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14
 15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 16 COUNTY OF KERN

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

19 Plaintiff,

20 v.

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

23 Defendants.

24 EILEEN RODRIGUEZ-DEL RIO and
 MIREYA RODRIGUEZ-DEL RIO,
 25 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**NOTICE OF ENTRY OF JUDGMENT
 AND STATEMENT OF DECISION**

Div.: J
 Judge: Hon. J. Eric Bradshaw

Action Filed: October 17, 2018

1 **TO: PLAINTIFF AND ITS ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that a Judgment, in the above-referenced matter was entered on
3 December 27, 2022. A conformed copy of said Judgment is attached hereto as Exhibit "A" and a
4 conformed copy of the Statement of Decision, entered on December 27, 2022, is attached hereto
5 as Exhibit "B."

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Dated: January 5, 2023


LiMANDRI & JONNA LLP

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EXHIBIT A

BY Urena, Veronica
DEPUTY

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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

JUDGMENT

EXHIBIT B

FILED
KERN COUNTY SUPERIOR COURT
12/27/2022

BY Urena, Veronica
DEPUTY

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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

STATEMENT OF DECISION

1 **INTRODUCTION**

2 1. Plaintiff Dept. of Fair Employment and Housing (“DFEH”) filed this enforcement
3 action under the Unruh Civil Rights Act on behalf of real parties in interest Eileen Rodriguez-del
4 Rio (“Eileen”) and Mireya Rodriguez-del Rio (“Mireya”). Eileen and Mireya have a homosexual
5 sexual orientation, and were married in California in December 2016. The defendants are Catharine
6 Miller (“Miller”) and Cathy’s Creations, Inc. Miller is the sole shareholder of Cathy’s Creations,
7 Inc., which is a small boutique and bakery doing business as “Tastries.”

8 2. DFEH alleges the defendants discriminated against Eileen and Mireya in 2017
9 because of their sexual orientation, in violation of the Unruh Civil Rights Act. DFEH failed to
10 prove its claim. The evidence showed that real parties in interest have standing. However, DFEH
11 failed to prove the discriminatory intent required under the Unruh Civil Rights Act. The evidence
12 also affirmatively showed that defendants offered full and equal service to real parties in interest by
13 referring them to a comparable bakery. These issues are dispositive.

14 3. To complete the trial record, this court has determined the remaining issues raised
15 by the parties, assuming—for the sake of the discussion—DFEH had proven its cause of action.
16 Defendants’ state and federal constitutional defense based on the free exercise of religion fail,
17 based on controlling California authority. DFEH is barred by defendants’ right to Free Speech
18 under the First Amendment of the U.S. Constitution from enforcing the Unruh Civil Rights Act to
19 compel or prohibit defendants’ speech.

20 **FACTUAL BACKGROUND**

21 4. Miller is a married woman of sincere Christian faith. She and her husband of over
22 40 years met at church, where her husband was formerly a church youth director. Miller was a
23 school teacher for approximately 30 years while she raised a family and also pursued interests in
24 floral arranging, event planning and baking. In 2013, she started “Tastries.”

25 5. The bakery items that Miller sells at Tastries include items that are made for the
26 bakery case, and items that are made to fill custom orders. The case items are not made for a
27 particular purpose, they are replenished frequently as needed, and they are for sale to anyone on a
28 “first-come, first-served” basis. The custom bakery items are ordered in advance and are made for

1 particular events, such as a birthdays, quinceañeras, and weddings.

2 6. The process of making wedding cakes varies, depending on the design, e.g., number
3 of tiers, type of cake, ingredients, flavors, colors, frosting, decorations and finish. The specific
4 ingredients may change depending on the venue and anticipated environmental conditions for the
5 cake before it is cut and served. Custom orders are often delivered to the venue, and are artistically
6 “constructed” on site. The entire process generally involves three to six people. Miller is personally
7 involved in every production-related aspect of her bakery, and, as it pertains to wedding cakes, she
8 is personally involved in *some* aspect of the design and making of virtually every wedding cake.

9 7. Approximately 70 percent of all custom orders at Tastries are wedding cakes,
10 ranging from four to twelve deliveries each week depending on the season. In 2017, custom
11 wedding cake orders represented approximately \$10,000-\$12,000, or twenty percent, of Miller’s
12 ~~gross~~ ^{monthly} revenues at Tastries. In addition to direct revenues, custom wedding orders generate indirect
13 revenues from referrals by guests and vendors at the weddings. Total revenues associated with
14 wedding orders approximate 25-30 percent of Miller’s business. Miller developed order forms
15 specifically for custom wedding cake orders.

16 8. The uncontroverted evidence showed that Miller’s sincere faith permeates her life
17 and work, and is “founded on God’s word.” As it pertains to the present case, Miller testified,
18 “God’s word says in Genesis that God created man and woman in his likeness, and marriage was
19 between a man and a woman.” Miller testified that the teaching “throughout the Bible” is that,
20 “Marriage is between a man and a woman and is very, very sacred, and it’s a sacrament...” As the
21 owner of Tastries, Miller considers herself a “steward” of “the Lord’s business he put in [her]
22 hands,” and that she “cannot participate in something that would hurt him and not abide by his
23 precepts in the Bible.” Much of Tastries décor includes Christian symbols and messages, such as
24 crosses and Bible verses, and it openly displays and sells such items. During design consultations
25 for wedding cakes, Miller discusses the meaning and religious significance of a wedding cake.

26 9. Over time, Miller has established written design standards for all custom bakery
27 items. The design standards are part of the employee handbook. The standards are rooted in
28 Miller’s Christian beliefs, which are in turn rooted in the Bible, and have evolved in response to

1 Miller’s experiences with peoples’ custom orders. Some of the requests people have made include
2 orders for “penis cookies,” “breast cookies and cakes,” marijuana-related items (when marijuana
3 laws changed), and designs with “adult cartoons.” The design standards address such requests.
4 Miller created the bakery design standards to conform to her Christian faith in the Bible and what
5 she believes the Bible teaches regarding marriage.

6 10. There were several versions of the design standards in existence during the relevant
7 time frame in 2017, but those versions vary in only minor detail. All versions quote a Bible verse at
8 the bottom of the page, “Whatever is true, whatever is noble, whatever is right, whatever is pure,
9 whatever is lovely, whatever is admirable—if anything is excellent or praiseworthy—think about
10 such things.” The concepts from that quote form the introductory question for all Tastries bakery
11 designs: “Is it lovely, praiseworthy, or of good report?”

12 11. Two versions of the design standards refer to the custom bakery design being
13 prepared “as a Centerpiece to Your Celebration.” Each version refers to “options that we can offer
14 at Tastries,” or “our criteria for what we are able to offer.” One version includes the statement, “If
15 we are unable to meet your design needs, we can refer you to several other bakers and bakeries in
16 town.” Another version asks, “Is the design based on godly themes...?” A number of such themes
17 are listed as part of the question. The design standard also states: “Our cakes are a reflection of our
18 business and speak volumes when sitting center stage.”

19 12. In August 2017, the design standards stated, in relevant part:

20 * * * * *

21 All custom orders must follow Tastries Design Standards:

- 22 • Look as good as it tastes, and taste as good as it looks []
- 23 • Beautiful and balanced: size is proportional to design
- 24 • Complimentary colors: color palettes are compatible; work with the design
- 25 • Appropriate design suited to the celebration theme
- 26 • Themes that are positive, meaningful and in line with the purpose
- 27 • We prefer to make cakes that would be rated PG or G

28

1 Order requests that do not meet Tastries Design Standards and we do not offer:

- 2 • Designs promoting marijuana or casual drug use
- 3 • Designs featuring alcohol products or drunkenness
- 4 • Designs presenting explicit sexual content
- 5 • Designs portraying anything offensive, demeaning or violent
- 6 • Designs depicting gore, witches, spirits, and satanic or demonic content
- 7 • Designs that violate fundamental Christian principals; wedding cakes must not
- 8 contradict God’s sacrament of marriage between a man and a woman

9 * * * * *

10 13. The list of requests that do not meet the design standards, and that are not offered—
11 designs that “violate fundamental Christian principles,” including wedding cakes that “contradict
12 God’s sacrament of marriage between “a man and a woman”—apply regardless of who makes the
13 request. On one occasion, a man requested a custom seven-tier cake for a wedding anniversary at
14 which he planned to announce to his wife he was divorcing her. Miller declined to make the cake,
15 telling the man that she was “not going to be part of something like that.”

16 14. Not all of the employees at Tastries agreed with, or abided by, the Tastries design
17 standards in every circumstance. One such former employee testified that Tastries is compelled to
18 make a cake with writing on it that says, “Hail satan,” if requested to do so. On two occasions
19 before the events giving rise to the present case, employees had taken and processed orders that
20 violated the design standards regarding marriage, and they concealed their activities from Miller.

21 15. For custom order requests that do not meet Tastries design standards, Miller
22 arranged for another local bakery, *Gimme Some Sugar*, to handle those orders by referral. This has
23 occurred several times. One such referral customer came back to Tastries and reported being “very
24 happy” with the referral, and had Tastries make custom orders for other events. *Gimme Some Sugar*
25 is not otherwise affiliated with Miller or Tastries. Before going to Tastries, Eileen and Mireya tried
26 *Gimme Some Sugar*, but were not satisfied because the cakes were too sweet. They wanted to try
27 something else, and Eileen had seen the Tastries sign while driving by.

28 ///

1 16. On August 17, 2017, Eileen and Mireya visited Tastries to buy a custom wedding
2 cake for their upcoming ceremony to repeat marriage vows and celebrate their marriage. They had
3 a pleasant visit with Rosemary, an employee who was familiar with the design standards, and who
4 talked to them about what they wanted. Eileen and Mireya chose a popular design for a wedding
5 cake that was on display—a three-tier white wedding cake with “wavy” frosting, i.e., a “wispy
6 cake,” with flowers on it, but no writing or “cake topper.” Rosemary began filling out the custom
7 order form, asking about flavor, color, number of guests, etc. During the discussion, they discussed
8 having Rosemary attend the ceremony and cut the cake. Rosemary came to understand that the
9 cake was probably for a same-sex wedding. She did not inform Eileen or Mireya about the design
10 standards.

11 17. During the course of the meeting, Rosemary spoke privately to the employee
12 manager, Natalie. Natalie was one of the employees who had previously processed a custom order
13 that violated the design standards regarding marriage, and she kept that information from Miller.
14 Rosemary informed Natalie that she was being asked to take an order that she believed was for a
15 same-sex wedding celebration. Natalie told Rosemary to give the order form to her when Rosemary
16 was finished, but not tell Miller about it. Rosemary did as Natalie suggested. She scheduled a cake
17 tasting for Eileen and Mireya on August 26, and Mireya bought a tote bag before they left the
18 bakery. Rosemary said nothing to Eileen and Mireya about the design standards, and she said
19 nothing to Miller about the order.

20 18. On Saturday, August 26, 2017, Eileen and Mireya arrived at Tastries for the cake
21 tasting with two male friends, and Eileen’s mother. Rosemary greeted them, and the sample cakes
22 for tasting were already set out and available, sitting next to the group. Rosemary went to speak
23 privately with Natalie. Natalie told Rosemary to do the tasting, but not tell Miller what was
24 happening. Uncomfortable with that approach, Rosemary told Miller that a group was there for
25 wedding cake tasting, but gave Miller little information. Miller agreed to handle the tasting. She
26 had no knowledge of Eileen’s and Mireya’s earlier visit to Tastries, or of their sexual orientation, or
27 that Rosemary had already started a custom order form.

28 ///

1 19. Miller greeted Eileen’s and Mireya’s group with a blank form, and began asking
2 standard questions for a wedding cake order, e.g., wedding venue, time of the event, type of cake,
3 etc. Eileen and Mireya assumed they would be finalizing their custom order, and were perplexed by
4 Miller’s questions, which they had previously answered for Rosemary. Miller could not understand
5 the apparent confusion.

6 20. During the course of the conversation, Miller became aware she was being asked to
7 design a wedding cake for a same-sex marriage celebration. After taking a moment to pray, Miller
8 told Eileen and Mireya she could not make the wedding cake, but would refer them to another
9 bakery that had similar recipes, *Gimme Some Sugar*. Miller was asked why she could not make the
10 cake, and was pressed for an answer. Miller told Eileen and Mireya, “I can’t be a part of a same-sex
11 wedding because of my deeply held religious convictions, and I can’t hurt my Lord and Savior.”
12 Eileen and Mireya never tasted the cakes at Tastries. They declined Miller’s offer to refer them to
13 *Gimme Some Sugar*. Someone from the group took the order form clipboard from Miller, and the
14 group left the bakery, upset about the encounter.

15 21. Within hours of Eileen and Mireya leaving Tastries that day, social media posts
16 appeared, expressing various viewpoints, not all of them friendly. In the hours and days that
17 followed, media appeared. Pornographic emails and messages were sent to Tastries, necessitating a
18 shut-down of the computer. An article was written about Eileen and Mireya that was not true.
19 Property was damaged. Hurtful things were said about Eileen and Mireya, and Miller and Tastries.

20 22. Eileen and Mireya found another bakery and ordered a cake they believed was
21 “delicious” and “beautiful,” similar in appearance to what they intended to order from defendants.
22 On October 7, 2017, they renewed vows in a ceremony and had a reception attended by their
23 guests. During the reception, the cake was placed in a central area of the venue where Eileen and
24 Mireya participated in a cake-cutting ceremony. Flowers had been placed on the cake, and Eileen
25 and Mireya were both happy with it. Approximately two weeks later, Eileen and Mireya filed an
26 administrative complaint with DFEH, alleging discrimination by the defendants.

27 23. On October 17, 2018, DFEH filed the present enforcement action. DFEH’s first
28 amended complaint alleges one cause of action against Miller and Tastries for discrimination in

1 violation of the Unruh Civil Rights Act.

2 **DISCUSSION**

3 **A. DFEH’s Cause of Action for a Violation of the Unruh Civil Rights Act.**

4 24. Civil Code § 51, known as the Unruh Civil Rights Act, states in relevant part:

5 (b) All persons within the jurisdiction of this state are free and equal,
6 and no matter what their ... sexual orientation, ... are entitled to the
7 full and equal accommodations, advantages, facilities, privileges, or
8 services in all business establishments of every kind whatsoever.

9 (c) This section shall not be construed to confer any right or
10 privilege on a person that is conditioned or limited by law or that is
11 applicable alike to persons of every ... sexual orientation....

12 25. Civil Code § 52 of the Unruh Civil Rights Act states in relevant part:

13 Whoever denies, aids or incites a denial, or makes any discrimination
14 or distinction contrary to Section 51 ..., is liable for each and every
15 offense for the actual damages, ... up to a maximum of three times
16 the amount of actual damage but in no case less than four thousand
17 dollars (\$4,000), and any attorney’s fees that may be determined by
18 the court in addition thereto, suffered by any person denied the rights
19 provided in Section 51

20 26. The objective of the Unruh Civil Rights Act is to prohibit “unreasonable, arbitrary,
21 or invidious discrimination.” *Sunrise Country Club Assn. v. Proud* (1987) 190 Cal.App.3d 377,
22 380. Unreasonable, arbitrary, or invidious discrimination is present where the defendant’s policy or
23 action “emphasizes irrelevant differences” or “perpetuate[s] [irrational] stereotypes.” *Koire v.*
24 *Metro Car Wash* (1985) 40 Cal.3d 24, 34, 36; see also, *Pizarro v. Lamb’s Players Theatre* (2006)
25 135 Cal.App.4th 1171, 1176. The Unruh Civil Rights Act applies not merely in situations where
26 businesses exclude individuals altogether, but also where treatment is unequal. *Koire v. Metro Car*
27 *Wash, supra*, 40 Cal.3d at p. 29.

28 27. To have “standing” to assert rights under the Unruh Civil Rights Act, a person
“cannot sue for discrimination in the abstract,” *White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1025,
but must possess “a bona fide intent to sign up for or use [the defendant’s] services.” *Id.* at p. 1032.

28 28. To prove a violation of the Unruh Civil Rights Act, the plaintiff must “plead and
prove intentional discrimination in public accommodations.” *Harris v. Capital Growth Investors*

1 *XIV* (1991) 52 Cal.3d 1142, 1175 (superseded by statute on other grounds as stated in *Munson v.*
2 *Del Taco, Inc.* (2009) 46 Cal.4th 661, 664); *Koebke v. Bernardo Heights Country Club* (2005) 36
3 Cal.4th 824, 854. A disparate impact analysis or test does not apply to claims under the Unruh Civil
4 Rights Act. *Koebke, supra*, 36 Cal.4th p. 854. For purposes of the Unruh Civil Rights Act, “sexual
5 orientation” means “heterosexuality, homosexuality, and bisexuality.” Civ. Code § 51(e)(7)
6 [adopting definition in Govt. Code § 12926].

7 29. The parties in the present case have referred to form jury instructions for claims
8 under the Unruh Civil Rights Act, CACI No. 3060, and BAJI No. 7.92. The Judicial Council’s
9 “Directions for Use” for CACI No. 3060 state:

10 ... [E]lement 2 uses the term “substantial motivating reason” to
11 express both intent and causation between the protected
12 classification and the defendant’s conduct. “Substantial motivating
13 reason” has been held to be the appropriate standard under the Fair
14 Employment and Housing Act to address the possibility of both
15 discriminatory and nondiscriminatory motives.” (See *Harris v. City*
of Santa Monica (2013) 56 Cal.4th 203, 232; CACI No. 2507,
“Substantial Motivating Reason” Explained.) Whether the FEHA
standard applies under the Unruh Act has not been addressed by the
courts.

16 ... [I]ntentional discrimination is required for violations of the Unruh
17 Act. (See *Harris v. Capital Growth Investors XIV* [“*Harris*”] (1991)
18 52 Cal.3d 1142, 1149.) The intent requirement is encompassed
within the motivating-reason element.

19 **1. Standing**

20 30. The unusual circumstance of another gay couple visiting Tastries to get a wedding
21 cake earlier the *same day* that Eileen and Mireya visited Tastries, and the fact Eileen and Mireya
22 decided against *Gimme Some Sugar* because its cakes were too sweet but decided for Tastries
23 without ever tasting its cakes, and other circumstances, have raised a question whether real parties
24 in interest intended to use Tastries, or were just “looking for a lawsuit.” The evidence showed that
25 Eileen and Mireya had a bona fide intent to use the defendants’ services. It was not a “shakedown.”
26 Eileen and Mireya have standing.

27 ///

28 ///

1 **2. No Intentional Discrimination**

2 31. DFEH failed to prove that defendants intentionally discriminated against Eileen and
3 Mireya because of their sexual orientation. The evidence affirmatively showed that Miller’s *only*
4 intent, her only motivation, was fidelity to her sincere Christian beliefs. Miller’s only motivation in
5 creating and following the design standards, and in declining to involve herself or her business in
6 designing a wedding cake for a marriage at odds with her faith, was to observe and practice her
7 own Christian faith, i.e., to avoid “violat[ing] fundamental Christian principles” or “contradict[ing]
8 God’s sacrament of marriage between a man and a woman.”

9 32. The evidence affirmatively showed that Miller and Tastries serve, and employ,
10 persons with same-sex orientations. Miller and Tastries serve each person—regardless of sexual
11 orientation—who desires to purchase items in the bakery case. Miller and Tastries serve each
12 person—regardless of sexual orientation—who requests a custom bakery item, the design for
13 which does not violate the design standards.

14 33. Miller and Tastries do not design and do not offer to *any* person—regardless of
15 sexual orientation—custom bakery items that “violate fundamental Christian principles.” Miller
16 and Tastries do not design and do not offer to *any* person—regardless of sexual orientation—
17 custom wedding cakes that “contradict God’s sacrament of marriage between a man and a woman.”
18 The evidence showed that Eileen and Mireya requested a wedding cake, the design for which was
19 at odds with the Tastries standards pertaining to “fundamental Christian principles” and “God’s
20 sacrament of marriage between a man and a woman.”

21 34. DFEH argues that defendants intended to make “a distinction between their gay and
22 straight customers seeking marriage-related preordered baked goods;” that through the design
23 standards, Tastries “willfully denies services to gay couples, thereby making a distinction on
24 account of their sexual orientation;” that it is “undisputed that Miller intended to make a distinction
25 based on ... sexual orientation;” that Eileen and Mireya “encountered Tastries’ exclusionary policy
26 and practice based on who they were—a lesbian couple—which prevented them from obtaining
27 Tastries goods and services;” and that “‘but for’ gay customers’ sexual orientation, Tastries would
28 sell them products.” DFEH failed to prove any of these assertions.

1 35. DFEH’s argument seems to take issue with *what* Miller believes the Bible teaches
2 regarding marriage, even though DFEH concedes she sincerely does believe it.

3 36. Also, the design standards apply uniformly to all persons, regardless of sexual
4 orientation. The evidence affirmatively showed that at no time was Miller’s conduct a pretext to
5 discriminate or make a distinction based on a person’s sexual orientation. The evidence
6 affirmatively showed that at no time was a Tastries design standard created, or applied, as a pretext
7 to discriminate or make a distinction based on a person’s sexual orientation. Miller’s only
8 motivation, at all relevant times, was to act in a manner consistent with her sincere Christian beliefs
9 about what the Bible teaches regarding marriage. That motivation was not unreasonable, or
10 arbitrary, nor did it emphasize irrelevant differences or perpetuate stereotypes. DFEH failed to
11 prove the requisite intent.

12 **3. Full and Equal Service**

13 37. The evidence affirmatively showed that Miller immediately referred Eileen and
14 Mireya to another good bakery when she was unable to design the wedding cake, but Eileen and
15 Mireya declined. Both parties cite and discuss *Minton v. Dignity Health* (“*Minton*”) (2019) 39
16 Cal.App.5th 1155, which quotes *North Coast Women’s Care Medical Group, Inc. v. Superior Court*
17 (“*North Coast*”) (2008) 44 Cal.4th 1145. Both *Minton* and *North Coast* acknowledge that a
18 physician with religious objections to performing certain medical procedures can avoid the conflict
19 by ensuring “full and equal” access to that procedure by a physician who lacks the religious
20 objections. The parties disagree on whether defendants’ referral to an “an unaffiliated bakery” in
21 the present case was “full and equal” access.

22 38. The Catholic hospital in *Minton* declined—for religious reasons—to allow a medical
23 procedure on a patient that a physician deemed medically necessary, and that the Catholic hospital
24 normally allowed on others at its facility. According to *Minton*, the hospital “initially did not ensure
25 that [the patient] had ‘full and equal’ access to a facility,” and the hospital’s “subsequent reactive
26 offer to arrange treatment elsewhere was not the implementation of a policy to provide full and
27 equal care to all persons at comparable facilities not subject to the same religious restrictions...”
28 (Emphasis added.) *Id.* pp. 1164-1165.

1 39. In the present case, Miller’s conduct was materially different than the Catholic
2 hospital in *Minton*, and in fact, Miller did precisely what the *Minton* decision suggests is adequate.
3 Miller’s offer to refer Eileen and Mireya to *Gimme Some Sugar* was almost simultaneous with
4 Miller’s discovery that she was being asked to design a wedding cake at odds with her Christian
5 faith and not offered under the Tastries design standards. Miller arranged, in advance, for *Gimme*
6 *Some Sugar* to take referrals from Tastries in such circumstances, before Eileen and Mireya ever
7 visited Tastries. Miller “initially” did ensure that Eileen and Mireya had “full and equal” access,
8 and her immediate offer to refer them to a comparable, good bakery was reasonable and timely, and
9 not a “subsequent reactive offer.”

10 40. DFEH contends that “businesses must provide their full range of goods and services
11 to all customers.” *Minton* does not say that. DFEH argues that *Minton* involved a referral to an
12 “affiliated” hospital in the same “network,” and that defendants in the present case have “no written
13 or oral agreement” with *Gimme Some Sugar* that requires it to “fulfill the order of any gay couple
14 referred by Tastries.” DFEH argues that the referral to a “different bakery, with different ownership,
15 staffed by different bakers and decorators using different recipes and ingredients, and located in a
16 different facility” does not satisfy the “full and equal” access requirement. This court disagrees.

17 41. The proposed alternative Methodist hospital in *Minton* was “a non-Catholic Dignity
18 Health hospital.” *Id.* at p. 1159. There is nothing in *Minton* to suggest that the two hospitals were
19 anything other than separate and distinct business organizations, e.g., corporations, that were
20 “owned” by a third entity known as “Dignity Health,” i.e., a corporation that owned the shares of
21 two separate corporations. There is nothing in *Minton* to suggest that the two hospitals had
22 anything *other than* different doctors, nurses and administrative staff, using different equipment
23 and medicines. It is apparent from *Minton* that the two hospitals were in different buildings
24 “nearby,” that a physician’s privileges at one hospital did not automatically translate to privileges at
25 the other, and that a person’s health insurance might apply to one hospital, but not the other.

26 42. *Minton* does not state the two hospitals would need a “written or oral” agreement for
27 the referral to satisfy the “full and equal” service requirement, as DFEH suggests. The evidence in
28 present case affirmatively showed that Miller had such an “oral agreement” with Stephanie at

1 *Gimme Some Sugar*. No evidence was presented otherwise.

2 43. DFEH argues that Eileen and Mireya had already tried and rejected *Gimme Some*
3 *Sugar*. The evidence showed that Miller was never made aware of that fact, or why, as Eileen and
4 Mireya simply declined Miller’s referral offer before walking out.

5 44. Because DFEH failed to prove the defendants violated the Unruh Civil Rights Act,
6 resolution of this case does not require this court to address defenses and other issues the parties
7 have raised. However, to complete the trial record, those defenses and issues will be addressed, and
8 this court will assume—for discussion purposes—a violation of the Unruh Civil Rights Act.

9 **B. Free Exercise of Religion**

10 45. The U.S. Supreme Court stated in *Masterpiece Cakeshop, Ltd v. Colorado Civil*
11 *Rights Comm.* (“*Masterpiece*”) (2018) 138 S.Ct. 1719:

12 Our society has come to the recognition that gay persons and gay
13 couples cannot be treated as social outcasts or as inferior in dignity
14 and worth. For that reason the laws and the Constitution can, and in
15 some instances must, protect them in the exercise of their civil rights.
16 The exercise of their freedom on terms equal to others must be given
17 great weight and respect by the courts. At the same time, the
18 religious and philosophical objections to gay marriage are protected
19 views and in some instances protected forms of expression. As this
20 Court observed in *Obergefell v. Hodges* [(2015) 576 U.S. 644], “[t]he
21 First Amendment ensures that religious organizations and persons
22 are given proper protection as they seek to teach the principles that
23 are so fulfilling and so central to their lives and faiths.” [*Id.* at 679-
24 680.] Nevertheless, while those religious and philosophical
25 objections are protected, it is a general rule that such objections do
26 not allow business owners and other actors in the economy and in
27 society to deny protected persons equal access to goods and services
28 under a neutral and generally applicable public accommodations law.
(Citations.)

When it comes to weddings, it can be assumed that a member of the
clergy who objects to gay marriage on moral and religious grounds
could not be compelled to perform the ceremony without denial of
his or her right to the free exercise of religion. This refusal would be
well understood in our constitutional order as an exercise of religion,
an exercise that gay persons could recognize and accept without
serious diminishment to their own dignity and worth. Yet if that
exception were not confined, then a long list of persons who provide
goods and services for marriages and weddings might 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

1 ensure equal access to goods, services, and public accommodations.
2 *Masterpiece, supra*, at p. 1727.

3 46. Both the federal and state constitutions protect the free exercise of religion. The
4 First Amendment to the U.S. Constitution states that “Congress shall make no law respecting an
5 establishment of religion, or prohibiting the free exercise thereof...” U.S. Const. 1st Amend. This
6 provision applies to the states because of its incorporation into the Fourteenth Amendment.
7 *Employment Div., Ore. Dept. of Human Res. v. Smith* (“*Smith*”) (1990) 494 U.S. 872, 876-877.

8 47. Article I, section 4 of the California Constitution states in relevant part: “Free
9 exercise and enjoyment of religion without discrimination or preference are guaranteed.”

10 48. With respect to the free exercise of religion, the First Amendment “first and
11 foremost” protects “the right to believe and profess whatever religious doctrine one desires.” *Smith*,
12 at p. 877. “[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to
13 others in order to merit First Amendment protection.” *Fulton v. City of Philadelphia* (2021) 141
14 S.Ct. 1868, 1876.

15 49. The First Amendment’s right to the free exercise of religion “does not relieve an
16 individual of the obligation to comply with a ‘valid and neutral law of general applicability on the
17 ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”
18 *Smith, supra*, at p. 879. A “law that is neutral and of general applicability need not be justified by a
19 compelling governmental interest even if the law has the incidental effect of burdening a particular
20 religious practice.” *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (“*Lukumi*”) (1993) 508 U.S. 520,
21 531.

22 50. In California, the Supreme Court specifically declined to hold that courts should
23 apply strict scrutiny “to neutral, generally applicable laws that incidentally burden religious
24 practice” in cases involving free exercise claims under the state Constitution. *Catholic Charities of*
25 *Sacramento, Inc. v. Superior Court* (“*Catholic Charities*”) (2004) 32 Cal.4th 527, 566. The
26 California Supreme Court has endorsed the *Smith* rule that a “valid and neutral law of general
27 applicability” is not subject to strict scrutiny. *Id.* at p. 549; see also *North Coast, supra*, 44 Cal.4th
28 1145, 1155.

1 51. DFEH argues that the decision in *North Coast* dictates a decision against the
2 defendants in the present case. Defendants take a contrary view, and articulate a different analytical
3 path. Defendants cite *Montgomery v. Bd. of Retirement* (1973) 33 Cal.App.3d 447, 451 [quoting
4 *People v. Woody* (1964) 61 Cal.2d 716, 719], stating that there is a “two-fold analysis which calls
5 for a determination of, first, whether the application of the statute imposes any burden upon the free
6 exercise of the defendant’s religion, and second, if it does, whether some compelling state interest
7 justifies the infringement.”

8 52. The evidence in the present case proves clearly and convincingly that application of
9 the anti-discrimination provisions of the Unruh Civil Rights Act, as advanced by DFEH in the
10 present case, *substantially* burdens Miller’s free exercise of her Christian faith and does not survive
11 strict scrutiny, because there is a less restrictive means of achieving the state’s interest.

12 53. Apart from the punitive fines and other relief DFEH seeks in its operative pleading,
13 DFEH states that it “does not seek an order forcing Tastries to sell preordered wedding cakes in the
14 retail marketplace to all customers, including gay couples.” At the same time, DFEH argues,
15 seemingly inconsistently, that Tastries has three options: (1) sell all its goods and services to all
16 customers; (2) cease offering wedding cakes for sale to anyone; (3) have Miller and employees
17 sharing her religious objections to same-sex marriage “step aside ... and allow her willing
18 employees to manage the process.”

19 54. The evidence affirmatively showed that DFEH’s proposed “options” would
20 substantially burden defendants’ free exercise of religious faith under the circumstances, as their
21 blunt force rigidity lacks any sensitivity to the rational, reasonable, sincere religious beliefs the
22 DFEH *says* it acknowledges.

23 55. DFEH’s “option” of defendants selling all goods to all customers, i.e., the option for
24 defendants to ignore sincere religious convictions, is sophistry. Apart from the fact Miller generally
25 *does* sell all goods to all customers, including those who are gay, this case presents a focused
26 scenario. Miller’s sincere Christian faith is simply buried and paved over by DFEH’s first option.

27 56. DFEH’s second option, defendants not selling wedding cakes at all, would have a
28 devastating effect on Miller’s business—loss of approximately 25-30 percent in gross revenues—

1 and could potentially put her out of business. Apart from the financial impact, Miller’s ability to
2 practice her faith by supporting and participating in marriage ceremony preparations that align with
3 her Christian views would be stifled. Miller’s participation in the wedding cake part of her
4 business, with her time, talent, and resources, is inextricably linked to her sincere Christian beliefs
5 about what the Bible teaches regarding the marriage of a man and a woman as a sacrament. She
6 created design standards consistent with her sincere beliefs. DFEH stated several times during the
7 trial of this case it did not dispute the sincerity of Miller’s Christian beliefs.

8 57. DFEH’s third “option,” that Miller “step aside ... and allow her willing employees
9 to manage the process,” is no more viable than the first two. Miller’s Tastries is a small business.
10 The evidence affirmatively showed that Miller is involved in some aspect of every wedding cake’s
11 design and creation, and they are being made almost all the time. Presumably, under this “option,”
12 DFEH would *not* ask Miller to instruct her employees to keep their activities a secret from her. It
13 seems self-evident that a policy of encouraging employees to hide their work-related activities from
14 their employer would be problematic, as is more than amply demonstrated by the evidence in this
15 case. Would DFEH ask Miller to step outside? When? How long? DFEH does not explain what
16 happens if there are no “willing employees.”

17 58. Although the third “option” has a *theoretical* advantage of avoiding the financial
18 impact of the second option, the evidence affirmatively showed it would not work that way in
19 reality, and that option does not address the other substantial burdens. Miller does not live her
20 Christian life only at church. The evidence showed that she does not artificially separate her faith
21 from her work, and weddings are a large part of her life. She believes whole-heartedly in what a
22 marriage between a man and a woman represents. Miller cannot turn a blind eye to what is
23 happening in her bakery, and it would be unreasonable to compel her to do so.

24 59. Under the circumstances of this case and the analysis advocated by defendants, the
25 *substantial* burden the state seeks to impose on defendants’ free exercise of religion, by application
26 of the Unruh Civil Rights Act, is not justified by the state’s legitimate interest in preventing
27 discrimination where, as here, the evidence affirmatively demonstrates there is a less restrictive
28 means to achieve the state’s objective. As discussed *supra*, the evidence affirmatively showed that

1 Miller arranged to refer wedding cakes to another good bakery when the designs requested at
2 Tastries were at odds with defendants’ Christian beliefs and design standards. That accommodation
3 was, and is, reasonable under the circumstances, and fulfills the requirement of “full and equal
4 service.” Miller offered that accommodation to Eileen and Mireya.

5 60. DFEH contends that defendants’ analytical approach—applying strict scrutiny—is
6 incorrect and that defendants’ constitutional free exercise claims under both the federal and state
7 Constitutions must be rejected. Notwithstanding this court’s determinations above under the strict
8 scrutiny analysis advocated by defendants, DFEH correctly argues that the holding in *North Coast*
9 controls the decision in the present case as it pertains to the defense based on free exercise of
10 religion, and that *North Coast* held the Unruh Civil Rights Act survives strict scrutiny.

11 61. *North Coast* summarizes the U.S. Supreme Court’s Free-Exercise analytical
12 approaches in *Sherbert v. Verner* (“*Sherbert*”) (1963) 374 U.S. 398 [Seventh-day Adventist denied
13 unemployment benefits because eligibility requirements required work on Saturdays, contrary to
14 applicant’s religion], and *Wisconsin v. Yoder* (“*Yoder*”) (1972) 406 U.S. 205, [state law compelling
15 school attendance for children ages 7-16 contrary to Amish religious objection to education beyond
16 eighth grade]. *North Coast* acknowledges that both *Sherbert* and *Yoder* determined the First
17 Amendment Free Exercise Clause required a “compelling” governmental interest to justify the
18 burden on religion. *North Coast* then notes the change in the high court’s analysis in 1990, in
19 *Smith*:

20 [T]he high court repudiated the compelling state interest test it had
21 used in [*Sherbert*] and in [*Yoder*]. Instead, it announced that the First
22 Amendment’s right to the free exercise of religion “does not relieve
23 an individual of the obligation to comply with a ‘valid and neutral
24 law of general applicability on the ground that the law prescribes (or
25 prescribes) conduct that his religion prescribes (or proscribes).’ ”
26 [*Smith, supra*, at p. 879.] Three years later, the court reiterated that
27 holding in [*Lukumi*], stating that “a law that is neutral and of general
28 applicability need not be justified by a compelling governmental
interest even if the law has the incidental effect of burdening a
particular religious practice.” *North Coast, supra*, p. 1155.

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1 62. *North Coast* applied the *Smith* test, and found:

2 California’s Unruh Civil Rights Act, from which defendant
3 physicians seek religious exemption, is “a valid and neutral law of
4 general applicability.” (Citation.) As relevant in this case, it requires
5 business establishments to provide “full and equal accommodations,
6 advantages, facilities, privileges, or services” to all persons
7 notwithstanding their sexual orientation. (Civ. Code, § 51, subds. (a)
8 & (b).) Accordingly, the First Amendment’s right to the free exercise
9 of religion does not exempt defendant physicians here from
10 conforming their conduct to the [Unruh Civil Rights] Act’s
11 antidiscrimination requirements even if compliance poses an
12 incidental conflict with defendants’ religious beliefs. (Citations.)
13 *North Coast, supra*, at p. 1156.

14 63. The analysis in *North Coast* was repeated in *Catholic Charities*, where the *Smith*
15 rule was applied, and the court stated that a “valid and neutral law of general applicability” is not
16 subject to strict scrutiny. *Id.* at pp. 548-549. The Supreme Court of California also stated in
17 *Catholic Charities* that it was not holding that courts should apply strict scrutiny “to neutral,
18 generally applicable laws that *incidentally* burden religious practice” (emphasis added) in cases
19 involving free exercise claims under the state Constitution, which the court specifically left open
20 for another day. *Id.* at p. 566.

21 64. As stated *supra*, the present case involves a *substantial* burden where there are less
22 restrictive means of achieving the state’s legitimate interest. The evidence affirmatively showed
23 that this case does not involve merely an “incidental burden” on the Miller’s practice and
24 observance of her sincere Christian beliefs.

25 65. Nevertheless, DFEH correctly argues in the present case that *North Coast* controls
26 the legal analysis, and *North Coast* does not allow for anything other than a rejection of defendants’
27 defenses based on the right to free exercise of religion under the federal and state Constitutions. It
28 appears the analysis can go no further, notwithstanding the substantial burden on the free exercise
29 of defendants’ religion.

30 66. Defendants argue that the Unruh Civil Rights Act is not “generally applicable”
31 because it allows for “exemptions.” Defendants argue that the Unruh Civil Rights Act only
32 prohibits “arbitrary” discrimination, rendering it a “‘good cause’ system of individualized

1 exemptions that triggers strict scrutiny.” It is true that this court has determined, as a factual matter,
2 that defendants’ religious beliefs, motivations and actions were not “arbitrary.” But that term is a
3 qualitative description of the intent required to violate the Unruh Civil Rights Act, not a categorical
4 exemption.

5 67. Defendants argue that, because the Unruh Civil Rights Act may not be “construed to
6 confer any right or privilege on a person that is conditioned or limited by law,” the Unruh Civil
7 Rights Act must give way to other laws and is therefore not generally applicable. Defendants cite a
8 number of such laws in their trial brief. This court must agree with DFEH that the Supreme Court
9 has determined the Unruh Civil Rights Act *is* a neutral, generally applicable law, that survives strict
10 scrutiny.

11 68. Defendants argue that DFEH’s administrative investigation and prosecution have not
12 been neutral, and that there has been disparate treatment and hostility. The evidence showed that
13 DFEH was at times insensitive to Miller’s sincere Christian beliefs. It has also been difficult to
14 grasp what DFEH means to convey when it claims not to doubt the sincerity of Miller’s beliefs.
15 DFEH apparently did not understand those beliefs, leading to irrelevant discovery that can
16 reasonably be interpreted as a lack of respect for Miller’s beliefs. Still, litigation—by its nature—
17 requires inquiry, analysis and argument, which are not always well received. Miller did not indict
18 her opposition when given the opportunity to do so while testifying at trial. It is an adversarial
19 process. While DFEH may have stepped on the line at times, it did not commit a personal foul
20 sufficient to constitute a defense in this case.

21 **C. Free Speech**

22 69. The First Amendment to the U.S. Constitution states that “Congress shall make no
23 law ... abridging the freedom of speech....” U.S. Const. 1st Amend. This provision applies to the
24 states because of its incorporation into the Fourteenth Amendment. *Smith, supra*, 494 U.S. 872,
25 876-877.

26 70. The right of freedom of thought protected by the First Amendment includes both the
27 right to speak freely and the right to refrain from speaking at all. *Wooley v. Maynard* (1977) 430
28 U.S. 705, 714. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515

1 U.S. 557, 573-574, the U.S. Supreme Court stated:

2 “Since *all* speech inherently involves choices of what to say and
3 what to leave unsaid,” (citation) (emphasis in original), one
4 important manifestation of the principle of free speech is that one
5 who chooses to speak may also decide “what not to say,” (citation).
6 Although the State may at times “prescribe what shall be orthodox in
7 commercial advertising” ... it may not compel affirmance of a belief
8 with which the speaker disagrees. (citation). Indeed this general rule,
9 that the speaker has the right to tailor the speech, applies not only to
10 expressions of value, opinion, or endorsement, but equally to
11 statements of fact the speaker would rather avoid... Nor is the rule’s
benefit restricted to the press, being enjoyed by business
corporations generally and by ordinary people engaged in
unsophisticated expression as well as by professional publishers. Its
point is simply the point of all speech protection, which is to shield
just those choices of content that in someone’s eyes are misguided,
or even hurtful. (Citations) (Emphasis added.)

12 71. Defendants in the present case contend that the wedding cake Eileen and Mireya
13 sought was itself artistic expression protected under the First Amendment as both “pure speech”
14 and “expressive conduct.” Defendants contend that, because of the broad injunctive relief DFEH
15 seeks in this enforcement action, the Free Speech analysis must expand beyond *just* the wedding
16 cake. This court agrees.

17 72. The Constitution looks beyond written or spoken words as mediums of expression,
18 and the cases have recognized that the First Amendment shields acts such as saluting a flag (and
19 refusing to do so), wearing an armband to protest a war, displaying a red flag, and even marching,
20 walking or parading in uniforms displaying the swastika. (*Id.* at p. 569.) A narrow, succinctly
21 articulable message is not a condition of constitutional protection. (*Ibid.*)

22 73. “In order to compel the exercise or suppression of speech, the government measure
23 must punish, or threaten to punish, protected speech by governmental action that is ‘regulatory,
24 prescriptive, or compulsory in nature.’ *Cressman v. Thompson* (“*Cressman*”) (10th Cir. 2015) 798
25 F.3d 938, 951. In order to make out a valid compelled-speech defense, a party must establish (1)
26 speech, (2) that is compelled by governmental action, and (3) to which the speaker objects. *Ibid.* If
27 the three elements are satisfied, strict scrutiny is triggered. See *Pacific Gas and Elec. Co. v. Public*
28 *Utilities Comm. of California* (1986) 475 U.S. 1, 19-20 (“*PG&E*”); *Taking Offense v. State* (2021)

1 66 Cal.App.5th 696.

2 74. The concept of pure speech includes fiction, music without words, dance, theater,
3 movies, pictures, paintings, drawings, sound recordings, engravings, art, tattoos, the sale of original
4 artwork, custom-painted clothing, and stained-glass windows, among others. See e.g., *Cressman*, at
5 p. 952; *Kaplan v. California* (1973) 413 U.S. 115, 119; *Chelsey Nelson Photography LLC v.*
6 *Louisville/Jefferson County Metro Government* (W.D. Ky. 2020) 479 F.Supp.3d 543, 548; *Ashcroft*
7 *v. Free Speech Coalition* (2002) 535 U.S. 234, 246; *National Endowment for the Arts v. Finley*
8 (1998) 524 U.S. 569, 580.

9 75. The justification for protecting these various media is “simply ... their expressive
10 character, which falls within a spectrum of protected ‘speech’ extending outward from the core of
11 overtly political declarations.” See *Cressman*, at p. 952 [quoting *Nat’l Endowment for the Arts v.*
12 *Finley* (1998) 524 U.S. 569, 602-603.] All images are not categorically pure speech. Instead,
13 courts, on a case-by-case basis, must determine whether the “disseminators of [an image] are
14 genuinely and primarily engaged in ... self-expression.” (Emphasis added.) *Cressman*, at p. 953
15 [quoting *Mastrovincenzo v. City of N.Y.* (2d Cir. 2006) 435 F.3d 78, 91].

16 76. In addition to “pure speech,” the First Amendment protects “conduct” that is
17 “sufficiently imbued with elements of communication.” *Texas v. Johnson* (“*Johnson*”) (1989) 491
18 U.S. 397, 404. Such conduct is protected speech if: (1) there is “an intent to convey a particularized
19 message,” and (2) “the likelihood is great that the message will be understood by those who view
20 it.” *Anderson v. City of Hermosa Beach* (9th Cir. 2010) 621 F.3d 1051, 1058. This test only applies
21 to expressive conduct, not pure speech. (*Id.* at p. 1060.) Examples include burning a flag, *Johnson*,
22 at p. 411, burning a draft card, *U.S. v. O’Brien* (1968) 391 U.S. 367, 370, and wearing a black
23 armband, *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 505-506
24 [wearing armband in silent protest of war “closely akin to ‘pure speech.’”].

25 77. The evidence affirmatively showed that defendants’ wedding cakes are pure speech,
26 designed and intended—genuinely and primarily—as an artistic expression of support for a man
27 and a woman uniting in the “sacrament” of marriage, and a collaboration with them in the
28 celebration of their marriage. The wedding cake expresses support for the marriage. The wedding

1 cake is an expression that the union *is* a “marriage,” and *should* be celebrated.

2 78. In addition, the evidence affirmatively showed that defendants’ participation in the
3 design, creation, delivery and setting up of a wedding cake is *expressive conduct*, conveying a
4 particular message of support for the marriage that is very likely to be understood by those who
5 view it.

6 79. The Tastries wedding cake designs range from simple to elaborate, but all are labor-
7 intensive, artistic and require skill to create, generally involving three to six people. The *visual*
8 design standards require wedding cakes that are “beautiful and balanced,” “proportional to design,”
9 with “complimentary colors,” “colors palettes [that] are compatible” and that “work with [the]
10 design.”

11 80. Apart from the visual, the evidence showed that a simple, specific message is
12 intended and understood by the presence of defendants’ wedding cakes, and separately, by
13 defendants’ participation in the wedding cake process. The Tastries wedding cake by itself, *and* the
14 people who are observed in the bakery or the wedding venue designing, delivering, setting up, or
15 cutting the wedding cake, are associated with support for the marriage. That is precisely how Miller
16 and Tastries view it, and intend it.

17 81. The design standards on which DFEH so heavily relies as evidence of Miller’s
18 intent, leave *no* room to doubt that Miller intends a message, which DFEH fails to acknowledge or
19 misunderstands. The evidence shows that *all* of Miller’s wedding cake designs are intended as an
20 expression of support for the sacrament of “marriage,” that is, the marriage of a man and a woman.
21 It is not a message that everyone may perceive, or accept.

22 82. *All* of Miller’s designs are specifically intended to *answer* the question at the top of
23 the design standard page: “Is it lovely, praiseworthy, or of good report?” Miller’s standard is
24 derived from a Bible verse quoted at the bottom of the design standards: “Whatever is true,
25 whatever is noble, whatever is right, whatever is pure, whatever is lovely, whatever is admirable—
26 if anything is excellent or praiseworthy—think about such things.” The designs must be “Creative,
27 Uplifting, Inspirational and Affirming.” Notably, Miller’s design standard also states, “Our cakes
28 are a reflection of our business and *speak* volumes when sitting center stage.”

1 83. What DFEH dismissively characterizes as a “blank cake” and “baked goods,” Miller
2 and Tastries intend as a creation that “*speaks*” a “meaningful,” “positive,” “affirming” message of
3 support for a marriage. She does not want to speak a different message. Yet that is precisely what
4 DFEH wants her to do.

5 84. It can hardly be questioned that openly participating, or an unwillingness to
6 participate, in a same-sex wedding ceremony conveys a social/political message as well:

- 7 • For or Against?
- 8 • Enlightened or Old-school?
- 9 • Red or Blue?
- 10 • Accepting or Judgmental?

11 None of these monikers may be true, but a message is nevertheless “heard” by a watching public.

12 85. For defendants, the wedding cake is intended as a “Centerpiece” to the celebration,
13 “suited to the celebration *theme*,” with a design “*theme*” that must be “*positive, meaningful* and in
14 line with the *purpose*.” The wedding cake has a purpose.

15 86. Symbols and acts associated with weddings become focal points of interest, e.g.,
16 walking down the aisle, recital of vows in front of “witnesses,” being introduced “for the first
17 time,” the toast, throwing rice, driving away. A just-married couple cutting wedding cake, and
18 being photographed doing so, is traditionally one of the last acts before a newly-married couple
19 “begins life together,” and some people stay only as long as “the cake-cutting.” A multi-tiered
20 white wedding cake is iconic. Eileen and Mireya understood all of this.

21 87. The evidence shows that Eileen and Mireya desired to do, and to be seen doing,
22 what “to-be-married” and “just-married” people generally do. It was important them. They were
23 already married before they heard of Tastries. They planned to marry in 2017, but decided to marry
24 in December 2016 out of concern for the future of same-sex weddings after the election. They
25 *never* let go of the idea of a wedding with lots of guests. They planned it. Their “to-do” list
26 included buying a wedding cake. They selected a three-tier white wedding cake. They visited
27 Tastries with friends and Eileen’s mother. After exchanging vows, their cake was moved to a
28 central area of the wedding venue, in full view of guests, as Eileen and Mireya participated in a

1 traditional ceremony cutting their wedding cake together.

2 88. From Miller’s standpoint, a wedding cake offered for any purpose *other* than the
3 union of a man and a woman, e.g., wedding of a man and a parrot, a man and multiple wives, a
4 man getting divorced, could *never* be “praiseworthy” or “of good report.” Nor would such purposes
5 align with Miller’s Christian beliefs. Miller’s concern was “hurt[ing] [her] Lord and Savior” by
6 being “part” of a same-sex wedding. There is a very high likelihood that a person who designs,
7 makes and delivers a wedding cake to a same-sex wedding ceremony will be understood as
8 conveying a message of support for that event.

9 89. Compelled expressive conduct is subject to strict scrutiny (as opposed to
10 intermediate scrutiny) if the compulsion is content or viewpoint—based. A regulation is content-
11 based if it “applies to particular speech because of the topic discussed or the idea or message
12 expressed.” *Reed V. Town of Gilbert, AZ* (“*Reed*”) (2015) 576 U.S. 155, 163-165; see *Telescope*
13 *Media Group v. Lucero* (8th Cir. 2019) 936 F.3d 740, 753 [law regulated based on content by
14 treating wedding videographers’ “choice to talk about one topic—opposite-sex marriages—as a
15 trigger for compelling them to talk about a topic they would rather avoid—same-sex marriages”].)
16 The phrase “content based” requires a court to consider whether a regulation of speech “on its face”
17 draws distinctions based on the message a speaker conveys. Some facial distinctions based on a
18 message are obvious, defining regulated speech by particular subject matter, and others are more
19 subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on
20 the message a speaker conveys, and, therefore, are subject to strict scrutiny. (*Reed, supra*, pp. 163-
21 164.)

22 90. Applying the foregoing legal principles, DFEH’s enforcement of the Unruh Civil
23 Rights Act under the circumstances of the present case compels expressive conduct based on
24 content, or viewpoint.

25 91. DFEH seeks to compel defendants to celebrate same-sex weddings, which changes
26 the content of defendants’ desired expressive conduct. DFEH also seeks to require defendants to
27 create wedding cakes celebrating same-sex weddings because they design and create wedding
28 cakes for traditional, opposite-sex weddings. It is only because Miller and Tastries design wedding

1 cakes celebrating marriage between a man and a woman that DFEH seeks to compel the defendants
2 to convey a different message celebrating same-sex marriage. DFEH's enforcement action would
3 also restrict access to the marketplace based on "viewpoint," i.e., defendants make cakes
4 celebrating weddings, the law does not require defendants to make cakes for every occasion, just
5 cakes for the celebration of same-sex weddings. Defendants disagree with that viewpoint.

6 92. Defendants' pure and expressive speech is entitled to protection under the First
7 Amendment. Application and enforcement of the Unruh Civil Rights Act under the circumstances
8 presented is not justified by a compelling governmental interest. DFEH's enforcement action seeks
9 to compel Miller and Tastries to express support for same-sex marriage, or be silent. No compelling
10 state interest justifies such a result under strict scrutiny.

11 **DISPOSITION**

12 93. Judgment for the defendants. Plaintiff shall take nothing by way of its first amended
13 complaint against the defendants.

14 94. Defendants are ordered to prepare a proposed judgment.

15 95. Costs of suit and attorneys' fees may be claimed and will be awarded in accordance
16 with applicable statutes and rules of court.

17
18
19
20 **IT IS SO ORDERED.**

JUDGE OF THE SUPERIOR COURT

21
22 Dated: Signed: 12/27/2022 12:13 PM



Hon. J. Eric Bradshaw