing (*i.e.*, age discrimination)—no other categorical exemptions. (See Answer Brief on the Merits, *North Coast*, *supra*, 44 Cal.4th 1145, 2006 WL 4098607 [citing Civ. Code, §§ 51.2, 51.3].) Further, the holding of the California Supreme Court in *North Coast* cannot be squared with the U.S. Supreme Court's most recent elaboration on general applicability in *Tandon* and *Fulton*.[9]

2.2.3. The DFEH's Administrative Investigation and Prosecution Has Not Been Neutral Due to Disparate Treatment & Hostility[10]

Government action is not neutral if it "stem[s] from animosity to religion or distrust of its practices" (*Masterpiece I*, *supra*, 138 S.Ct. at 1731), or when the government acts "in a manner intolerant of religious beliefs." (*Fulton*, *supra*, 141 S.Ct. at 1877.) This lack of neutrality is apparent where the government "passes judgment upon or presupposes the illegitimacy of religious beliefs and practices" (*Masterpiece I*, *supra*, 138 S.Ct. at 1731), or "assume[s] the worst" about religious motivations for accommodation "but assume[s] the best" about secular ones. (*Tandon*, *supra*, 141 S.Ct. at 1297.) This can be shown explicitly, by the government calling religious beliefs "prejudices." (*Klein v. Oregon BOLI* (2022) 317 Or.App. 138, 161.) It can also be shown implicitly, through "the difference in treatment between [a religious baker's] case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission" (*Masterpiece I*, *supra*, 138 S.Ct. at 1730; see *Masterpiece II*, *supra*, 445 F.Supp.3d at 1242), or implicitly through timing and legal positions indicating retaliation for a prior successful legal victory.

[9] The issue of whether the "arbitrary" affirmative defense was an individualized exemption mechanism, thus automatically triggering strict scrutiny, was also not litigated in *North Coast*. This is because the concept that an individualized exemption system triggers strict scrutiny only emerged in 2021 with the U.S. Supreme Court's holding in *Fulton*.

[10] See also Def. MIL Nos. 7-8.

(*Masterpiece II*, *supra*, 445 F.Supp.3d at 1242.) In cases of religious "hostility," strict scrutiny does not apply; rather, courts "'set aside' such policies without further inquiry." (*Kennedy*, *supra*, 142 S.Ct. at 2422, fn.1 [quoting *Masterpiece I*, *supra*, 138 S.Ct. at 1732].)

Here, Defendants will prove that Plaintiff DFEH treated Defendants differently from others because: (1) during its administrative investigation, the DFEH was actively partisan, and assumed the worst regarding Defendants' religious beliefs by applying for a TRO a few days before Defendants' discovery responses were even due, despite the fact that as an investigator, "[t]he DFEH serves as a neutral fact-finder and represents the state of California rather than the complaining party" (Def. Trial Ex. 21, Notice of Filing of Discrimination Complaint (Oct. 16, 2017) p.1); and (2) Plaintiff DFEH admitted that it cannot and will not apply the Unruh Act to compel speech, and that all business owners could refuse to create a product that they view as offensive (Jud. Adm. Doc. 2, DFEH Supp. Responses to RFAs (Feb. 25, 2022) Nos. 4-7, 22), yet after reviewing Defendants' declarations and administrative discovery responses, and Judge Lampe's preliminary injunction order, it still chose to find probable cause to initiate the present misguided litigation. (Def. Trial Ex. 23, Notice of Cause Finding (Oct. 10, 2018) p.1.)

Second, Defendants will prove that Plaintiff DFEH has shown hostility to Defendants because: (1) both during its administrative investigation and the subsequent civil litigation, Plaintiff DFEH has compared Defendants' sincere religious beliefs to racial discrimination and other forms of invidious and opprobrious hate; and (2) both during its administrative investigation and the subsequent civil litigation, Plaintiff DFEH has argued that Defendants need to change their religious beliefs that no Tastries employee may participate in a same-sex wedding. (See Defendants' Motions in Limine, Nos. 7, 8 (July 8, 2022); Defendants' Opposition to Plaintiff's Motion in Limine, No. 3 (July 18, 2022).)

2.3. The Free Speech Clause of the U.S. Constitution[11]

Under the Free Speech clause of the U.S. Constitution (U.S. Const., amend. I), all Americans have "the right to speak freely" and "the right to refrain from speaking at all." (*Wooley v. Maynard*

[11] See Def. MSJ, § 2.3, pp.24:18-29:3; Def. MSJ Reply, § 2.3, pp.15:12-16:11.

(1977) 430 U.S. 705, 714.) Any restriction on this must satisfy "strict scrutiny." (See *Pacific Gas and Elec. Co. v. Public Utilities Com'n of California* (1986) 475 U.S. 1, 19-20 ["*PG&E*"].) The Free Speech clause of the First Amendment protects both "pure speech" and "expressive conduct."

For the reasons discussed below, the specific wedding cake that the Real Parties sought was itself artistic expression protected under the First Amendment as both "pure speech" and "expressive conduct." However, the analysis cannot be limited to just that wedding cake. In addition to prosecuting the Defendants on behalf of the Real Parties, Plaintiff DFEH seeks broader injunctive relief requiring Defendants to treat opposite-sex couples and same-sex couples identically with respect to all aspects of their wedding services. (FAC Prayer ¶ 2.) This implicates other Free Speech concerns, as discussed during the oral argument in *Masterpiece Cakeshop*:

> JUSTICE GINSBURG: Would that be true—would that be true if what the message—the message, let's say Craig and Mullins said we would like to have on this wedding cake of ours these words: "God bless the union of Craig and Mullins."
>
> MR. COLE [ACLU ATTORNEY]: So if he would not put that message on any other cake, then he doesn't have to put it on that cake.
>
> JUSTICE GINSBURG: He would put … that message on a cake that said: God bless the union of Ruth and Marty.
>
> MR. COLE: Right. If he would—if he would say that, then he would have to say God bless the union of Dave and Craig because the only difference between those two cakes, Your Honor, is the identity of the customer who is seeking to purchase it. It is the same cake otherwise.

(Oral Argument Transcript at 75:24-76:19, *Masterpiece I*, *supra*, 138 S.Ct. 1719.[12])

2.3.1. Compelled Pure Speech

A compelled-speech defense has three elements: (1) speech; (2) that the government compels' and (3) that the speaker objects to. (See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 U.S. 557, 572-573.) Elements two and three are conceded: because Defendants make wedding cakes celebrating traditional marriages, Plaintiff seeks to use the Unruh

[12] Transcript available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf; see also audio recording at 1:03:12-1:04:03, available at https://youtu.be/YO5WPCUh_MY?t=3792.

Act to compel Defendants to make wedding cakes celebrating same-sex weddings. (FAC, Prayer ¶ 2; MIL Ex. 8, DFEH Supp. Resp. to Tastries SROGs (Feb. 25, 2022) No. 23.) The only question is whether Defendants' wedding cakes are speech. Most simply, "[a]rt is speech." (*Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metro Government* (W.D. Ky. 2020) 479 F.Supp.3d 543, 548; *Hurley*, *supra*, 515 U.S. at 569.) Neither collaboration between a business and a customer in creating the art, nor the anonymity of the business when the customer later publishes the art, is relevant: the business is still speaking. (See *Brush & Nib Studio, LC v. City of Phoenix* (2019) 247 Ariz. 269, 287-291; *Anderson v. City of Hermosa Beach* (9th Cir. 2010) 621 F.3d 1051, 1061-1062.)

Here, Defendants will prove that when they create a custom wedding cake, they are engaged in artistic expression. Cake designs can range from simple to elaborate, but all styles require skill and each design portrays an image and message intended by the customer. (See Miller MSJ Decl., ¶¶ 2, 7, 12, 25-29, 32 & Exs. B, D.) In this case, the Real Parties wanted to communicate theirs was a "traditional wedding," so the traditional all white, three-tier cake was chosen. (MIL Ex. 8, DFEH Supp. Resp. to Tastries SROGs (Feb. 25, 2022) No. 14.) This custom cake was art entitled to full First Amendment protection. (See *DFEH v. Miller* (2018) Cal.Super. No. BCV-17-102855, 2018 WL 747835, at *3 ["A wedding cake is not just a cake in a Free Speech analysis. It is an artistic expression by the person making it that is to be used traditionally as a centerpiece in the celebration of a marriage."].)

2.3.2. Compelled Expressive Conduct

Separate from pure speech, the First Amendment protects "conduct" that is "sufficiently imbued with elements of communication" (*Texas v. Johnson* (1989) 491 U.S. 397, 404), if (1) there is "an intent to convey a particularized message;" and (2) "the likelihood is great that the message will be understood by those who view it." (*Anderson*, *supra*, 621 F.3d at 1058 [cleaned up].) As framed by Plaintiff DFEH, the first element is undisputed (Defendant Miller's intent is sincere), but it will "argu[e] that, under the law, any message Miller may believe she sends is not understood by those who view Tastries' baked goods." (Plaintiff's Opposition to Defendants' Motion in Limine, No. 9 (July 18, 2022) p.6:7-8.) Thus, according to Plaintiff DFEH, "[c]onduct, such as baking and selling baked goods, may become 'sufficiently imbued with elements of communication' to receive free

speech protections [] where '[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it'." (*Id*. at pp.5:28-6:4 [quoting *Spence v. Washington* (1974) 418 U.S. 405, 410-411].) But, Plaintiff DFEH contends, this rule does not apply here.

This argument is simply absurd. As Judge Lampe held: "A wedding cake is not just a cake in a Free Speech analysis. It is an artistic expression by the person making it that is to be used traditionally as a centerpiece in the celebration of a marriage. There could not be a greater form of expressive conduct." (*Miller*, *supra*, 2018 WL 747835, at *3.) The message need not be as complicated as DFEH contends, *i.e.*, "Tastries endorses this union, and so should you." Although many people would reasonably perceive that message, the primary message sent is simply: "This is a marriage." As Justice Thomas noted, "[i]f an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding," and thus, "[f]orcing [a baker] to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are 'weddings'." (*Masterpiece I*, *supra*, 138 S.Ct. at 1743-1744 [Thomas, J., concurring].)

Plaintiff DFEH essentially seeks an order compelling Defendants to write a sign with the words "This is a marriage" because they will do so for opposite-sex weddings. As Judge Lampe found, this does "violence to the essentials of Free Speech guaranteed under the First Amendment." (*Miller*, *supra*, 2018 WL 747835, at *1.) Moreover, context matters. It does not matter if there is a current, recent trend (which will shortly reverse, no doubt, as trends do) to use more colorful cakes at weddings, and sometimes use white cakes at baby showers or quinceñearas. When Real Parties would have displayed Defendants' sign, everybody would have known what it meant. (Compare Trial Ex. 631 [Photo of Wedding Cake]; with Trial Ex. 627A [Wedding Day Photos].)

Indeed, when Real Parties later commissioned a wedding cake from Tiers of Joy, they purchased cakes shaped as bread loaves to be sliced and have a scoop of frosting added. If they merely wanted to provide dessert to their guests, this would have been sufficient. But they *also* commissioned a three-tier white wedding cake (with the bottom two tiers made of Styrofoam), the traditional symbol of a wedding, so that they could engage in the traditional cake-cutting. Since this

thiree-tier cake was *not* intended for serving guests, it could *only* be for expressing a message through having the image of a traditional wedding cake as a centerpiece of the celebration and participating in the cake cutting ceremony where the cake is used to memorialize their first act as a married couple. (See *Kaahumanu v. Hawaii* (9th Cir. 2012) 682 F.3d 789, 799 [wedding ceremony itself is expressive conduct].) Thus, Defendants will prove that when they design and create custom wedding cakes, they do intend to convey a message, and that their message is likely to be understood by those who view their cakes. (Miller MSJ Decl., ¶¶ 19-23, 28 & Ex. C.)

Compelled expressive conduct is only subject to strict scrutiny (as opposed to intermediate scrutiny) if the compulsion is content or viewpoint based. A regulation is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed." (*Reed v. Town of Gilbert* (2015) 576 U.S. 155, 163-165; see *Telescope Media Group v. Lucero* (8th Cir. 2019) 936 F.3d 740, 753 ["*TMG*"] [law regulated based on content by treating wedding videographers' "choice to talk about one topic—opposite-sex marriages—as a trigger for compelling them to talk about a topic they would rather avoid—same-sex marriages"].)

As applied to Defendants, Plaintiff's interpretation of the Unruh Act compels expressive conduct based on content and viewpoint in three ways: (1) Plaintiff's interpretation of the Unruh Act would compel Defendants to celebrate same-sex weddings, which changes the content of their desired expressive conduct; (2) Plaintiff's interpretation of the Unruh Act would require Defendants to create cakes celebrating same-sex weddings *because* they create cakes celebrating opposite-sex weddings. If Defendants only created cakes celebrating quinceañeras, they'd be safe. It is only because Defendants create cakes celebrating traditional marriage that Plaintiff seeks to compel Defendants to also create cakes celebrating same-sex marriage. Thus, the Unruh Act is triggered by the content of Defendants' prior speech, making it content-based; and (3) Applying the Unruh Act here would only permit access to the marketplace based on one's viewpoint. According to Plaintiff, if Defendants make cakes celebrating weddings, the law does not require them to make cakes on every subject requested of them; rather, according to Plaintiff, the law only requires them to create cakes promoting a specific view—cakes celebrating same-sex weddings. That is a viewpoint-based access requirement that requires Defendants to speak a view with which they disagree.

2.3.3. Strict Scrutiny

As noted above, compelling individuals or businesses to engage in unwanted speech requires satisfaction of strict scrutiny. Further, as explained above, the Real Parties actually got their wedding cake, and they got it for free. Thus, the only interest they have is in compelling Defendants to violate their religious beliefs and endorse the Real Parties' definition of "marriage." This is not a compelling interest. (*Miller*, *supra*, 2018 WL 747835, at *5.) "[T]he point of all speech protection … is to shield just those choices of content that in someone's eyes are . . . hurtful." (*Hurley*, *supra*, 515 U.S. at 574.) Thus, "regulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be." (*TMG*, *supra*, 936 F.3d at 755.)

CONCLUSION

Applying the Unruh Act to this case is really like trying to fit a square peg into a round hole: there is an imperfect fit. Plaintiff DFEH admits that Defendants' religious beliefs concerning marriage are sincerely held and not pretextual—their intent was pure. Defendants offered to connect the Real Parties with another bakery as part of a good faith effort to accommodate both their own religious beliefs and the Real Parties' interests in obtaining full and equal services. There is no evidence here of animus against the LGBT community, and Defendants have regularly served and employed members of that community. From Defendants' perspective, this case has nothing to do with LGBT individuals—it has everything to do with their own religious beliefs about *marriage*. Those beliefs, in turn, are constitutionally protected and in no way can be considered "arbitrary" or "invidious" under the Unruh Act.

Turning to Defendants' constitutional rights, that Defendants' speech and free exercise rights are being violated, is not meaningfully in dispute. The only question is whether requiring Defendants to make a same-sex wedding cake, instead of connecting the couple with a competitor bakery, would satisfy strict scrutiny. In this respect, the U.S. Supreme Court recently granted certiorari to answer the question "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment." (*303 Creative LLC v. Elenis* (2022) 142 S.Ct. 1106.) It will undoubtedly answer that question in the affirmative.

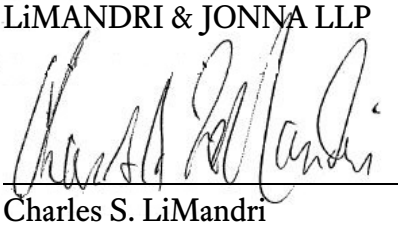
///

Thus, for the reasons discussed above, Defendants intend to prove that there was no violation of the Unruh Act, and even if there arguably was, their constitutional rights protect them.

Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: July 21, 2022

By: 

Charles S. LiMandri
Paul M. Jonna
Jeffrey M. Trissell
Attorneys for Defendants Cathy's Creations, Inc. and Catharine Miller

ATTACHMENT

Cal. Jury Instr.--Civ. 7.92

California Civil Jury Instructions (BAJI) | February 2022 Update
West's Committee on California Civil Jury Instructions

Part 7. Intentional Torts

K. Civil Rights Violation

BAJI 7.92 Unruh Act Violation (Spring 2022 Comment Revision)

Authority:

(Civil Code §§ 51-52a))

The plaintiff [also] seeks to recover damages based upon a claimed violation of the "Unruh Civil Rights Act."

The essential elements of this claim are:

1. The plaintiff [was denied] [was discriminated against] [, or] [a distinction was made between plaintiff and others,] [depriving plaintiff of] the full and equal accommodations, advantages, facilities, privileges, or services in a business establishment;

2. Plaintiff's [perceived] _____ was a [substantial] motivating factor for this [denial] [discrimination] [distinction];

3. Defendant [either] [denied or aided or incited a denial to plaintiff] [or] [made any discrimination or distinction which deprived plaintiff] of the full and equal accommodations, advantages, facilities, privileges, or services;
[4. The [denial] [discrimination] [distinction] was arbitrary;] and

[4.] [5.] Defendant's wrongful conduct caused plaintiff to suffer injury, damage, loss or harm.

[_____ is a business establishment.]

[A business policy, practice or limitation is not arbitrary if it is reasonably related to a valid business objective. Your determination of whether the action taken was arbitrary, requires an examination of the entire context of the factual situation in which the action was taken or the conduct occurred. The action or conduct alleged to be discriminatory must be considered with respect to the defendant's type of business, and it's legitimate business interests.

[A "substantial motivating factor" exists when an act of discrimination or distinction deprives the plaintiff of the full and equal accommodations, advantages, facilities, privileges, or services of a business establishment and plaintiff's (protected status) is both a motivating and substantial factor in producing the deprivation.]

The plaintiff has the burden of proving by a preponderance of the evidence all of the facts necessary to establish essential elements number 1, 2, 3 and 5. The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish that the [denial] [discrimination] [distinction] was not arbitrary, but rather was action taken reasonably related to a valid business objective, namely _____.]

USE NOTE

The list of protected statuses as set forth in the statute, are race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, or sexual orientation. Fill in the appropriate status in element #2. Use BAJI 12.08 for definitions for some of these terms. These definitions are equally appropriate for this cause of action.

The legislature in 2015 amended Civil Code § 51, subdivision (b) by adding to the previously declared protected statuses, "citizenship, primary language, or immigration status". Subdivision (g) provides that "verification of immigration status and any discrimination based upon verified immigration status, where required by federal law, shall not constitute a violation of this section". Subdivision (h) also provides that these new protections do not require "the provision of services or documents in a language other than English, beyond that which is otherwise required by law".

Use BAJI 12.13 for definitions of "disability" and "medical condition". The Unruh act adopts the definitions of these terms as found in Government Code § 12926, upon which BAJI 12.13 is based.

"Actions reasonably related to a valid business purpose" appears to be an affirmative defense. (See California Civil Practice, Civil Rights Litigation, § 2:11(3).)

If this contention is not asserted as a defense, delete the bracketed element four, the reference to a fifth element and the last two bracketed paragraphs.

A violation of the right of any individual under the Americans With Disabilities Act of 1990 shall also constitute a violation of Civil Code § 51(f). In Munson v, Del Taco, Inc.(2009) 46 Cal.4th 661, 94 Cal.Rptr.3d 685, 208 P.3d 623, the court held that a plaintiff who establishes a violation of the ADA need not prove intentional discrimination to obtain damages under Civil Code section 52. However it appears that other alleged violations of the Unruh Act not involving an ADA violation still must be intentional to be actionable. Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 278 Cal.Rptr. 614, 805 P.2d 873. If the case involves an ADA violation, use BAJI 7.92.1.

Motivating factor is defined in BAJI 12.01.1.

Damages recoverable are governed by § 52. Since actual damages include general and/or special damages, use BAJI 14.10–14.13 or BAJI 12.88, if only emotional distress damages are sought.

For punitive damages, use BAJI 7.94.

Respondeat superior instruction are found at BAJI 13.00 et seq.

There may be other affirmative defenses, including, but not limited to, public policy, unclean hands, or an exercise of a constitutional right. If so, special instructions will have to be prepared. Presumably the defendant will have the burden of proof on those matters.

BAJI 16.69.2 is a form of special verdict that tracks this instruction.

COMMENT

Civil Code §§ 51(a)–(f) and 52(a).

8 Witkin, Summary of California Law (11th ed. 2017), Constitutional Law §§ 994, 995.

California Civil Practice, Civil Rights Litigation, §§ 2:1 et seq.

"The Act's language and its history compel the conclusion that the Legislature intended to prohibit all arbitrary discriminations by business establishments," whether or not the ground of discrimination is expressly set forth in the Act. (Marina Point, Ltd. v. Wolfson (1982) 30 Cal.3d 721, 732, 180 Cal.Rptr. 496, 503, 640 P.2d 115.)

The identification of particular bases of discrimination added by the 1959 amendments, is illustrative rather than restrictive. (In re Cox (1970) 3 Cal.3d 205, 216, 90 Cal.Rptr. 24, 31, 474 P.2d 992.

However, a business establishment may impose reasonable restrictions on customers rationally related to business being conducted or the facilities and services being provided. (Wynn v. Monterey Club (2d Dist.1980) 111 Cal.App.3d 789, 796, 168 Cal.Rptr. 878, 881.

Age-based preferences based on a strong public policy do not violate the Unruh Act. (Sargoy v. Resolution Trust Corp. (2d Dist.1992) 8 Cal.App.4th 1039, 10 Cal.Rptr.2d 889.

The Unruh Act does not prohibit economic discrimination that is applied equally to all potential consumers of the public accommodations. It does apply to arbitrary discrimination amongst consumers on the basis of personal characteristics of individuals that bear little or no relationship to their abilities to be responsible consumers of public accommodations. The plaintiff must plead and prove intentional discrimination in public accommodations. A disparate impact analysis or test does not apply to Unruh Act claims. (Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 278 Cal.Rptr. 614, 805 P.2d 873. The intent requirement is set forth in element number two.

In *Harris v. Capital Growth Investors XIV* (1991) *supra,* the Supreme Court cautioned against further extending the Unruh Civil Right's reach; it fashioned a three step inquiry for considering application of the Act to other forms of "economic" discrimination, namely, (1) the language of the statute, (2) the legitimate business interests of the defendants, and (3) the consequences of allowing the new discrimination claim.

Civil Code § 52(b)(2) establishes a separate remedial category of damages that is distinct from the exemplary damages provided for in subdivision (b)(1), and the transportation company is not immune from liability for such damages under Gov. Code § 818. Los Angeles County Metropolitan Transportation Authority v. Superior Court (Lyons) (2d Dist.2004) 123 Cal.App.4th 261, 20 Cal.Rptr.3d 92.

Discrimination against registered domestic partners as compared to married couples is a type of discrimination that is actionable under the Unruh Act. Koebke v. Bernardo Heights Country Club (2005) 36 Cal.4th 824, 31 Cal.Rptr.3d 565, 115 P.3d 1212.

Plaintiff need not demonstrate that a request for nondiscriminatory treatment was made and refused in order to state a claim under the Unruh Act. It is sufficient if plaintiff sustained damage as a result of the discriminatory treatment. Angelucci v. Century Supper Club (2007) 41 Cal.4th 160, 59 Cal.Rptr.3d 142, 158 P.3d 718.

Arbitrary occupational discrimination is prohibited under the Unruh Act. Sisemore v. Master Financial, Inc. (2007) 151 Cal.App.4th 1386, 60 Cal.Rptr.3d 719.

Civil Code section 51.13, adopted in 2009 as an urgency measure, provides: "Any discount or other benefit offered to or conferred on a consumer or prospective consumer by a business because the consumer or prospective consumer has suffered the loss of employment or reduction of wages shall not be considered an arbitrary discrimination in violation of section 51."

Under the Unruh Act, a plaintiff with HIV is disabled as a matter of law. The court held in Maureen K. v. Tuschka, M.D. (2012) 215 Cal.App.4th 519, 155 Cal.Rptr.3d 620, that it was prejudicial error to submit to the jury the issue of whether a plaintiff with HIV was disabled.

This spring 2017 revision adds the word "substantial" before "motivating" in element #2. It appears since Harris v. City of Santa Monica (2013) 56 Cal. 4th 203, 152 Cal. Rptr. 3d 392, 294 P.3d 49, relating to FEHA employment discrimination, held that in addition to the requirement of intentional discrimination, it is necessary that there be a causal connection between the bias and the discrimination. It has been bracketed inasmuch as no appellate court has so held.

In Osborne v. Yasmeh (2016) 1 Cal. App. 5th 1118, 205 Cal. Rptr. 3d 656, the court held that a hotel visitor and companions had standing to sue hotel owner for Unruh Act violation after the management refused to rent them a room unless they first paid a non-refundable cleaning fee relating to the visitor's service dog, even though the visitor and companions left the hotel without paying any fee or checking in as guests.

In Smith v. BP Lubricants USA Inc. (2021) 64 Cal.App.5th 138, 149-154, 278 Cal.Rptr.3d 587, 596-600, the court observed that the Unruh Act only applies to "business establishments" that are "generally open to the public" [citation], and mandates that those establishments "serve all persons without arbitrary discrimination." A business remains "generally open to the public," and continues to be subject to the Unruh Act even when the discrimination occurs at a meeting not open to the public within such a business. The Unruh Act does not stop at the doors of a business establishment generally open to the public simply because its doors are closed to some, but not all of its "clients, patrons or customers." when discrimination occurs.

West's Key Number Digest

- West's Key Number Digest, Civil Rights 1752

Primary Authority

- See CACI 3020 to 3021, 3026, 3027

COURT OF THE STATE OF CALIFORNIA KERN COUNTY SUPERIOR COURT - METROPOLITAN DIVISION		FOR COURT USE ONLY
TITLE OF CASE (Abbreviated) **Dept. of Fair Employment & Housing v. Cathy's Creations, Inc. dba Tastries**		
ATTORNEY(S) NAME AND ADDRESS Charles S. LiMandri, SBN 110841 Paul M. Jonna, SBN 265389 LiMANDRI & JONNA LLP P.O. Box 9120 Rancho Santa Fe, California 92067 Tele: (858) 759-9930; Fax: (858) 759-9938		
ATTORNEY(S) FOR: Defendants CATHY'S CREATIONS, INC. d/b/a TASTRIES, a California Corporation; and CATHY MILLER, an individual	HEARING Dept. 11	CASE NO.: BCV-18-102633 JUDGE: Hon. J. Eric Bradshaw

CERTIFICATE OF SERVICE

I, Kathy Denworth**,** declare that: I am over the age of 18 years and not a party to the action; I am employed in, or am a resident of the County of San Diego, California; where the mailing occurs; and my business address is P.O. Box 9520, Rancho Santa Fe, CA 92067, Telephone number (858) 759-9948; Facsimile number (858) 759-9938.I further declare that I served the following document(s) on the parties in this action:

- **DEFENDANTS' TRIAL BRIEF.**

by one or more of the following methods of service to:

Janette Wipper, Chief Counsel
Paula D. Pearlman, Asst. Chief Counsel
Gregory J. Mann - Sr. Staff Counsel
Timothy Martin, Staff Counsel
Tiffany Tejeda, Staff Counsel
Soyeon Mesinas, Staff Counsel
Department of Fair Employment and Housing
320 4th Street, Suite 1000
Los Angeles, CA 90013
Tel: (213) 439-6799; Fax: (888) 382-5293
E-Mail: Gregory.Mann@dfeh.ca.gov
E-Mail: Tiffany.Tejeda@dfeh.ca.gov
E-Mail: Soyeon.Mesinas@dfeh.ca.gov
Attorneys for Plaintiff Department of Fair Employment and Housing

X **(BY E-MAIL/ELECTRONIC MAIL)** I caused a copy of the foregoing document(s) to be sent to the persons at the e-mail addresses listed above, this date via internet/electronic mail.

X (**BY ELECTRONIC FILING/SERVICE)** I caused such document(s) to be Electronically Filed and/or Service through the One Legal System.

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

Executed on July 21, 2022.

Kathy Denworth