JANETTE WIPPER (#275264)
Chief Counsel
NELSON CHAN (#109272)
Assistant Chief Counsel
GREGORY J. MANN (#200578)
Associate Chief Counsel
2218 Kausen Drive, Suite 100
Elk Grove, CA 95758
Telephone: (916) 478-7251
Facsimile: (888) 382-5293

Attorneys for Plaintiff DFEH
(No Fee Pursuant to Gov. Code, § 6103)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

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

Plaintiff,

vs.

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

Defendants.

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

Real Party in Interest.

Case No.: BCV-18-102633-DRL

PLAINTIFF DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

Date: November 4, 2021
Time: 8:30 a.m.
Dept.: 11
Judge: David R. Lampe

Action Filed: October 17, 2018
Trial Date: December 13, 2021

[Concurrently filed with DFEH's Notice of Motion and Motion for Summary Judgment/ Adjudication; Separate Statement; Request for Judicial Notice; Declaration of Gregory J. Mann; and Declaration of Mireya Rodriguez-Del Rio]

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I. INTRODUCTION

This case concerns "the delicate question of when the free exercise of [one's] religion must yield to an otherwise valid exercise of state power …." (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n* (2018) 138 S.Ct. 1719, 1724 ["*Masterpiece*"].) As in *Masterpiece*, defendants here assert serious and weighty speech and free exercise arguments to defend their refusal to sell pre-ordered cakes for use in the celebration of a same-sex wedding. (*Id*. at p. 1723.) But this is exactly the sort of case where, as "a business serving the public," defendants' First Amendment rights are "limited by generally applicable laws" like the Unruh Civil Rights Act (Civ. Code, § 51 ["Unruh"]). (*Id*. at pp. 1723-24.) Here, there was no request for the sort of "special cake"—for example with "religious words or symbols"—that *Masterpiece* suggested might implicate the First Amendment. (*Id.* at p. 1723.) Indeed, the cakes here had no unique characteristics whatsoever. Instead, the same-sex couple here faced, in essence, a "refusal to sell any cake at all." (*Ibid*.) The bakery has a blanket policy against providing *any* pre-ordered cake, no matter how basic or generic, for same-sex marriage celebrations. *Masterpiece*, along with decades of precedent, makes plain that the First Amendment does not protect such a broad policy, which is based not on the artistry or message of the cake at issue but merely on the protected identity of the couple. (*Id.* at p. 1727.) For similar reasons, this case implicates only defendants' *conduct* in refusing to provide full and equal services—not *speech* protected by the First Amendment. (Cf. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. ("FAIR")* (2006) 547 U.S. 47, 66.)

Tastries is a for-profit bakery operating out of a storefront in Bakersfield owned by Catharine Miller ("Miller" and collectively with Tastries bakery, "Tastries"). Tastries enforces a policy to deny *any and all* pre-ordered cakes to same-sex couples celebrating their weddings. In August 2017, Tastries enforced its facially discriminatory policy to deny Eileen and Mireya Rodriguez-Del Rio a cake order for a round, three-tiered, white buttercream cake and two sheet cakes—none of which would have a written message—the couple wanted to use in celebrating their same-sex wedding. Miller denied the cake order despite the simple and generic nature of the cakes.

DFEH moves for summary judgment or, in the alternative, summary adjudication as to its Unruh cause of action and defendants' free exercise and free speech defenses, because DFEH makes a prima facie showing and the defenses do not nullify Unruh as applied here. The free exercise defense

fails because Unruh prohibits discriminatory conduct, i.e., the refusal to sell goods and services based on sexual orientation, without targeting religion. In fact, religion is a protected characteristic under Unruh. As a neutral, generally applicable law of public accommodation, application of Unruh here satisfies free exercise review under the First Amendment and California Constitution. (See *Employment Div. Dept. of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 879.)

Unruh likewise satisfies free speech review under the First Amendment. The refusal to sell the plain cakes the Rodriguez-Del Rios wanted to order was discriminatory conduct, not speech. (Cf. *FAIR*, *supra*, 547 U.S. at p. 66.) A business selling generic cakes with no written messages in the commercial marketplace sends no message by doing so, nor does such a commercial transaction endorse any message of the purchaser. Precedent makes clear that the act of selling cakes is not inherently expressive: the ultimate observers of plain cakes receive no message about the cakes, regardless of whether a baker intends to send a message. (See *ibid*.) But even if defendants are correct in their alternative assertions, they cannot prevail; application of Unruh here satisfies even strict scrutiny, much less intermediate scrutiny.

At base, while the religious views at issue here merit respect and careful consideration, the policy defendants chose to implement those views and their reading of the First Amendment are simply too broad. Application of their overbroad approach to the First Amendment impermissibly threatens to both re-entrench the "community-wide stigma" against same-sex couples, (*Masterpiece*, *supra*, 138 S.Ct. at p. 1727), and vitiate the "general rule" that a business's objections to same-sex marriage "do not allow business owners … to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." (*Ibid.*, citing *Newman v. Piggie Park Enters., Inc.* (1968) 390 U.S. 400, 402, fn. 5.). Indeed, in 1968 in *Piggie Park*, the Supreme Court rejected arguments identical to those Tastries asserts here as "patently frivolous" when a restaurant owner asserted the same free exercise and free speech defenses against application of the federal public accommodations law that prohibited him from discriminating on the basis of race. (*Piggie Park, supra,* at p. 402, fn. 5.) Defendants' arguments here are no more persuasive when asserted to excuse their discrimination based on sexual orientation.

The undisputed material facts demonstrate that DFEH meets its burden to establish a prima facie case for violation of Unruh. And because defendants' affirmative defenses fail as a matter of law, this Court should grant DFEH's motion for summary judgment/adjudication.

II. THE UNDISPUTED FACTS

A. Tastries Enforces a Discriminatory Policy that Denies *Any and All* Pre-Ordered Cakes to Same-Sex Couples Celebrating their Marriage Regardless of the Design of the Cakes.

Tastries is a for-profit bakery business—not incorporated for a religious purpose or officially affiliated with any religious organization—owned solely by Miller. (SSUMF Nos. 1, 2.) Tastries sells a variety of baked goods, including generic, pre-made cakes kept in refrigerated cases ("case" cakes) offered for immediate sale to anyone for any purpose. (SSUMF No. 3.) Tastries also sells pre-ordered cakes, referring to *any* cake that is ordered in advance as "custom." (SSUMF No. 4.)

For any such pre-ordered cake, the customer decides the details, often with help from a Tastries employee, filling out a form to select the characteristics of their cake: size, shape, number of tiers, colors, frosting, filling, and decorations. (SSUMF No. 67.) Customers regularly reference a pre-existing case cake, display cake, or photo of an existing cake when describing the cake-design they want. (SSUMF No. 68.) Miller does not participate in the design or preparation of each pre-ordered cake. (SSUMF No. 69.) Tastries can deliver, and has delivered, cakes to venues without becoming involved in weddings or other events by dropping off cakes before guests or participants arrive. (SSUMF No. 70.)

Since opening Tastries in 2013, Miller has enforced a policy to deny *any and all* pre-ordered cakes to same-sex couples celebrating "[a]nything that has to do with the marriage [or] … [t]he union of a same-sex couple"—whether that be a wedding, anniversary, or bridal shower. (SSUMF Nos. 5, 6.) Tastries documents its policy in its "Design Standards," which are available to customers. (SSUMF No. 7.) Miller confirmed there are no circumstances under which Tastries would knowingly provide a pre-ordered cake for use in the celebration of a same-sex union, even if the pre-ordered cake was identical to a case cake.[1] (SSUMF No. 8.) Tastries employees, however, have provided pre-ordered wedding cakes to same-sex couples without Miller's knowledge. (SSUMF No. 72.) And on one occasion, Miller saw a cake order for a same-sex wedding reception and did not recognize it as a wedding cake.

[1] Miller testified, however, that Tastries would provide *pre-made* case cakes to same-sex couples celebrating their union and even add a written congratulatory message to the couple. (SSUMF No. 71.)

(SSUMF No. 73.) Thinking it was a birthday or Quinceañera cake, she approved the order for delivery. (SSUMF No. 74.)

B. Tastries Refused to Take the Rodriguez-Del Rios' Order Because the Cakes Were to Be Used for a Same-Sex Wedding Reception.

In August 2017, after months of planning an exchange of vows and reception to celebrate their December 2016 wedding with their extended family and friends, the Rodriguez-Del Rios prepared to order a cake. (SSUMF No. 9.) Eileen and Mireya visited Tastries on August 17 and were assisted by front-end associate Rosemary Perez. (SSUMF No. 10.) Dozens of "display" cakes—decorated cakes made of Styrofoam to provide customers with ideas—were exhibited throughout the bakery. (SSUMF No. 11.) Because the couple wanted a simple cake design, for their main cake they chose a design based on one of the pre-existing sample display cakes—a cake with three round tiers, frosted with scaly white buttercream frosting, decorated only with a few frosting flowers/rosettes on the sides, and unadorned by any written message. (SSUMF No. 12.) During their discussion with Perez, the Rodriguez-Del Rios selected the details of their main cake—round, three tiers, white buttercream frosting, decorated with frosting rosettes—along with a matching sheet cake. (SSUMF No. 13.) None of the cakes would have any written message. (SSUMF No. 14.) The Rodriguez-Del Rios did not want to order a cake topper from Tastries. (SSUMF No. 75.) After discussing the details of the cakes, the Rodriguez-Del Rios considered ordering their cakes from Tastries on the spot but agreed to return for a cake tasting. (SSUMF Nos. 15, 16.)

The couple and members of their wedding party returned to Tastries for a cake tasting on August 26, 2017. (SSUMF No. 17.) Miller greeted the Rodriguez-Del Rio party and asked for some details about their order. (SSUMF No. 18.) Mireya explained she wanted a three-tiered round cake and two sheet cakes with matching finish. (SSUMF No. 19.) In the course of their conversation, Miller discovered Eileen and Mireya wanted the cakes to celebrate their same-sex wedding. (SSUMF No. 20.) As a result, Miller declined to take their order. (SSUMF No. 21.) Miller referred the couple to another bakery, but Eileen had already visited it and decided against ordering from there. (SSUMF No. 22.) Overwhelmed, upset, and frustrated by Ms. Miller's refusal to serve them because they wanted cakes to celebrate their same-sex wedding, the Rodriguez-Del Rios and their party left. (SSUMF No. 23.)

The three-tiered cake the Rodriguez-Del Rios eventually ordered from another baker, pictured in Figure 1, looked just like the main cake they wanted to order from Tastries. (SSUMF No. 76.) It had no written message. (SSUMF No. 77.) The only differences were that the Rodriguez-Del Rios' actual cake was decorated with real flowers, while the Tastries cake would have had frosting-rosettes, and the frosting was more wavy than scaly. (SSUMF No. 78.) Instead of the sheet cake the couple wanted to order from Tastries, they had loaf cakes at their wedding reception. (SSUMF No. 79.)

Figure 1

III. MOTION FOR SUMMARY JUDGMENT/ADJUDICATION LEGAL STANDARD

"A party may move for summary judgment in an action … if it is contended that … there is no defense to the action." (Code Civ. Proc., § 437c, subd. (a).) "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Id*., subd. (c).) "Summary adjudication motions are 'procedurally identical' to summary judgment motions. [Citation.]" (*Serri v. Santa Clara Univ.* (2014) 226 Cal.App.4th 830, 859.) "A party may move for summary adjudication as to … one or more affirmative defenses." (Code Civ. Proc., § 437c, subd. (f)(1).)

Whether for summary judgment or adjudication, a plaintiff meets its burden by demonstrating "the nonexistence of any triable issue of material fact" (*Aguilar v. Atlantic Richfield Oil Company* (2001) 25 Cal.4th 826, 850) in proving "each element of the cause of action." (*Paramount Petroleum Corp. v. Super. Ct.* (2014) 227 Cal.App.4th 226, 241; Code Civ. Proc., § 437c, subd. (p)(1).) "Unlike former law, it is not plaintiff's initial burden to disprove affirmative defenses …. [Citations.]" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, ¶ 10:235.) "[T]he court may summarily adjudicate that an affirmative defense … is without merit. [Citations.]" (*Id*. at ¶ 10:40; Code Civ. Proc., § 437c, subd. (f)(1).)

IV. ARGUMENT

DFEH is entitled to summary judgment/adjudication because the undisputed evidence demonstrates that Tastries denied the Rodriguez-Del Rios pre-ordered cakes because of their sexual orientation, and defendants cannot establish their affirmative defenses. The undisputed facts establish a prima facie case that Tastries violated Unruh when Miller declined the couple's cake order. As this Court concluded in its order denying defendants' first Anti-SLAPP motion, the "Defendants' conduct was discriminatory, and fell within the ambit of the law and may be actionable if not otherwise constitutionally protected." (Declaration of Gregory J. Mann ("Mann Decl."), Ex. 1 [March 27, 2019 Order Denying Defendants Anti-SLAPP Motion to Strike the Complaint, 5:2-5].)

Defendants' constitutional affirmative defenses based on free exercise and free speech arguments do not exempt them from Unruh liability here. The *Smith* test still applies to free exercise challenges to public accommodations laws. (See *Employment Div. Dept. of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 879 ["*Smith*"]; see also *Masterpiece*, *supra*, 138 S.Ct. at p. 1727.) As a neutral and generally applicable public accommodations law, application of Unruh here passes the *Smith* test, defeating defendants' free exercise arguments.

Defendants' free speech defense also fails. Unruh prohibits discriminatory conduct, i.e., Tastries' refusal to provide cakes to the Rodriguez-Del Rios. Unruh does not attempt to regulate Miller's speech here. The preparation and sale of cakes—especially cakes with no written messages—is not pure speech under the First Amendment. At most it is conduct with expressive elements, subjecting the application of Unruh here to intermediate scrutiny, which Unruh satisfies. (Cf. *FAIR*, *supra*, 547 U.S. at p. 67.) In fact, application of Unruh here satisfies even strict scrutiny because it is the least restrictive means to accomplish California's compelling interest in eradicating invidious discrimination. (See *North Coast Women's Care Medical Group v. Super. Ct.* (2008) 44 Cal.4th 1145, 1158 ["*North Coast*"].)

Lastly, defendants' selective prosecution affirmative defenses fail because they can muster no evidence to meet the demanding standard. They cannot satisfy their burden to establish that DFEH acted with a discriminatory purpose in bringing this action, nor can they demonstrate that Tastries has been treated differently from other businesses that have violated Unruh. (*United States v. Armstrong* (1996) 517 U.S. 456, 465.)

Because DFEH establishes Tastries' prima facie violation of Unruh and defendants cannot meet their burden to prove their affirmative defenses, DFEH's motion for summary judgment/adjudication should be granted.

A. Summary Judgment Should Be Granted Because Tastries Violated Unruh By Discriminating Against the Rodriguez-Del Rios Based on Their Sexual Orientation.

Unruh provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their … sexual orientation … are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51.) Business establishments have a duty to "serve all persons without arbitrary discrimination." (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 167.) "The [Unruh] Act is to be given a liberal construction with a view to effectuating its purposes." (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 28.) By refusing to take the order of a same-sex couple for cakes it would have prepared for opposite-sex couples, Tastries violated Unruh on the basis of sexual orientation.[2]

1. The undisputed facts establish a prima facie case of defendants' violation of Unruh.

As found by this Court in denying defendants' anti-SLAPP motions, there is no factual dispute that Tastries' refusal to take the Rodriguez-Del Rio's cake order establishes a prima facie Unruh violation. A plaintiff "must plead and prove intentional discrimination in public accommodations" to establish an Unruh violation. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1175 [superseded by statute on other grounds].) DFEH establishes a prima facie Unruh violation here.

Tastries is a for-profit bakery and, therefore, a business establishment under Unruh, which this Court may determine as a matter of law.[3] (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050-1055.) Tastries has a facially discriminatory policy to deny same-sex couples any and all pre-ordered cakes to celebrate their unions, and Miller admits that she "declined the opportunity to create the requested custom cakes." (SSUMF Nos. 5, 21.) Based on this direct evidence

[2] Where, as here, the facts are undisputed, violations of Unruh are properly determined on summary judgment/adjudication. (See *Wilson v. Haria and Gogri Corp*. (E.D.Cal. 2007) 479 F.Supp.2d 1127, 1141 [summary judgment granted on liability]; *Hubbard v Twin Oaks Health & Rehabilitation Center* (E.D.Cal. 2004) 408 F.Supp.2d 923, 932 [same].)

[3] As the creator and enforcer of Tastries' discriminatory policy to deny same-sex couples pre-ordered cakes to celebrate their unions, Miller is also individually liable because "liability under [Unruh] … extends beyond the business establishment itself to the business establishment's employees responsible for the discriminatory conduct." (*North Coast*, *supra*, 44 Cal.4th at p. 1154.)

of Tastries' intentional discrimination under its facially discriminatory policy, DFEH establishes a prima facie Unruh violation here. (See *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 736-37.)

Violations of Unruh are "*per se* injurious." (*Koire*, *supra*, 40 Cal.3d at p. 33.) Violators of Unruh are "liable for each and every offense … in no case less than four thousand dollars ($4,000)." (Civ. Code, § 52, subd. (a).) DFEH seeks only statutory minimum damages here, which are properly awarded upon summary judgment.[4]

2. Tastries declined the Rodriguez-Del Rios' order because of their sexual orientation.

Unable to create a factual dispute as to Tastries' intentional discrimination, Tastries attempts to create a legal dispute, arguing that there is a relevant difference between discriminatory action aimed at *same-sex marriage* and discriminatory action aimed at the couples' sexual orientations. She is mistaken: Discrimination is not excused because it is aimed at an individual's *demonstration* of their protected status; such a narrow view of the law would offer little protection. And courts have uniformly rejected this argument, refusing to distinguish between people's status (i.e., sexual orientation) and their conduct (i.e., entering into a same-sex marriage) when the conduct is "engaged in exclusively or predominately by a particular class of people, [since] an intent to disfavor that class can readily be presumed." (*Bray v. Alexandria Women's Health Clinic* (1993) 506 U.S. 263, 270 ["A tax on wearing yarmulkes is a tax on Jews."].) Indeed, even the U.S. Supreme Court's "decisions have declined to distinguish between status and conduct in [the] context" of discrimination on the basis of sexual orientation. (*Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings College of Law v. Martinez* (2010) 561 U.S. 661, 689 citing *Lawrence v. Texas* (2003) 539 U.S. 558, 575 [criminalizing conduct typically undertaken by gay people is discrimination against gay people].) The California Supreme Court also recognized that this distinction is meaningless: California's former laws prohibiting same-sex marriage "properly must be understood as classifying or discriminating on the basis of sexual

[4] It is reversible error to require proof of harm in an Unruh case where only statutory damages are sought. (*Rotary Club of Duarte*, *supra*, 178 Cal.App.3d at p. 1061 [affd. *sub nom. Bd. of Directors of Rotary Internat. v. Rotary Club of Duarte* (1987) 481 U.S. 537] [holding that upon proof of an Unruh violation, injunctive relief is available and "damages are presumed"].) If the court is inclined to resolve the statutory damages at this stage, as it may do, DFEH seeks minimum statutory penalties of $4,000 for Tastries' violation as to each of the Rodriguez-Del Rios. (See, e.g., *Wilson*, *supra*, 479 F.Supp.2d at p. 1141 [awarding $52,000 on summary judgment based on 13 violations of Unruh]; *Feezor v. Del Taco* (S.D.Cal. 2005) 431 F.Supp.2d 1088, 1091 [awarding $12,000 on summary judgment for 3 violations].)

orientation ….” (*In re Marriage Cases* (2008) 43 Cal.4th 757, 783-84, superseded by Constitutional amendment as stated in *Hollingsworth v. Perry* (2013) 570 U.S. 693, 701.) There is no basis to construe Unruh differently, especially given its “liberal construction.” (*Koire*, *supra*, 40 Cal.3d at p. 28.)

Discrimination against individuals celebrating same-sex marriages violates Unruh’s prohibition against discrimination based on sexual orientation. (See *Romer v. Evans* (1996) 517 U.S. 620, 641 [Scalia, J. dissenting] [“‘After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.’”]; see also *State v. Arlene’s Flowers* (2019) 193 Wash.2d 469, 503-05; see also *Elane Photography, LLC v. Willock* (2013) 309 P.3d 53, 68.) And there is no dispute that Miller discriminated against the Rodriguez-Del Rios’ based on their celebration of a same-sex marriage. (SSUMF Nos. 20, 21.)

B. Neither Free Exercise nor Free Speech Rights Provide Tastries a Defense.[5]

The only real dispute regarding defendants’ affirmative defenses centers on whether application of Tastries’ discriminatory policy is protected by federal and state free exercise or free speech law. The First Amendment and the California Constitution both recognize and protect the dignity and importance of sincere religious beliefs. But neither empowers a bakery operating in the commercial marketplace to deny generic products, requiring only the application of routine skill and no special artistry or message, to same-sex couples.

1. The free exercise clauses of the federal and state constitutions do not permit the discrimination here.

United States Supreme Court “decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” (*Employment Div. Dept. of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 879 [“*Smith*”] [quoting *United States v. Lee* (1982) 455 U.S. 252, 263, fn. 3 (Stevens, J., concurring)].) The Supreme Court recently reaffirmed the *Smith* rule in *Masterpiece*, acknowledging that while individuals are free to object to same-sex marriage under the First Amendment’s free exercise clause, “it is a general rule that such objections do not allow business owners and other actors

[5] Although defendants assert 15 affirmative defenses, the real dispute here concerns their free exercise and free speech defenses. DFEH addresses the remaining defenses, below.

in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. [Citations.]" (*Masterpiece*, *supra*, 138 S.Ct. at p. 1727.)

a. As a valid and neutral law of generally applicability, Unruh satisfies the *Smith* test under the First Amendment's free exercise clause.

Under *Smith*, "a religious objector has *no federal constitutional right* to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious beliefs." (*North Coast*, *supra*, 44 Cal.4th at p. 1155 [italics original].) To determine whether a law is "neutral," courts first inquire whether "the object of a law is to infringe upon or restrict practices because of their religious motivation …." (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 533.) This analysis involves an examination of both the text of the law and its impact. (*Ibid*.) However, "adverse impact will not always lead to a finding of impermissible targeting." (*Id*. at p. 535.) Next, whether a law is "generally applicable" depends on whether the government selectively seeks to advance its interests "only against conduct with a religious motivation." (*Id*. at p. 543.)

The California Supreme Court has conclusively settled the question of Unruh's neutrality: "Unruh … is 'a valid and neutral law of general applicability.'" (*North Coast*, *supra*, 44 Cal.4th at p. 1156 quoting *Smith*, *supra*, 494 U.S. at p. 879.) Unruh is neutral; its text does not refer to any religious belief or practice. Rather, it applies to "all persons" and "all business establishments." (Civ. Code, § 51, subd. (b).) Likewise, its prohibition against arbitrary discrimination does not target religious beliefs or practices. It is also generally applicable as it prohibits discriminatory conduct by businesses, not "conduct with a religious motivation." (*Lukumi*, *supra*, 508 U.S. at p. 543.) Indeed, Unruh itself *protects* religious beliefs. (Civ. Code, § 51, subd. (b).) Therefore, defendants' federal free exercise rights "do[] not exempt [them] from conforming their conduct to [Unruh's] antidiscrimination requirements even if compliance poses an incidental conflict with [their] religious beliefs." (*North Coast*, *supra*, 44 Cal.4th at p. 1156 [citing *Lukumi*, *supra*, 508 U.S. at p. 531 and *Smith*, *supra*, 494 U.S. at p. 879.) And there is no legitimate dispute that California routinely seeks to enforce Unruh to prevent discriminatory conduct with no religious underpinning. (SSUMF. No. 82.)

Defendants attempt to rely on *Masterpiece*, but *Masterpiece* dooms their free exercise claim. While *Masterpiece* left open the possibility that a "special cake," for example with "religious words or symbols," might implicate free exercise interests, the cakes here had no such unique characteristics. (*Masterpiece, supra*, 138 S.Ct. at p. 1723; SSUMF Nos. 12, 76, 77.) Instead, Tastries has a blanket policy against providing *any* pre-ordered cake, no matter how basic or generic, for same-sex marriage celebrations. (SSUMF Nos. 5 - 8). In other words, the Rodriguez-Del Rios faced a policy akin to an unprotected "refusal to sell any cake at all"; the refusal was based on a blanket policy targeting the identity of the couple, not the nature of the product. (*Ibid*.) *Masterpiece* makes clear that such a policy is unprotected "and is subject to a neutrally applied and generally applicable public accommodations law." (*Id.* at p. 1728.)

Indeed, the Supreme Court rejected a similar free exercise defense over fifty years ago in *Newman v. Piggie Park Enters., Inc.*, which *Masterpiece* invokes in support of "the general rule" that the objections here "do not allow business owners … to deny protected persons equal access to goods and services under a neutral and generally applicable law." (*Id.* at p. 1727 citing *Piggie Park*, *supra*, 390 U.S. at p. 402, fn. 5.) *Piggie Park* concerned whether Title II of the Civil Rights Act of 1964 prohibited racial discrimination where the owner of a restaurant asserted a free exercise defense. (*Piggie Park*, *supra*, 390 U.S. at p. 402, fn. 5.) The Court concluded it was "not even a borderline case," and that defendant's contention that the Civil Rights Act "was invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of [his] religion,'" was "patently frivolous …." (*Ibid*.) As *Masterpiece* makes clear, Tastries' arguments cannot be meaningfully differentiated from those in *Piggie Park* and must similarly be rejected.

b. Application of Unruh here likewise satisfies review under the California Constitution's free exercise clause.

Despite California courts' historical practice of interpreting California's free exercise clause in tandem with its federal counterpart (*Catholic Charities of Sacramento, Inc. v. Super. Ct.* (2004) 32 Cal.4th 527, 561-62), Tastries contends California should ignore *Smith* and instead apply strict scrutiny review to application of Unruh here. However, as far back as 1946, well before *Smith*, the State's high court concluded "that 'a person is free to hold whatever belief his conscience dictates, but when he translates his belief into action he may be required to conform to reasonable regulations which are

applicable to all persons and are designed to accomplish a permissible objective.'" (*Catholic Charities*, *supra*, 32 Cal.4th at p. 561 [quoting *Rescue Army v. Municipal Ct.* (1946) 28 Cal.2d 460, 470].)

i. California courts should remain consistent with federal law and apply *Smith*.

Although *Smith* does not automatically apply here "[b]ecause construing a state constitution is a matter left exclusively to the states," (*North Coast*, *supra*, 44 Cal.4th at p. 1158), this Court should apply the *Smith* test. This is especially true here where Unruh's application only incidentally burdens Miller's religious practices.

Miller's exercise of religion is not substantially burdened by Unruh because DFEH does not seek an order forcing Tastries to sell pre-ordered wedding cakes in the retail marketplace to all customers, including same-sex couples. Rather, as in *North Coast* (see *id*. at pp. 1158-59), Tastries has at least three options to comply with Unruh. One, Tastries can follow Unruh's explicit language and sell all its goods and services to all customers. Two, rather than provide all services to all customers irrespective of sexual orientation, Tastries may choose to cease offering pre-ordered wedding cakes for sale to anyone.[6] (See *North Coast*, *supra*, 44 Cal.4th at p. 1159 [Physicians could "avoid any conflict between their religious beliefs and [Unruh]" by "simply refus[ing] to perform" the fertility treatment at issue to any patients]; see *Smith v. Fair Empl. & Hous. Com. (FEHC)* (1996) 12 Cal.4th 1143, 1170 [Landlord whose religious beliefs motivated her to deny rental housing to non-married couples could avoid conflict between her beliefs and FEHA "by selling her units and redeploying the capital in other investments."].) Three, Miller can step aside from participating in the preparation of any pre-ordered cakes sold to same-sex couples and allow her willing employees to manage the process. (See *North Coast*, *supra*, 44 Cal.4th at p. 1159.) Tastries employees have prepared and delivered cakes to same-sex couples without Miller's involvement in the past. (SSUMF No. 72.) Unruh does not substantially burden Miller's religious beliefs, and its application here satisfies review under the *Smith* test.

[6] The fact that Miller's religious beliefs may motivate Tastries to stop selling pre-ordered wedding cakes altogether does not mean Unruh substantially burdens her beliefs, even if it led to Tastries restructuring its business. (*Smith v. Fair Empl. & Hous. Com*. (1996) 12 Cal.4th 1143, 1172–73 [Landlord's option of "shifting her capital from rental units to another investment" was a relevant factor in assessing FEHA's burden on her religious beliefs because "[a]n economic cost … does not equate to a substantial burden for purposes of the free exercise clause."]; *Easebe Enterprises, Inc. v. Alcoholic Bev. etc. Appeals Bd.* (1983) 141 Cal.App.3d 981, 987 ["An entrepreneur's discriminatory practice based upon ostensible rational economic self-interest still violates public policy as codified in Civil Code section 51."].)

ii. Even if the court ignores *Smith* and accepts defendants' flawed proposition, Unruh satisfies strict scrutiny review under California's free exercise clause.

Even if this Court ignores *Smith* and accepts defendants' invitation to apply strict scrutiny, Unruh satisfies strict scrutiny as the least restrictive means to achieve California's compelling interest in eradicating invidious discrimination. "Under strict scrutiny, 'a law could not be applied in a manner that substantially burden[s] a religious belief or practice unless the state show[s] that the law represent[s] the least restrictive means of achieving a compelling interest." (*North Coast*, *supra*, 44 Cal.4th at p. 1158 [quoting *Catholic Charities*, *supra*, 32 Cal.4th at p. 561].) "[P]ublic accommodations laws 'plainly serv[e] compelling state interests of the highest order.' [Citation]."[7] (*Bd. of Directors of Rotary Intern. v. Rotary Club of Duarte* (1987) 481 U.S. 537, 549 [Unruh serves California's compelling interest in ensuring women equal access to "the acquisition of … tangible goods and services"]; *Roberts v. U.S. Jaycees* (1984) 468 U.S. 609, 628 ["[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent."]; *North Coast*, *supra*, 44 Cal.4th at p. 1158 [Unruh "furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation."].)

Indeed, the Supreme Court has repeatedly upheld public accommodations laws in particular as "'well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination.'" (*Masterpiece*, *supra*, 138 S.Ct. at p. 1287, citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 U.S. 557, 572.) The Court recognizes that states possess "broad authority to create rights of public access on behalf of [their] citizens," to ensure "wide participation in political, economic, and cultural life" and to thwart the "stigmatizing injury" and "denial of equal opportunities" that accompanies discrimination in public accommodations. (*Roberts*, *supra*, 468 U.S. at p. 625.)

[7] The California Legislature codified the State's compelling interest in protecting its citizens from sexual orientation discrimination in this situation: While "[r]eligious freedom is a cornerstone of law and public policy in the United States, and the Legislature strongly supports and affirms this important freedom …, *[t]he exercise of religious freedom should not be a justification for discrimination*. (Gov. Code, § 11139.8, subd. (a) [italics added].)

Moreover, Unruh is the least restrictive means of achieving California's compelling interest. The California Supreme Court held that physicians seeking to deny fertility treatment to same-sex couples were not entitled to a free exercise exemption from Unruh despite a "presumably … substantial[] burden [on] their religious beliefs" because "there are no less restrictive means for the state to achieve [Unruh's] goal." (*North Coast*, *supra*, 44 Cal.4th at p. 1158; *Roberts*, *supra*, 468 U.S. at p. 626, 628–29 [Minnesota "advanced [its] interests through the least restrictive means" by applying its public accommodations law to prohibit a civic organization from excluding women].) Any exemption from Unruh in this situation would empower vendors "who provide goods and services for marriages and weddings [to] refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." (*Masterpiece*, *supra*, 138 S.Ct. at p. 1727.) Moreover, as noted in section (b)(i) above, Tastries has at least three options to comply with Unruh. (See *North Coast*, *supra*, 44 Cal.4th at p. 1158-59.) As the least restrictive means to accomplish California's compelling interest in eradicating illegal discrimination from the marketplace, Unruh satisfies even strict scrutiny review under the free exercise provision of the California Constitution.

2. The First Amendment's free speech clause is not offended by application of Unruh to prohibit Tastries' discriminatory conduct.

"The First Amendment's plain terms protect 'speech,' not conduct." (*State v. Arlene's Flowers, Inc.* (2019) 193 Wash.2d 469, 511 [quoting U.S. Const. amend. I].) As a general matter, prohibiting discrimination does not infringe on free speech rights. (*FAIR*, *supra*, 547 U.S. at p. 62 ["Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.]".) Thus, free speech challenges to application of public accommodation and anti-discrimination laws typically fail.[8]

This case is no exception: by prohibiting Tastries from denying equal services Unruh permissibly regulates only what Tastries must *do*, not what it may or may not *say*. (Cf. *FAIR*, *supra*,

[8] (See, e.g., *Roberts*, *supra*, 468 U.S. at pp. 625-29 (private, commercial association had no free speech right to exclude women from full membership); *Hishon v. King & Spalding* (1984) 467 U.S. 69, 78 (prohibiting law firm from discriminating on the basis of gender in making partnership decisions did not violate members' free speech or association rights).

547 U.S. at p. 60.) At most, Tastries' conduct in refusing to sell cakes to same-sex couples contains expressive elements. It is not pure speech nor is it inherently expressive. Therefore, application of Unruh here should be reviewed under intermediate scrutiny, which Unruh satisfies.

a. Tastries' sale of pre-ordered cakes is not inherently expressive; thus, intermediate scrutiny review of Unruh's application here is appropriate.

Conduct is not protected by free speech rights unless it is "inherently expressive." (*FAIR*, *supra*, 547 U.S. at p. 66.) Conduct becomes "sufficiently imbued with elements of communication" to receive free speech protections *only* 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." (*Spence v. Washington* (1974) 418 U.S. 405, 410-11; accord *United States v. O'Brien* (1968) 391 U.S. 367, 376 [rejecting "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea"].)

The *FAIR* case is instructive here. (*Rumsfeld v. Forum for Academic and Institutional Rights, Inc. ("FAIR")* (2006) 547 U.S. 47.) *FAIR* concerned the Solomon Amendment, which required institutions of higher education to provide the same on-campus access for military recruiters as they did for other recruiters. (*Id*. at p. 58.) An association of law schools challenged it on free speech grounds; the schools wanted to restrict military recruiters from their campuses as a protest against the government's "don't ask, don't tell" policy, which they considered discrimination based on sexual orientation. (*Id*. at p. 52.) The schools argued that offering equal access to military recruiters, *which included sending e-mails and posting notices* on their behalf, compelled them to express a message of support for the military. (*Id*. at p. 62.)

The Supreme Court rejected the law schools' arguments that providing equal access to military recruiters infringed their free speech rights because *the denial of equal access* was not "inherently expressive," reasoning that "the point of requiring military interviews to be conducted [off campus] is not 'overwhelmingly apparent.' [Citation]." (*Id.* at p. 66.) The Court explained that an observer of "military recruiters interviewing away from the law school" would not know whether they were doing so because the law school intended to express disapproval or because of alternate causes. (*Ibid.*) The law schools' actions could be understood as expressing disagreement with the military "only because the law schools accompanied their conduct with speech explaining it." (*Ibid*.)

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

Because Tastries' pre-ordered wedding cakes are not inherently expressive, compliance with Unruh does not regulate Miller's speech. In fact, Tastries has sold wedding cakes to same-sex couples on multiple occasions (SSUMF No. 72) precisely because its cakes do not express an inherent message. On at least one occasion, Miller herself approved an order for a wedding cake for a same-sex couple because she misidentified it as a birthday or Quinceañera cake as she was unable to perceive Tastries' purported message in the absence of accompanying speech. (SSUMF Nos. 73, 74.) Exactly as in *FAIR*, "the fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection …." (*FAIR*, *supra*, 547 U.S. at p. 66.)

Tastries' policy denies *any and all* pre-ordered cakes to same-sex couples celebrating their union: "[a]nything that has to do with the marriage … [t]he union of a same-sex couple." (SSUMF No. 5.) Tastries refused to take the Rodriguez-Del Rio's order not based on any design, characteristic, or written message they requested.[9] The cakes here were entirely generic. Yet Tastries refuses to sell such generic cakes to same-sex couples—even cakes that are *identical* to the off-the-rack pre-made case cakes that Tastries *is* willing to sell to same-sex couples. (SSUMF Nos. 8, 71.) And the creation of these cakes need not involve Tastries attending a same-sex wedding. (SSUMF No. 70.) In other words, Tastries' refusal is neither based on nor involves expressive conduct associated with a cake—rather, it turns solely on the identity of the purchaser. "[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." (*Clark v. Cmty.*

[9] Since Tastries' policy denies *all* pre-ordered cakes to same-sex couples celebrating their union and the cakes here were entirely generic, whether *some other* cake may have sufficient artistry or be inherently expressive is not before this Court.

for Creative Non-Violence (1984) 468 U.S. 288, 293, fn. 5.) "To hold otherwise would be to create a rule that all conduct is presumptively expressive." (*Ibid*.) Tastries cannot carry its burden to demonstrate that the cakes here, much less any and all of its pre-ordered wedding cakes, are sufficiently artistic to become inherently expressive.

Although defendants claim that Tastries' sale of generic cakes like the Rodriguez-Del Rios wanted to order is pure speech requiring strict scrutiny review, the sale of such cakes is, at most, conduct with expressive elements, which is subject to intermediate scrutiny. (Cf. *FAIR*, *supra*, 547 U.S. at p. 67.) The Supreme Court "cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." (*United States v. O'Brien* (1968) 391 U.S. 367, 376.) Rather than viewing conduct as speech initiating strict scrutiny review, the Court recognizes that some conduct possesses both expressive and non-expressive elements. (See *ibid*.) "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." (*Ibid*.; *FAIR*, *supra*, 547 U.S. at p. 67.)

Unruh's application here easily satisfies intermediate scrutiny. As a public accommodations law, Unruh "plainly serves compelling state interests of the highest order." (*Roberts*, *supra*, 468 U.S. at p. 624.) Any burden imposed by Unruh on Tastries' "speech" is incidental because California's interest in "eliminating discrimination and assuring its citizens equal access to publicly available goods and services … is unrelated to the suppression of expression." (*Ibid*.) Lastly, "even if enforcement of [Unruh] causes some incidental abridgment of [Tastries'] protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes." (*Id*. at p. 628) Because application of Unruh here satisfies intermediate scrutiny, Tastries' free speech affirmative defense fails.

b. Unruh does not compel speech; thus, strict scrutiny review is not appropriate.

In an attempt to convince this Court to apply strict scrutiny review to Unruh's application here, defendants contend Tastries' refusal to take the Rodriguez-Del Rio's cake order is speech, and that being forced to comply with Unruh will compel them to speak in violation of the First Amendment. Defendants are wrong. First Amendment compelled speech doctrine, which requires strict scrutiny review, applies when the government forces an individual to speak a specific message, because free

speech protections prohibit the government from telling people what to say. (See *West Virginia Bd. of Ed. v. Barnette* (1943) 319 U.S. 624, 642 [schoolchildren cannot be required to recite the Pledge of Allegiance and salute the flag]; *Wooley v. Maynard* (1977) 430 U.S. 705, 717 [motorists cannot be forced to display the New Hampshire state motto—Live Free or Die—on their license plates].)

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

Like the Solomon Amendment, Unruh is a content neutral regulation of conduct, not speech. (*FAIR, supra,* 547 U.S. 47 at p. 62.) In enforcing Unruh, DFEH does not dictate the design of Tastries' cakes or otherwise dictate the content of defendants' speech. (Cf. *id*. at p. 62.) Unruh provides Tastries at least three options for complying with its mandate, and only requires Tastries to prepare cakes for same-sex couples to the extent it would prepare the same cakes for opposite-sex couples. Thus, any speech required as part of Tastries' providing full and equal services under Unruh is merely incidental to Unruh's regulation of conduct and does not implicate free speech protections. (Cf. *id*. at pp. 61–62.)

Application of Unruh here is a quintessential application of a public accommodations law. Tastries is a for-profit business selling its baked products from a storefront in the commercial marketplace. (See *Arlene's Flowers*, *supra*, 193 Wash.2d 469 at p. 514.) Unruh does not regulate Tastries' cakes. It applies "to its business operation, and in particular, its business decision not to offer its services to protected classes of people." (*Elane Photography, LLC v. Willock* (2013) 309 P.3d 53,

68.) Providing full and equal services to same-sex couples celebrating their unions neither regulates Tastries' speech nor compels it to endorse same-sex marriage.[10] (Cf. *FAIR*, *supra*, 547 U.S. at p. 64-65.)

Selling generic cakes with no written message on them is not speech; it's commerce. The cases are clear that nothing about selling plain, generic cakes to paying customers suggests that a bakery agrees with its customers' beliefs. (Cf. *id*. at p. 65 [observers can "appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so."]; cf. *Catholic Charities*, *supra*, 32 Cal.4th at pp. 558-59 ["For purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen [as] a statement of support for the law or its purpose. Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition."].) And Unruh does not restrict Miller's ability to express her opinions about same-sex marriage. (Cf. *FAIR*, *supra*, 547 U.S. at p. 65; cf. *North Coast*, *supra*, 44 Cal.4th at p. 1157 "[D]efendant[s] … remain free to voice their objections, religious or otherwise, to [Unruh's] prohibition against sexual orientation discrimination.")

Because selling generic pre-ordered cakes on an equal basis regardless of sexual orientation is not speech under the First Amendment, strict scrutiny review is inappropriate. Even if it was, Unruh's application in this case satisfies strict scrutiny for the reasons stated in section IV.B.1.b.ii, above.

3. Tastries' cannot meet the demanding burden to prove its selective enforcement affirmative defense with clear evidence of discriminatory effect and purpose.[11]

Defendants also assert selective enforcement affirmative defenses. To prove this defense, they must establish both a "discriminatory effect"—i.e., DFEH has treated them differently from similarly situated individuals—and a "discriminatory purpose." (*United States v. Armstrong* (1996) 517 U.S. 456, 465.) Supreme Court "cases delineating the necessary elements to prove a claim of selective prosecution

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[10] Underscoring the arbitrariness of the policy, Miller testified that Tastries would add to a pre-made case cake a *written* congratulatory message to a same-sex couple celebrating their wedding. (SSUMF No. 71.)

[11] Defendants' 10 remaining affirmative defenses lack evidence or fail as a matter of law. DFEH states a prima facie case (defenses 1 and 2). Real parties' purported unclean hands (defense 3), abuse of process (defense 4), or trespass (defense 5) do not affect this case in which *DFEH is plaintiff*; likewise as to estoppel (defense 7). Justification (defense 6) is limited to criminal cases. The Rodriguez-Del Rios testified about their injury, although DFEH seeks only statutory minimum damages here, making the "no injury" (defense 8) moot. Whether punitive damages (defense 9) or attorney's fees (defense 10) are available—they are (see Gov. Code, § 12965, subd. (b))—are questions of law.

have taken great pains to explain that the standard is a demanding one." (*Id*. at p. 463.) Defendants do not meet it.

As a public prosecutor pursuing litigation under Unruh, as incorporated into the Fair Employment and Housing Act (Gov. Code, § 12948; *State Personnel Bd. v. Fair Empl. & Hous. Com'n* (1985) 39 Cal.3d 422, 444), DFEH is presumed to have properly exercised its authority and courts accord it broad discretion to do so. (*Armstrong*, *supra*, 517 U.S. at p. 464.) Such presumption is overcome only by "'clear evidence to the contrary.' [Citation.]" (*Id*. at p. 465.)

Defendants can present no evidence, much less clear evidence, of selective enforcement here. They cannot prove discriminatory effect because they lack evidence that they have been treated differently from others similarly situated. Nor can they establish discriminatory purpose because they lack evidence that DFEH pursues this action based on Miller's religious beliefs. This Court has repeatedly rejected Tastries' baseless assertions: "there's no evidence before the Court that the Department is going around singling out Christian providers." (Mann Decl., Ex. 2 [2/2/18 Reporter's Transcript of Proceedings on OSC re preliminary injunction, 30:6-16]; *id.* Ex. 3 [3/2/18 Order Denying DFEH's Order to Show Cause Re: Preliminary Injunction, attachment, p. 6 of 8 "[t]here is also no evidence before the court that the State is targeting Christian bakers for Unruh Act enforcement …."].)

V. CONCLUSION

California and U.S. Supreme Court precedent compel the conclusion that Tastries' refusal to sell generic cakes to the Rodriguez-Del Rios for use in the celebration of their same-sex wedding violates Unruh. Because Tastries cannot carry its burden to establish any affirmative defense, DFEH's Motion for Summary Judgment or, in the Alternative, Adjudication should be granted and an order indicating its entitlement to injunctive and monetary relief should be entered.

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DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

Gregory J. Mann
Attorneys for the DFEH