Case No. F085800

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

CIVIL RIGHTS DEPARTMENT, FORMERLY THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, AN AGENCY OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

CATHY'S CREATIONS, INC., D/B/A TASTRIES, A CALIFORNIA CORPORATION, ET AL.,

Defendants and Respondents;

EILEEN RODRIGUEZ-DEL RIO AND MIREYA RODRIGUEZ-DEL RIO,

Real Parties in Interest.

Appeal from Kern County Superior Court
Case No. BCV-18-102633
Hon. Judge J. Eric Bradshaw (Division J)

Brief of Amici Curiae ACLU, ACLU of Southern California, ACLU of Northern California, and ACLU of San Diego & Imperial Counties In Support of Plaintiff–Appellant Seeking Reversal

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STATEMENT OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego and Imperial Counties are three of the ACLU's regional affiliates. As organizations that advocate for First Amendment liberties as well as equal rights for lesbian, gay, bisexual, transgender, and queer people, the ACLU, ACLU of Northern California, ACLU of Southern California, ACLU of San Diego and Imperial Counties, and their members have a strong interest in the application of proper standards when evaluating constitutional challenges to civil rights laws. The ACLU and its California affiliates have appeared as co-counsel of record and as amicus curiae in numerous cases that have helped shape and define LGBTQ protections in California, including *Minton v. Dignity Health* (2019) 39 Cal.App.5th 1155 (*Minton*) (counsel), and *North Coast Women's Care Med. Grp., Inc. v. Super. Ct.* (2008) 44 Cal.4th 1145 (*North Coast*) (amici).

INTRODUCTION AND SUMMARY OF ARGUMENT

The California Unruh Civil Rights Act ("Unruh Act") guarantees "full and equal…services… in all business establishments" regardless of sexual orientation. (Civ. Code, § 51, subd. (b).) Real Parties in Interest Eileen Rodriguez-Del Rio and

Mireya Rodriguez-Del Rio were denied that guarantee when Respondent Catherine Miller, owner of Respondent Cathy's Creations, doing business as Tastries, refused to sell them a wedding cake because of their sexual orientation. Ms. Miller had no objection to making the specific wedding cake they requested, until she learned that the Rodriguez-Del Rios were two women marrying each other. At that point, Ms. Miller refused to fill the order. Ms. Miller later testified that had a heterosexual couple requested an identical wedding cake, she would have filled the order. In short, Ms. Miller did not object to anything inherent to the cake's design or message, but to the fact that the Rodriguez-Del Rios were a same-sex couple.

Shortly after their wedding, the Rodriguez-Del Rios filed an administrative complaint with the California Department of Fair Employment and Housing ("DFEH"), now the Civil Rights Department ("Department"), alleging that Tastries unlawfully refused to provide them "full and equal" service on the basis of their sexual orientation. After investigating, DFEH found cause to believe that Tastries had discriminated against the couple in violation of the Unruh Act. In October 2018, DFEH filed the underlying civil action. Following a week-long bench trial, the trial court entered a judgment on behalf of Respondents. The Department appealed.

The lower court erred in three crucial ways. First, the trial court applied the wrong standard for discriminatory intent when it held that Respondents did not

intentionally discriminate against the Rodriguez-Del Rios because Ms. Miller acted based on religious beliefs rather than hostility to LGBTQ people. California law only requires the Department to prove that Respondents took "willful" or "affirmative" steps to deny the Rodriguez-Del Rios services because of their sexual orientation—which the Department did.

Second, the lower court erred by holding that referring the Rodriguez-Del Rios to another bakery satisfied Respondents' obligation to provide "full and equal" treatment under the Unruh Act. A business cannot avoid liability under the Unruh Act by providing a referral to another business that does not discriminate. Accepting such a view would not only undermine the purpose of the Unruh Act but upend antidiscrimination law as we know it.

Finally, the trial court erred in sustaining Respondents' First Amendment defense. Respondents cite the U.S. Supreme Court's decision in *303 Creative LLC v. Elenis* (2023) 600 U.S. 570 (*303 Creative*), in claiming a First Amendment right to refuse to sell a cake to the Rodriguez-Del Rios. The Court in *303 Creative* expressly rejected the charge that its decision permitted identity-based discrimination, and instead upheld a business owner's right to refuse to express a particular message it categorically objects to expressing. Here, the Unruh Act is not being applied to compel a business to express a message it objects to expressing

for anyone. Instead, this case involves the very identity-based discrimination that the *303 Creative* majority insisted the First Amendment did not authorize.

Accordingly, the decision below should be reversed. Amici file this Brief to advance arguments in support of the Department in appealing the lower court's Unruh Act and Free Speech holdings. Amici support the portion of the decision below addressing the Free Exercise Clause but do not address it in this Brief.

I. Respondents Violated the Unruh Act by Intentionally Refusing to Provide "Full and Equal" Wedding Cake Services

The Unruh Act 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, subds. (b).) "[A] person suffers discrimination under the [Unruh] Act when the person presents himself or herself to a business with an intent to use its services but encounters an exclusionary policy or practice that prevents him or her from using those services." (*White v. Square, Inc*. (2019) 7 Cal.5th 1019, 1023 (*White*).)

A. Respondents Intentionally Discriminated against the Rodriguez-Del Rios Because of Their Sexual Orientation

The Unruh Act was enacted in 1959 "to 'eradicate' or 'eliminate' arbitrary, invidious discrimination in places of public accommodation." (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 169 (*Angelucci).*) The Legislature

adopted the Act, in part, to address concerns that its predecessor statute was construed too narrowly by California courts. (*Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 76 (*Isbister)*.) "The Legislature's desire to banish [discrimination] from California's community life has led [the California Supreme Court] to interpret the [Unruh] Act's coverage 'in the broadest sense reasonably possible.'" (*Id.* at pp. 75–76. (quoting *Burks v. Poppy Construction Co*. (1962) 57 Cal.2d 463, 468), *as modified on denial of reh'g* (Dec. 19, 1985); see also *White*, *supra*, 7 Cal.5th at p. 1025 [holding that courts must construe the Act liberally to effectuate its "broad preventive and remedial purposes."]).)

On its face, the Unruh Act expressly forbids business establishments from denying individuals "full and equal" services because of their sexual orientation. To establish a violation under the Unruh Act, a plaintiff must "plead and prove intentional discrimination." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1174 (*Harris)*.) Importantly, a plaintiff does not need to show that the discriminatory action was motivated by animus or ill will. (See, e.g., *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 115, 128 [explaining that the "substantial motivating factor" test does not require a plaintiff to prove the discriminatory action "was motivated by animosity or ill will"].)

Here, there is ample evidence that Respondents intentionally discriminated against the Rodriguez-Del Rios because of their sexual orientation. Tastries'

written policy expresses an intent to deny certain services to same-sex couples, including wedding cakes and any other cake that celebrates the engagement, marriage, or anniversary of the couple. (AA2282-2285, AA2535.) In August 2017, the Rodriguez-Del Rios selected one of Tastries' on-display sample cake designs as the design they wanted to order. (AA2286, AA2536.) Once Ms. Miller realized that the Rodriguez-Del Rios were a same-sex couple ordering a wedding cake, Ms. Miller cited the bakery's written discriminatory policy and refused to fulfill their order. (AA2536.) Ms. Miller later admitted during her court testimony that sexual orientation was the motivating reason.[1] She testified that had the Rodriguez-Del Rios been in a heterosexual relationship, Tastries would have fulfilled their order. (RT1600, RT1645, RT1826.) Respondents' actions were both "willful" and "affirmative." (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 853 (*Koebke)*.)

Despite the Department's overwhelming evidence of Respondents' intent to discriminate against the Rodriguez-Del Rios because of their sexual orientation, the trial court held that the Department failed to meet its burden of proof. The court

[1] Even if sexual orientation was not the sole motivating reason for Respondents' discrimination, the Department satisfied its burden of proof. Under the applicable standard, the Department only need prove that sexual orientation was *a* substantial motivating reason for the alleged discrimination to establish a violation of the Unruh Act. (See, e.g., CACI Nos. 2507, 3060.)

reasoned that Tastries did not discriminate within the meaning of the Unruh Act because Ms. Miller's motivation was adherence to her religious beliefs, which it viewed as benign. But, as described above, the proper question under the Unruh Act is whether there was "willful, affirmative misconduct on the part of those who violate the Act" (*Koebke*, *supra,* 36 Cal.4th at p. 853), not whether the motivation for the discrimination was hostile or benign. Regardless of whether Respondents denied the Rodriguez-Del Rios full and equal services because of animus or ill will, California law only requires the Department to prove that Respondents intentionally discriminated against the Rodriguez-Del Rios because of their sexual orientation – which the Department did.

Likewise, the court erred in reasoning that Respondents did not discriminate because Ms. Miller's refusal to sell the Rodriguez-Del Rios a standard wedding cake was motivated by religion. (AA2546.) To establish a violation under the Unruh Act, a plaintiff only need show that a business acted upon an impermissible reason in its denial of services. (*Harris, supra,* 52 Cal.3d at p. 1174.) If adherence to one's religion alone were enough to find that a business's action was not discriminatory, then *North Coast, supra*, 44 Cal.4th at p. 1145, would have been reasoned differently. There would have been no reason for the court to consider whether the defendant medical practice was *exempt* from complying with the Unruh Act because of individual physicians' faith objections; under the trial

court's reasoning, the practice would not have discriminated. Here, Ms. Miller impermissibly relied on the Rodriguez-Del Rios' sexual orientation to deny them wedding cake services. That alone is sufficient to establish a violation of the Unruh Act.

B. Providing Third-Party Referrals of Service Does Not Constitute "Full and Equal" Services under the Unruh Act

The trial court found that Ms. Miller's referral of the Rodriguez-Del Rios to Gimme Some Sugar bakery constituted "full and equal" service under the Unruh Act. (AA2542.) In reaching this decision, the trial court misinterpreted the decisions in *North Coast* and *Minton*, to hold that a business may satisfy its "full and equal" services obligation simply by referring potential clients to another business. (AA2542.) Interpreting the Unruh Act in such a way would not only conflict with its "broad remedial purpose and overarching goal of deterring discriminatory practices by businesses," but it would lead to untenable results for antidiscrimination law. (*White, supra,* 7 Cal.5th at p. 1025.)

In *Minton*, the trial court concluded that Dignity Health's alleged denial of a scheduled surgery for a transgender patient did not violate the Unruh Act's guarantee of "full and equal" service because the patient's same doctor eventually performed the procedure at another facility owned by Dignity Health. (*Minton, supra,* 39 Cal.App.5th at p. 1161.) This Court reversed, holding that, if the facts as

plaintiff Minton alleged were proven, then he would have suffered discrimination the moment his surgery was cancelled. The fact that plaintiff Minton eventually received services from another hospital owned by the same chain had no impact on whether he "was denied full and equal access to health care treatment, a violation of the Act." (*Id*. at p. 1164.) As this Court noted, "'full and equal' access requires avoiding discrimination, not merely remedying it after it has occurred." (*Id.* at p. 1165.)

The trial court here incorrectly interpreted *Minton* to conclude that Respondents fulfilled their obligations under the Unruh Act by "reasonabl[y] and timely" referring the Rodriguez-Del Rios to an alternative bakery. (AA2547.) To the contrary, like plaintiff Minton, the Rodriguez-Del Rios were denied service. But the Rodriguez-Del Rios were worse off than plaintiff Minton because they did not ultimately receive the service they wanted from the same entity with which they set out to do business. Instead, they were given a referral – and shown to the door.

The *dicta* of *North Coast*—to the effect that a medical facility could avoid liability under the Unruh Act by providing "access to that medical procedure through a North Coast physician lacking [the specific physician's] religious objections"—similarly offers no shelter. (*North Coast, supra,* 44 Cal.4th at p.

1145, quoting Civ. Code, § 51, subd. (b).) *North Coast* contemplated continuity of care, not a rejection and a business card.

Further, should this Court accept the lower court's logic—that providing a referral to another business establishment constitutes "full and equal" service under the Unruh Act—it would not only undermine the Unruh Act's purpose, but also lead to untenable results for antidiscrimination law. Business owners would have the ability to deny entire classes of people access to their services, conflicting with all types of local, state, and federal anti-discrimination law. For example, if this Court were to affirm the trial court's decision, a bakery could refuse to sell a birthday cake to a person with a disability—so long as the business owner provided a referral to another establishment. Or a sporting goods store could refuse to sell a uniform to a child with same-sex parents, provided that the store owner referred the family elsewhere. Not only would this conflict with the long-standing purpose of the Unruh Act, but it would destabilize and ultimately upend antidiscrimination law as we know it.

Finally, in denying the Rodriguez-Del Rios "full and equal" services, Respondents engaged in precisely the type of behavior that the Unruh Act was enacted to eliminate. Respondents' treatment of the Rodriguez-Del Rios inhibited the Rodriguez-Del Rios' access to "full and equal" services and thus relegated them to an inferior status in "community life." (*Isbister, supra,* 40 Cal.3d at pp. 75-

76; see also *303 Creative, supra,* 600 U.S. at p. 580. "[[A] public accommodations law ensures equal dignity in the common market. Indeed, that is the law's 'fundamental object': 'to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments."'"] (Sotomayor, J., dissenting) (quoting *Heart of Atlanta Motel, Inc. v. United States* (1964) 379 U.S. 241, 250 (quoting S. Rep. No. 872, 88th Cong., 2d Sess., at p.16 (1964); *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n* (2018) 584 U.S. 617, 631 ["Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."].) Thus, Respondents' discrimination violated the core purpose of the Unruh Act.

II. The Department's Enforcement of the Unruh Act Did Not Violate Respondents' Free Speech Rights

Tastries and Ms. Miller argue that the U.S. Supreme Court's decision in *303 Creative* protects their refusal to sell a cake to the Rodriguez-Del Rios, because, they claim, they are being forced to express a message about gender to which they object. (Resp. Br. 39-44.) Because *303 Creative* is easily distinguishable and the Unruh Act is a law of general applicability, it should be subject to, at the most, intermediate scrutiny, to the extent application of the law in this situation even burdens the bakery's expressive rights at all.

303 Creative held that the government may not compel a web designer to produce "pure speech"—an original, customized message using the owner's own words and artwork—expressing a view that the owner objected to expressing *for anyone*. (*303 Creative, supra*, 600 U.S. at p. 580.) The Court further found that in such circumstances, requiring the business to provide the service was motivated by a state desire to suppress disfavored ideas. (*Id*. at p. 602.) At the same time, the Court expressly rejected the dissent's charge that it was authorizing businesses to refuse service to customers based on their identity. (*Id*. at p. 598.) Because it found that *303 Creative* did not object to the customer's identity, but to the content of the message it would be required to express, the law's application under these unusual circumstances violated the First Amendment. (*Id*. at p. 603.)

This case is fundamentally different. It does not involve a request for a business to provide a "pure speech" service, consisting of words and pictures, expressing a message to which the owner objects. Instead, it involves the refusal to sell a cake bearing no words or pictures to particular customers. The cake itself is a simple white cake – three tiers with flowers and wavy frosting but no topper and no words. The bakery would sell this exact same product to others; the only reason the owner refused to sell it to the Rodriguez-Del Rios is because they are a same-sex couple. *303 Creative* holds that businesses can refuse to express a particular message *for anyone*, and that application of nondiscrimination laws to compel

them to express such a message violates the First Amendment. It does not remotely support a claim that a bakery can refuse to sell a cake to same-sex couples that it would gladly sell to anyone else.

The Unruh Act is a generally applicable nondiscrimination law, designed to halt discrimination in the provision of goods and services by businesses open to the public. California's interest in prohibiting discrimination in public accommodations applies equally to all businesses that serve the public, and, as a general matter, is unrelated to the suppression of expression. Accordingly, at most intermediate scrutiny applies, and is easily satisfied.

A. *303 Creative v. Elenis* Is Not Applicable in this Case Because Making Ordinary Baked Goods Is Not Compelled Speech.

In *303 Creative*, the Supreme Court majority framed the question before it as whether "a State [can] force someone who provides her own expressive services to abandon her conscience and speak *its* preferred message instead." (*303 Creative, supra,* 600 U.S. at p. 597.) While the Court recognized that public accommodations laws may generally be applied to protect LGBTQ people from discrimination, *id.* at pp. 591-592, it observed that "public accommodations statutes can sweep too broadly when deployed to compel speech." (*Id.* at p. 592.) *303 Creative*'s conclusion that Colorado's public accommodations law could not constitutionally be applied to the plaintiff business's expression depended on the Court's finding that the law was being applied to compel its owner to engage in

pure speech, and that the owner objected to providing the message requested *for anyone*—not to serving a gay couple. Because the case arose in a pre-enforcement posture, the Court had no actual denial of service to examine. Instead, the Court rested its decision on the following stipulated facts:

- "Ms. Smith is 'willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender,' and she 'will gladly create custom graphics and websites' for clients of any sexual orientation." (*Id.* at p. 582 (quoting App. to Pet. Cert. 184a).)
- "She will not produce content that 'contradicts biblical truth' regardless of who orders it." (*Id.* (quoting App. 184a).)
- "Ms. Smith's websites promise to contain 'images, words, symbols, and other modes of expression.'" (*Id.* at p. 587 (quoting App. 181a).)
- "[E]very website will be her 'original, customized' creation." (*Id.* (quoting App. 181a).)
- She intended to "consult with clients to discuss 'their unique stories as source material'" and "produce a final story for each couple using her own words and her own 'original artwork.'" (*Id.* at p. 588 (quoting App. 182a–183a).)
- "And they have stipulated that Ms. Smith will create these websites to communicate ideas—namely, to 'celebrate and promote the couple's wedding and unique love story' and to 'celebrat[e] and promot[e]' what Ms. Smith understands to be a true marriage." (*Id.* at p. 587 (quoting App. 186a-187a).)

Under these circumstances and pursuant to these stipulations—in which the owner refused a pure speech service because of its content, and not because of the identity of the customer—the Court found that application of Colorado's public accommodations law would result in compelled speech in violation of the First Amendment. (*Id*. at p. 603.) While the Court recognized that "determining what qualifies as expressive activity protected by the First Amendment can sometimes

raise difficult questions," it concluded that "this case presents no complication of that kind. The parties have *stipulated* that Ms. Smith seeks to engage in expressive activity. And the Tenth Circuit has recognized her services involve 'pure speech.'" (*Id.* at p. 599 (emphasis in original).) Neither is true in the present case.

"Pure speech" is bare communication "for the purpose of expressing certain views," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (1969) 393 U.S. 503, 505, like a parade, *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* (1995) 515 U.S. 557 (*Hurley*), film, or painting. (See *303 Creative, supra,* 600 U.S. at p. 587.) But "all images are not categorically pure speech" and courts must determine on a "case-by-case basis" whether the disseminators are "primarily engaged in . . . 'self-expression.'" (*Cressman v. Thompson* (10th Cir. 2015) 798 F.3d 938, 953 (*Cressman*), ellipsis in original.) Pure speech is not, for example, the sale of "playing cards with artistic designs on the back" or "T-shirts emblazoned with the stars and stripes," *Mastrovincenzo v. City of N.Y.* (2d Cir. 2006) 435 F.3d 78, 94, or the reproduction of an image of a sculpture on a state license plate, *Cressman,* at pp. 953-954. "Pure speech" is also distinct from situations where "'speech' and 'nonspeech' elements are combined in the same course of conduct." (*United States v. O'Brien* (1968) 391 U.S. 367, 376 (*O'Brien)*.)

The stipulations in *303 Creative* rendered the wedding website "pure speech." But the facts here are distinct. There are no stipulations. The product is a

basic white cake.[2] As the trial court acknowledged in its decision, the Rodriguez-Del Rios "chose a popular design for a wedding cake that was on display—a three-tier white wedding cake with 'wavy' frosting, i.e., a 'wispy cake,' with flowers on it, but no writing or 'cake topper.'" (AA2541.) The cake requested was made to order, not custom: it was identical to a cake in the display case. (AA2541.) The cake did not involve the bakery's "own words" or "original artwork." (Cf. *303 Creative*, *supra*, 624 U.S. at p. 588.) The plain white cake they selected is unlike an original sculpture, painting, verse, or music and lacks any of the hallmarks or characteristics that courts have associated with pure speech. Neither *303 Creative* nor any other precedent suggests that a cake of that kind, or the act of selling it, constitutes expression for First Amendment purposes.

Rather, the cake was an ordinary baked good used for many purposes. Tastries regularly made and sold the same cake for various celebrations, including

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[2] Before *303 Creative*, the Supreme Court had previously found public accommodations laws were misapplied to compel expression in *Hurley* and *Boy Scouts of America v. Dale*, (2000) 530 U.S. 640 (*Dale*), but those decisions, involving, as in *303 Creative*, peculiar applications, did not call into question the enforcement of public accommodations laws in general, or even of those states' public accommodations laws in other applications. Rather, those cases invalidated the "peculiar application" of the laws to compel purely expressive content, *Hurley*, *supra,* 515 U.S. at p. 572; or that would "significantly affect [an expressive association's] expression," *Dale*, at p. 658. So too, *303 Creative* invalidated a particular application of Colorado's public accommodations law to "pure speech" where the business's objection was to the content of the message, not the identity of the customer. It did not otherwise hold that nondiscrimination laws cannot be enforced, even if they might incidentally affect expression.

birthdays, baby showers, and quinceañeras. (AA0178; AA0538; AA1129.) The cake cannot be inherently expressive if the message only exists when used for weddings, but not when used for a birthday party.

Tastries objected to making this product not because of any content intrinsic to the cake. Ms. Miller and her staff had already baked the exact cake – in fact, the cake sat in the display case the day the Rodriguez-Del Rios visited Tastries. (AA2541.) Ms. Miller would have accepted an order for a cake identical in size, shape, and design for a heterosexual couple. (AA2534-AA2535.) The only difference between the products would be the identities of the buyers. Ms. Miller only refused to sell to the Rodriguez-Del Rios because of their sexual orientation. Indeed, Ms. Miller testified that she would not make a macaron, cinnamon roll, or cookie – none of which require decorating – for a same-sex couple celebrating their anniversary. (AA2142.) And, beyond weddings and anniversaries, Ms. Miller would not make a cake for a same-sex couple to celebrate their housewarming, baby shower, proposal, engagement, bridal shower, bachelorette party, or civil union. (AA0334- AA0335; AA0337- AA0338.) If the business has to know the identity of the customer in order to know whether it will provide a service, it is engaged in status-based discrimination, not protected speech.

Whatever meaning the product's *use* by the Rodriguez-Del Rios might express was not the *bakery's* speech, just as the fact that a customer ordered pink

paint from a paint store because they intended to paint pink triangles would not mean the paint store was expressing anything about LGBTQ status. The bakery's objection here is to baking and frosting the identical cake it would sell to other customers because the owner knows the cake will be served at a same-sex couple's wedding. The sale of a cake with no intrinsic message does not *become* "compelled speech" about marriage equality because the couple getting married happens to be gay.

Requiring a bakery to sell to an LGBTQ customer the same product it would make for others does not compel pure speech, as it is *not* expression she would not otherwise make. Just as the bakery could not refuse to sell the same cake to a Black or Jewish customer because it did not think that Black or Jewish occasions are worthy of celebration, it cannot refuse to sell it to an LGBTQ person because it does not think that LGBTQ people should be permitted to marry. What the customer does with the product is their own decision, not the bakery's compelled speech. *303 Creative* expressly rejected any suggestion that it authorized status-based discrimination by expressive businesses, and this Court should reject efforts to expand that decision. (See *303 Creative, supra,* 600 U.S. at p. 598 ["[W]e do no such thing."]; see generally Cole, *"We Do No Such Thing": 303 Creative v. Elenis and the Future of First Amendment Challenges to Public Accommodations Laws* (2024) 133 YALE L.J. FORUM 499.)

This is not to say that government regulation of baked goods could never implicate the First Amendment. If the government passed a law explicitly targeting the expressive elements of cakes, such regulation would be content-based and thus trigger strict First Amendment scrutiny. A requirement, for example, that bakeries make and sell cakes bearing American flag décor—or vice versa, prohibiting cakes with American flag décor—would not be "unrelated to the suppression of expression," *O'Brien, supra,* 391 U.S. at p. 377, and therefore would trigger, and likely fail, strict scrutiny. Such a law would violate the First Amendment's bar on a state requiring its citizens to "use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty." (*Wooley v. Maynard* (1977) 430 U.S. 705, 715; see also *W. Va. State Bd. of Educ. v. Barnette* (1943) 319 U.S. 624, 633 ["Here it is the State that . . . requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks."].) But the application of the Unruh Act, a law of general applicability prohibiting identity-based discrimination, to a refusal to sell because of a customer's identity, is unrelated to the suppression of expression, and triggers at most intermediate scrutiny—which it easily survives.[3] See Part II. B, *infra.*

[3] The Unruh Act does not regulate business activity beyond the prohibition of class-based discrimination. Accordingly, businesses remain free to decline sales for nearly any reason, or no reason, so long as the decision is not based in any part on intentional disparate treatment of one or more people based on their non-economic

Based on the parties' stipulations in *303 Creative*, the Court viewed the website designer as a content creator who "speaks for pay." (*303 Creative, supra*, 600 U.S. at p. 589.) It was concerned that applying Colorado's public accommodations law in those circumstances "would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty." (*Ibid.)* Because this case does not implicate the application of a public accommodations law to pure speech where the business objects to the content of a particular message requested, but a mere requirement of equal treatment, it does not implicate the First Amendment prohibition announced in *303 Creative*. Therefore, traditional First Amendment principles firmly apply to the facts of this case.

B. The First Amendment's Free Speech Principles Do Not Protect the Refusal to Sell Baked Goods to a Customer Because of Their Sexual Orientation.

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personal characteristics. For example, a bakery could refuse to sell a child's first birthday cake based on the knowledge that it would be used to smash, not eat, because it objects to wasting food. Or it could refuse to sell a pie to be used in a slapstick routine because it doesn't find people getting pie in the face funny. (See *Harris, supra*, 52 Cal.3d at pp. 1142, 1148, 1162-1164 [distinguishing Unruh-prohibited discrimination based on personal characteristics from permissible decision-making based on "legitimate business interests" such as ability to pay for the requested service or to "be responsible consumers of public accommodations"]; see also *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 732 [reviewing legislative history of Unruh Act and predecessor statutes that barred all "arbitrary" discrimination, and contrasting prohibited efforts to exclude people based on "class or group affiliation" with permissible "deportment regulations"].))

The Unruh Act is a law of general applicability that targets discriminatory conduct, rather than expression. It forbids the refusal to engage in commerce with people because of protected characteristics, regardless of whether a business sells books (protected by the First Amendment) or groceries (not protected by the First Amendment).

Even if there were something expressive about a plain frosted cake, *O'Brien* would govern because the law regulates conduct with both expressive and non-expressive elements, and the law is "unrelated to the suppression of expression." (*O'Brien, supra*, 391 U.S. at pp. 376-377.) "Under *O'Brien*, a content-neutral regulation" that imposes an incidental burden on speech "will be sustained if 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" (*Turner Broad. Sys., Inc. v. FCC* (1994) 512 U.S. 622, 662 (quoting *O'Brien,* at p. 377).) The critical inquiry is whether the government seeks to regulate conduct *because* of what it communicates, or *regardless* of what it communicates. (*Texas v. Johnson* (1989) 491 U.S. 397, 406-407.)

The Unruh Act is content-neutral because it bans all discriminatory sales practices by businesses open to the public, regardless of whether they sell

expressive goods at all. The Superior Court incorrectly concluded that the regulation is content-based because the Department sought to compel Ms. Miller to celebrate same-sex weddings. (AA2559.) But the Department did no such thing. The Department, pursuant to the Unruh Act, merely required Ms. Miller to serve all customers equally. A regulation is content-based only if it "applies to particular speech because of the topic discussed or the idea or message expressed." (*Reed v. Town of Gilbert* (2015) 576 U.S. 155, 163-165.) The Unruh Act is triggered not by a refusal to celebrate same-sex weddings, but by all refusals of service based on identity. The Unruh Act's prohibition on discrimination in sales is entirely indifferent to whether the product being sold is expressive; the law applies equally to "expressive" businesses—such as bookstores, corporate photo studios, and newspapers—and "nonexpressive" businesses, such as hardware stores.

As the U.S. Supreme Court recognized in *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288 (*Clark*), the government is free to enforce generally applicable regulations of conduct "even against people who choose to violate [those] regulations for expressive purposes." (*Id*. at p. 298, n.7; see also *United States v. Albertini* (1985) 472 U.S. 675, 687-688.) In *Clark*, the Court upheld the application of a federal rule barring sleeping in national parks against a non-profit group whose members sought to sleep overnight in Washington, DC's Lafayette Park to protest the plight of the homeless. (*Clark,* at pp. 291-292.) The

Court acknowledged that the protesters sought to engage in overnight camping for expressive purposes, but it concluded that the National Park Service's interest in "limit[ing] the wear and tear on park properties" was "unrelated to the suppression of expression," *id.* at p. 299, and therefore subject only to *O'Brien* scrutiny, which it satisfied. (*Id.* at p. 298.)

And in *O'Brien* itself, the defendant was undeniably engaged in expression when he burned his draft card on the steps of a Boston courthouse to protest the draft and the Vietnam War. (*O'Brien, supra*, 391 U.S. at p. 376.) The U.S. Supreme Court nonetheless found that because the government's interest in preserving draft cards was "unrelated to the suppression of expression," *id.* at p. 377, and the impact on O'Brien's expression was "incidental," *ibid*., his conviction for draft card destruction did not violate the First Amendment. (*Id.* at pp. 381-382.)

Accordingly, because any compelled expression here is entirely incidental to the content-neutral regulation of conduct, the Unruh Act's application is plainly valid, and triggers, at most, *O'Brien* scrutiny, which is easily satisfied here. The State has a substantial, even compelling, interest in fostering full inclusion in civic life by guaranteeing equal access to businesses open to the public, an essential component of equal participation in a free society. (See *Romer v. Evans* (1996) 517 U.S. 620, 631; *Rotary Int'l v. Rotary Club of Duarte* (1987) 481 U.S. 537, 549 (*Duarte*).) The Unruh Act's "fundamental purpose is to secure all persons equal

access to public accommodations no matter their personal characteristics," *Candelore v. Tinder, Inc*. (2018) 19 Cal.App.5th 1138, 1144 (citing *Harris, supra,* 52 Cal.3d at p. 1150), and to "create and preserve [a] nondiscriminatory environment in state business establishments," *White, supra,* 7 Cal.5th at p. 1025, by "'banishing' or 'eradicating' arbitrary, invidious discrimination by such establishments," *Munson v. Del Taco* (2009) 46 Cal.4th 661, 666 (quoting *Angelucci, supra,* 41 Cal.4th at p. 167).

Public accommodation laws protect "the State's citizenry from a number of serious social and personal harms." (*Roberts v. U.S. Jaycees* (1984) 468 U.S. 609, 625 (*Roberts*).) The U.S. Supreme Court has recognized repeatedly that the government has a compelling interest in "eliminating discrimination and assuring . . . citizens equal access to publicly available goods and services." (*Id.* at pp. 623-624; see also *id.* at p. 628 [discrimination "cause[s] unique evils that government has a compelling interest to prevent"]; *N.Y. State Club Ass'n, Inc. v. City of N.Y.* (1988) 487 U.S. 1, 14 n.5 (*N.Y. State Club*) [recognizing the "State's 'compelling interest' in combating invidious discrimination"]; *Duarte, supra,* 481 U.S. at p. 549; *Bob Jones Univ. v. U.S.* (1983) 461 U.S. 574, 604; see also *Lumpkin v. Brown* (9th Cir. 1997) 109 F.3d 1498, 1501 [compelling interest in eradicating discrimination based on sexual orientation].)

California's interest in preventing discrimination in access to public accommodations is unrelated to the suppression of expression. As the U.S. Supreme Court has recognized, antidiscrimination laws "do[] not aim at the suppression of speech." (*Roberts, supra,* 468 U.S. at p. 623.) The mere fact that such laws apply to "expressive" as well as non-expressive commodities does not evince an intent to suppress dissenting views. (See *O'Brien*, *supra*, 391 U.S. at p. 382.)

In *303 Creative*, the Tenth Circuit and the U.S. Supreme Court concluded that when Colorado's public accommodations law was applied to compel pure speech on a particular viewpoint that the business objected to expressing for anyone, the application functioned as a "content-based restriction" and risked "excising certain ideas of viewpoints from the public dialogue." (*303 Creative*, 6 F.4th 1160, 1178 (10th Cir. 2021); 600 U.S. at p. 588.) In that peculiar application, the court noted, "[e]liminating such ideas is [the Colorado civil rights law's] very purpose." (6 F.4th at p.1178.) The Supreme Court cited this language in support of its conclusion that as applied to compel speech on a topic a business owner had chosen not to speak upon (marriages of same-sex couples), the law had an impermissible purpose. (600 U.S. at p. 588.) But nothing in either decision suggests a broader conclusion that the purpose of public accommodations laws in general is to suppress ideas.

The Unruh Act is not being applied here to compel speech at all, much less speech that the business objects to expressing for anyone, so applying the Unruh Act here has nothing to do with eliminating "dissenting ideas," nor is it content-based. If the Tenth Circuit or Supreme Court had meant that *all* public accommodations laws are improperly motivated, the Unruh Act would be unconstitutional in all circumstances. Nothing in the decisions even remotely suggests such a radical conclusion, which would have required overruling the Court's many decisions upholding nondiscrimination laws against First Amendment objections.[4] It was only because the Supreme Court found that Colorado sought to apply its law to require a business owner to produce pure speech, bearing a specific message that she objected to producing for anyone, that the Court held the state's interest in applying the public accommodations law in that case was related to the suppression of expression. (See Cole, *"We Do No Such Thing," supra,* at p. 17.) Where, as here, the law is applied to prohibit identity-based discrimination in the sale of a product that the business would willingly sell to others, the government's interest is in prohibiting discrimination in sales by public businesses, an interest unrelated to the suppression of expression.

[4] (See, e.g., *Runyon v. McCrary* (1976) 427 U.S. 160, 176; *Hishon v. King & Spalding* (1984) 467 U.S. 69, 78-79; *Roberts, supra,* 468 U.S. at pp. 617-629; *N.Y. State Club, supra,* 487 U.S. at pp. 11-12.)

The *303 Creative* Court confirmed that most commercial transactions one might seek or encounter in daily life remain fully covered by applicable anti-discrimination law. (See, e.g., *303 Creative, supra,* 600 U.S. at pp. 591-592 ["Colorado and other States are generally free to apply their public accommodations laws, including their provisions protecting gay persons, to a vast array of businesses."].) At a minimum, goods and services that do not involve creating original pure speech must be provided to all comers on equal terms. (See *id.* at p. 598 n.5 ["[O]ur case is nothing like a typical application of a public accommodations law requiring an ordinary, nonexpressive business to serve all customers or consider all applicants."].) Respondents' argument would void these propositions by imputing to *every* enforcement of an anti-discrimination law a constitutionally impermissible motive of eliminating dissenting ideas.

CONCLUSION

If the trial court's conclusion and rationale were adopted, it would be difficult to identify any wedding vendors whose products or services would not implicate the First Amendment. That raises the prospect that all manner of vendors—insurance companies, shuttle bus operators, event halls, party furniture rental stores, alcohol distributors, and caterers, among many others—could potentially refuse to serve gay and lesbian Californians simply because they disapprove of weddings of same-sex couples. And the harm would not stop there—

vendors could refuse to serve interracial or interfaith couples and others under the same rationale, and it would not be limited to wedding services. (Cf. *303 Creative*, *supra*, 600 U.S. at pp. 638-639 [dis. opn. of Sotomayor, J.].) All of this would be profoundly at odds with the Unruh Act's core purpose of ensuring that all Californians enjoy "full and equal" access to business establishments. (Civ. Code, § 51.)

Dated: April 11, 2024

Respectfully Submitted,

/s/ Michelle Fraling

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CERTIFICATE OF COMPLIANCE

I certify that the text in the attached Brief contains 6678 words—as calculated by Microsoft Word, including footnotes but not the caption, the table of contents, the table of authorities, signature blocks, or this certification—and that this document was prepared in a 14-point Times New Roman font. See Rule of Court 8.204(c)(1), (3).

Dated: April 11, 2024

By: */s/ Amanda Goad*
Amanda Goad

PROOF OF SERVICE

CIVIL RIGHTS DEPARTMENT v. CATHY'S CREATIONS, INC.
Case No. F085800

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Angelica Lujan, am over the age of 18, employed in Los Angeles, California, and not a party to this action. My business address is 1313 W. 8TH Street, Los Angeles, California, 90017. I served **Brief of Amici Curiae In Support of Plaintiff–Appellant Seeking Reversal** by electronic service via TrueFiling, which automatically notices all counsel involved in this matter.

I further declare that I served the same document, **Brief of Amici Curiae In Support of Plaintiff–Appellant Seeking Reversal**, by mail as a courtesy copy to Hon. Judge J. Eric Bradshaw of Kern County Superior Court of California (Division J) at the following address: 1215 Truxtun Ave, Bakersfield, CA 93301.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on April 11, 2024.

/s/ Angelica Lujan
Angelica Lujan