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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 CATHY MILLER, an individual, Defendants. EILEEN RODRIGUEZ-DEL RIO and MIREYA RODRIGUEZ-DEL RIO, Real Parties in Interest.	CASE NO.: BCV-17-102855 **IMAGED FILE** **DEFENDANTS CATHARINE MILLER AND TASTRIES'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION** Date: February 2, 2018 Time: 1:30 p.m. Dept: 11 Judge: Hon. David R. Lampe Action Filed: December 13, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Cases:

TABLE OF AUTHORITIES (Cont.)

California Cases:

United States Supreme Court Cases:

TABLE OF AUTHORITIES (Cont.)

United States Supreme Court Cases:

TABLE OF AUTHORITIES (Cont.)

United States Supreme Court Cases:

Other Federal Cases:

Out-of-State Cases:

California Statutes & Rules:

TABLE OF AUTHORITIES (Cont.)

Other Authorities:

I. INTRODUCTION.

As this Court noted in denying the Department of Fair Employment and Housing's (DFEH) ex parte application for a temporary restraining order forcing Cathy Miller and Tastries[1] to design and create wedding cakes for same-sex marriage celebrations, important constitutional and dignitary interests are at issue here on both sides of the case. To receive a preliminary injunction, the DFEH must establish both a probability of prevailing on the merits and irreparable harm absent such an injunction. The DFEH ignored the second prong, relying instead on a rebuttable presumption that the second prong favors the DFEH. Cathy can rebut it, and the Court should not entertain new arguments on reply. With respect to the first prong, Tastries' policy of accommodating Cathy Miller's religion simply does not violate the Unruh Act. Even if it did, however, Cathy has religious and free speech objections to participating in same-sex wedding ceremonies by designing, creating, and setting up the temporary cake sculpture which is the focal point of many weddings. As a result, the DFEH has the burden of satisfying strict scrutiny and showing that applying the Unruh Act to her in this situation is the least restrictive means of achieving a compelling governmental interest. It cannot do this. Finally, there is a compelling reason to stay this case until July 2018. The United States Supreme Court is adjudicating a nearly identical case right now, and will issue its opinion by the end of June 2018. Importantly, other courts have stayed their "wedding professional" cases in the interim. This Court should do likewise.

II. FACTUAL BACKGROUND & HISTORY.

Cathy incorporates by reference both her and Reina Benitez's declarations filed in support of this opposition. Cathy's declaration lays out her sincerely held religious beliefs, the design process for creating a Tastries wedding cake, the participation of Tastries' employees in their clients' weddings, and Tastries' policy of accommodating both Cathy's religious liberty interests and Tastries' customers' interests in obtaining wedding cakes by referring some customers to a rival bakery, Gimme Some Sugar. Cathy's and Reina's declarations also lay out the facts showing that Mireya and Eileen Rodriguez-Del Rio may not have been shopping for a wedding cake, but instead shopping for a lawsuit. This includes that they had earlier approached and recorded other wedding vendors when asking if they objected to same-sex marriage, stated several misrepresentations regarding their upcoming wedding reception during their Tastries' cake tasting, and immediately after their cake tasting began publicizing their experience online.

III. LEGAL STANDARD.

"The general purpose of a preliminary injunction is to preserve the status quo," not change the status quo. (*SB Liberty, LLC v. Isla Verde Association, Inc.* (2013) 217 Cal.App.4th 272, 280.)

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[1] For simplicity, "Cathy" will refer to both Catharine Miller and Tastries throughout this brief as the context permits. Cathy has opted to use 37 lines per page. (See Cal. Rules of Court, rule 2.108(1) ["The lines on each page must be one and one-half spaced or double-spaced"]; *Tiffany v. State Farm Mut. Auto. Ins. Co.* (1993) 14 Cal.App.4th 1763, 1767 [California Rules of Court permit "37-line pleading paper with one and one-half inch spacing"].)

"A preliminary mandatory injunction is rarely granted, and is subject to stricter review[.]" (*Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 625.) "The law is well settled that the decision to grant a preliminary injunction rests in the sound discretion of the trial court." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.)

A request for a preliminary injunction by the government to enjoin the alleged violation of a statute involves a multi-step analysis. First, the government must establish that it is "reasonably probable it will prevail on the merits[.]" (*Id*. at 72.) If the government can do so, the burden shifts to the defendant to "show[] that it would suffer grave or irreparable harm from the issuance of the preliminary injunction[.]" (*Id*.)

If the government cannot meet its burden, or if the defendant does meet its burden, then the court must engage in the traditional preliminary injunction analysis. (*Id*.) This includes a balancing of two factors: (1) the likelihood the government will prevail on the merits, and (2) the relative balance of harms likely to result from granting or denying preliminary injunctive relief. (*Id*.) If the government meets its burden, and the defendant does not, then the second factor is presumed to favor the government, and the court will only consider the probability of prevailing at trial factor. (*Id*.)

Here, the traditional preliminary injunction analysis applies. While the DFEH argues that it satisfies its burden on the first prong, that ignores how "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (*Elrod v. Burns* (1976) 427 U.S. 347, 373.) The DFEH devotes five pages of its brief to rebutting Cathy's anticipated free speech and free exercise of religion arguments. Nevertheless, as shown below, the preliminary injunction would violate her First Amendment rights. Thus, the Court cannot presume that the balance of harms factor favors the DFEH, and must consider this prong in deciding whether to grant or deny preliminary injunctive relief.

IV. LEGAL ARGUMENT.

A. <u>The DFEH is Likely to Fail on the Merits.</u>

1. Cathy did not discriminate based on sexual orientation.

There is no California case, or other case interpreting the Unruh Civil Rights Act, which has held that a business declining to facilitate and promote[2] a same-sex wedding constitutes discrimination based on sexual orientation. To address this deficiency, the DFEH cites cases interpreting other non-discrimination laws or policies from other states, and cases interpreting the equal protection clauses of the California and federal constitutions. All of these cases are inapposite; the Unruh Act does not prohibit discrimination based on a "person's conduct, as opposed to his status[.]" (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 96.)

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[2] As argued in section IV.3.c, *infra*, Cathy declined to make the wedding cake and participate in Mireya and Eileen's wedding due to her concern with *promoting* any form of marriage besides marriage between one man and one woman.

The DFEH first cites *Christian Legal Society. Chapter of the University of California, Hastings College of the Law v. Martinez* (2010) 561 U.S. 661. In that case, the United States Supreme Court essentially stated that the definition of "homosexuality" is not limited to "a characteristic of the individual, like biological sex, gender identity, or age" when interpreting a law school's non-discrimination policy (*In re Marriage Cases* (2008) 43 Cal.4th 757, 840, n. 59), but also includes the class of persons who engage in homosexual acts and believe those homosexual acts to be morally licit. (*Christian Legal Soc., supra*, 561 U.S. at 689.) It has no applicability here because it does not stand for the proposition that refusing to promote a same-sex wedding is discrimination based on sexual orientation, and specifically homosexuality. The other cases which the DFEH cites are expressly limited to interpreting Colorado and Oregon non-discrimination statutes – they have no applicability here. (*US Ecology, Inc. v. State* (2005) 129 Cal.App.4th 887, 905 ["[O]ut-of-state cases . . . are not binding on this court."].)

The DFEH next cites cases interpreting the right to marry under the California and federal constitutions. (See generally *Obergefell v. Hodges* (2015) 135 S.Ct. 2584 [federal constitution]; *Latta v. Otter* (9th Cir. 2014) 771 F.3d 456 [federal constitution]; *Strauss v. Horton* (2009) 46 Cal.4th 364 [California constitution]; *In re Marriage Cases* (2008) 43 Cal.4th 757, 783 [California constitution].) These cases also do not address the Unruh Act at all, and are therefore inapposite in determining what constitutes sexual orientation discrimination under the Unruh Act. They do, however, speak to the rights of persons to object to same-sex marriage. First, *Strauss* specifically states that under the California constitution, although same-sex couples are entitled to all of the "fundamental substantive components encompassed within the" right to marry, they do not have an "inalienable" right to have their union termed a "marriage." (*Strauss*, *supra*, 46 Cal.4th at 466.) Even if California equal protection jurisprudence were applicable here, which it is not, vendors would have a right to object to supporting a same-sex "marriage." (Cf. *id*.)

Second, *Obergefell* in interpreting the rights of all people under the federal constitution, states that "[t]o [some], it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held – and continues to be held – in good faith by reasonable and sincere people here and throughout the world." (*Obergefell*, *supra*, 135 S.Ct. at 2594.) And "many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." (*Id*. at 2602.) "[T]hose who adhere to religious doctrines[] may . . . advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." (*Id*. at 2607 [emphasis added].)

The DFEH apparently argues that, by analogy, *Obergefell* and the other constitutional cases stand for the proposition that refusing to facilitate and promote a same-sex wedding is the same as discriminating against homosexual persons for purposes of the Unruh Act. The DFEH also

apparently argues that the language about how decent and honorable people – including homosexual persons[3] – can disagree about the morality of same-sex marriage is mere dicta. **Justice Kennedy, who authored *Obergefell*, completely disagrees.** "Well, but this whole concept of identity is a slightly – suppose he says: Look, I have nothing against – against gay people. He says but I just don't think they should have a marriage because that's contrary to my beliefs. . . . It's not their identity; it's what they're doing. . . [Y]our identity thing is just too facile." (Ex. 1, Oral Argument in *Masterpiece Cakeshop*, 86:20-87:6.)[4] This argument is also at odds with other constitutional cases. (See *Boy Scouts of America v. Dale* (2000) 530 U.S. 640, 653 [the event organizers did not "exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner"]; *Bray v. Alexandria Women's Health Clinic* (1993) 506 U.S. 263, 269-70 [opposition to abortion is not akin to discrimination against women].)

Cathy's decision not to facilitate and promote same-sex weddings is not discrimination on the basis of sexual orientation, and therefore not a violation of the Unruh Civil Rights Act.

2. Cathy's referral of some customers to a rival does not violate the Unruh Act.

Even if Cathy did discriminate on the basis of sexual orientation for purposes of the Unruh Act, that discrimination did not violate the act because it does not take away "the right of a business establishment to adopt reasonable restrictions on its customers when those restrictions are rationally related to the business being conducted or the facilities and services being provided." (*Wynn v. Monterey Club* (1980) 111 Cal.App.3d 789, 796.) "Most often, the nature of the business enterprise or the facilities provided has been asserted as a basis for upholding a discriminatory practice only when there is a strong public policy in favor of such treatment." (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 31.) "Thus, an establishment serving liquor may refuse access or service to an intoxicated person or one who had in the past created a disturbance; and a gambling establishment may legally contract with a husband to bar his wife, a compulsive gambler, from further play." (*Business or Occupational Discrimination* (2017) 8 Witkin, Summary 11th Const Law § 1003 [collecting cases].)

Here, Tastries created a policy of referring wedding cake orders for any marriage except between one man and one woman to Gimme Some Sugar. This policy was rationally related to Tastries' business because, as a bakery with a third of its business relating to the wedding industry, Tastries necessarily comes into close contact with religion. (See *Obergefell*, *supra*, 135 S.Ct. at 2594 ["Marriage is sacred to those who live by their religions"]; *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 851 [marriage is one of the choices "central to personal

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3 (See Ex. 7, Gates, *LGB Families and Relationships: Analyses of the 2013 National Health Interview Survey* (Oct. 2014) The Williams Institute, at p. 6, [18% of adults who identify as gay or lesbian and are raising children have "a different-sex married spouse"]; Ex. 8, Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample* (2010) 7 Sexuality Res. & Soc. Pol'y 176, 194 [22.1% of self-identified LGB individuals did not agree with redefining marriage].)

4 Exhibits 1-9 are attached to the Declaration of Charles LiMandri.

dignity and autonomy" and encompassed within the individual's "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"]; *Griswold v. Connecticut* (1965) 381 U.S. 479, 485-86 [marriage is "sacred" and "noble" and "promotes a way of life].)

The policy ensured that its employees' free exercise of religion interests, and same-sex couples' interests in obtaining a wedding cake, were both met. The policy was not based on animus towards people of sexual orientation, but rather based on accommodating its employees' interests in the free exercise of religion. (See Miller Decl., ¶¶11-13; *Burwell v. Hobby Lobby Stores, Inc.* (2014) 134 S.Ct. 2751, 2770 [The scope of protected religious exercise extends beyond "belief and profession" and extends to "the performance of (or abstention from) physical acts that are engaged in for religious reasons" and even to "[b]usiness practices" that are "compelled or limited by the tenets of a religious doctrine"].) Tastries' policy is also supported by public policy; as noted above, the United States Supreme Court announced a public policy of accommodating those who object to same-sex marriage on religious grounds. (*Obergefell*, *supra*, 135 S.Ct. at 2594, 2602, 2607; cf. Ex. 1, Oral Argument in *Masterpiece Cakeshop*, 63:14-64:14 [Justice Breyer inquiring why, since a baker could enter into an agreement with another baker to refer "a lot of people I don't want to serve," the baker could not enter into such an agreement to refer same-sex wedding cake orders].) The Executive Branch of the federal government has followed suit. (Ex. 9, Religious Freedom Proclamation ["No American – whether a nun, nurse, baker, or business owner – should be forced to choose between the tenets of faith or adherence to the law."].) As a result, Tastries' policy, even if sexual orientation discrimination, is not a violation of the Unruh Act.

3. The DFEH must, and cannot, satisfy strict scrutiny.

Even if Cathy's actions violated the Unruh Act, it cannot be applied against Cathy because the DFEH would have to satisfy strict scrutiny, and it cannot meet that burden.

a. The Free Exercise Clause of the California Constitution.

The Free Exercise clause of the Federal Constitution "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." (*Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 879 [quotation marks omitted].) But, "California courts have typically construed the [Free Exercise clause of the California Constitution] to afford the same protection for religious exercise as the federal Constitution before [the United States Supreme Court decision] *Employment Division v. Smith*." (*Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1177; cf. *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 586 [Brown, J., dissenting] ["Other states with very similar constitutional liberty of conscience clauses have found that infringement requires strict scrutiny."].) For this reason, the California Supreme Court has continued to apply strict scrutiny when applying the Free Exercise clause of the California Constitution. (See *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court* (2008) 44 Cal.4th 1145, 1158; *Catholic*

Charities, supra, 32 Cal.4th at 562.) In the absence of additional guidance by the California Supreme Court, this Court is obliged to apply strict scrutiny to Cathy's claim that applying the Unruh Act to her in this situation would violate her religious freedom. (See *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417, 438.)

b. Free Exercise Clause of the Federal Constitution.

Under the Free Exercise clause of the federal constitution, "if the object of a [governmental action] is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless" it satisfies strict scrutiny. (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 533 [citation omitted].) "It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating" First Amendment claims. (*Washington v. Trump* (9th Cir. 2017) 847 F.3d 1151, 1167; see also *Lukumi*, *supra*, 508 U.S. at 534 ["Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."]; *Hawai'i v. Trump* (D. Hawaii 2017) 241 F.Supp.3d 1119, 1135-1136 ["[C]ircumstantial evidence of intent . . . may be considered in evaluating whether a governmental action was motivated by a discriminatory purpose"]; see also *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly* (3d Cir. 2002) 309 F.3d 144, 167-168.) "[T]he same government action may be constitutional if taken in the first instance and unconstitutional if it has a [discriminatory] heritage. This presents no incongruity, however, because purpose matters. Just as [a] dog could tell the difference between being kicked and being stumbled over, it will matter to objective observers whether [conduct] follows on the heels of [conduct] motivated by [discrimination], or whether it lacks a history demonstrating that purpose." (*McCreary County, Ky. v. American Civil Liberties Union of Ky.* (2005) 545 U.S. 844, 866, n. 14.)

"[T]hose who adhere to religious doctrines[] may . . . advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. ***The First Amendment ensures that religious . . . persons are given proper protection*** as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." (*Obergefell*, *supra*, 135 S.Ct. at 2607 [emphasis added].) The Supreme Court "went out of its way" to include this language in *Obergefell*, and it is substantive law. (See Ex. 1, Oral Argument in *Masterpiece Cakeshop*, 73:20-74:3 [Roberts, C.J.].) During the oral argument in *Masterpiece Cakeshop*, Justice Kennedy, who authored *Obergefell*, turned to that language specifically. First Justices Kennedy and Gorsuch indicated that hostility to the baker's religious beliefs could make the Colorado Commission on Civil Right's prosecution of the baker unconstitutional under *Lukumi*, a point which Colorado conceded. (Ex. 1, 52:18-53:10 [Kennedy, J.]; 55:16-56:20 [Gorsuch, J.].) Immediately following this, Justice Breyer inquired why no potential accommodation was ever entertained – as one was manifestly possible. (Ex. 1, 57:2-19.) Justice Kennedy then stated that it appeared that the

Commission had violated *Obergefell* by refusing to entertain an accommodation, such as referral to another bakery – and that the failure to even entertain an accommodation could be viewed as discriminatory intent under *Lukumi*. (Ex. 1, 62:12-22 ["***the state in its position here has been neither tolerant nor respectful of [the baker's] religious beliefs . . . because accommodation is[] quite possible . . . there were other . . . bakery shops that were available***"] [emphasis added].)

Here, as noted above, there is evidence showing that the Rodriguez-Del Rios were not shopping for a wedding cake, but shopping for a lawsuit. It appears that the DFEH was as well. On November 9, 2017, the DFEH agreed to extend the time for Cathy to respond to the DFEH's written discovery to December 15, 2017. Something happened between those two dates, and the DFEH decided to appear ex parte on December 14, 2017, seeking a temporary restraining order and order to show cause re preliminary injunction. (LiMandri Decl., ¶11.) The only occurrence of note was the United States Supreme Court oral argument on December 5, 2017, in *Masterpiece Cakeshop*. During that oral argument, Justice Kennedy several times indicated that he would probably lead a five-justice majority in reversing the lower court decision, primarily on the basis that the lower court had too narrowly interpreted the baker's free speech and freedom of religion rights.

Less than ten days later, the DFEH rushed into court, filing its "petition" under Government Code section 12974, which permits the filing of a civil action prior to the termination of the DFEH's investigation in egregious circumstances where "prompt judicial action is necessary[.]" (Gov. Code § 12974.) Per its text, and in contrast to Government Code section 12965 which permits the filing of a civil action after the DFEH's investigation is complete, section 12974 requires that there be a need for "prompt judicial action." (*Id.*) The DFEH acknowledged this requirement, but relied entirely on a hypothetical harm to the public should the Court agree with its strained argument on the law and facts.

This timing clearly indicates that the DFEH went out of its way and used irregular procedures in a rush to punish Cathy. And it did so when there was no need to do so. By the end of June 2018, the Supreme Court will issue an opinion definitively clarifying the lay of the law with respect to wedding professionals who have religious or other objections to participating in same-sex weddings. There is no reason why adjudication of the issues in this case cannot wait until then – except of course, to punish Cathy. This anti-religious animus alone makes the DFEH's prosecution of Cathy unconstitutional. In this respect, the recent "Travel Ban" cases prove illustrative: "defendants argue that the evidence on which the Commonwealth relies proves too much, because it would render every policy that the president makes related to Muslim-majority countries open to challenge. This fear is exaggerated. The Court's conclusion rests on the highly particular 'sequence of events' leading to this specific EO and the dearth of evidence indicating a national security purpose." (*Aziz v. Trump* (E.D. Va. 2017) 234 F.Supp.3d 724, 737.)

c. Free Speech Under the Federal Constitution.

The Free Speech clause of the federal constitution protects individuals' right to control the content of their artistic expression. (See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*

of Boston (1995) 515 U.S. 557, 576.) "[T]he Constitution looks beyond written or spoken words as mediums of expression," (*Id.* at 569), and protects artistic expression as pure speech. (See, e.g., *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 246; *National Endowment for the Arts v. Finley* (1998) 524 U.S. 569, 580.)[5]

Cathy's custom wedding cakes are her artistic expression because she intends to, and does in fact, communicate through them. Those intricately designed, ornately decorated, elaborately constructed, and typically multi-tiered wedding cakes serve as the centerpiece of wedding celebrations. Their iconic presence at weddings – functioning as temporary monuments to a most memorable occasion – speaks to all who see them. In one sense, those cakes announce a basic message: that this event is a wedding and the couple's union is a marriage. But in another sense, Cathy's wedding cakes – endowed with all their grandeur – declare an opinion too: that the couple's marriage should be celebrated. For all these reasons, couples commission Cathy to design a wedding cake for them. Although they and their guests eventually eat it, that happens well after family and friends admire it, the couple takes photographs with it, and all witness the cake-cutting celebration. No one pays significant sums for an ornate wedding cake just for its taste. (Cf. Ex. 1, 40:18-20 [Gorsuch, J.: "In fact, I have yet to have a – a wedding cake that I would say tastes great."].)[6] Nor does it matter that Cathy writes, paints, and sculpts using mostly edible materials like icing and fondant rather than ink and clay. "[T]he basic principles of freedom of speech . . . do not vary when a new and different medium for communication appears." (*Brown v. Entertainment Merchants Ass'n* (2011) 564 U.S. 786, 790 [quotation marks omitted].) This is why Cathy declined the Rodriguez-Del Rios' request for a wedding cake before learning all the details of the wedding cake they wanted. They were filling out a custom cake form when they told Cathy that they wanted her to make a cake for their wedding. When she heard this, Cathy immediately knew that any wedding cake she would design for them would express messages about their union that she could not in good conscience communicate. Expressing such messages would contradict the core of her beliefs about marriage.

Moreover, not only are Cathy's wedding cakes expressive, so too are the weddings her cakes celebrate. As the Ninth Circuit has explained: "The core of a wedding ceremony's 'particularized

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5 As the Court rightly surmised at the ex parte hearing, this case is very similar to *Masterpiece Cakeshop*. As a result, the lengthy briefing in that case is the best resource for understanding the complex free speech issues at play here. Cathy invites the Court to review that briefing for a comprehensive treatment of the legal authorities. (See Ex. 1 [Transcript of Supreme Court oral argument]; Ex. 2 [Masterpiece Cakeshop's opening brief]; Ex. 3 [Masterpiece Cakeshop's reply brief]; Ex. 4 [The Becket Fund For Religious Liberty's Amicus Curiae Brief]; Ex. 5 [The Freedom of Conscience Defense Fund Amicus Brief].)

6 The First Amendment shields not only Cathy's custom cakes, but also the process by which she creates them. (See *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue* (1983) 460 U.S. 575, 582 [nullifying a tax on paper and ink used to produce some publications in part because the tax "burden[ed] rights protected by the First Amendment"]; *Anderson v. City of Hermosa Beach* (9th Cir. 2010) 621 F.3d 1051, 1061 ["tattooing is purely expressive activity"].)

message' is easy to discern, even if the message varies from one wedding to another. Wedding ceremonies convey important messages about the couple, their beliefs, and their relationship to each other and to their community. . . . The core of the message in a wedding is a celebration of marriage and the uniting of two people in a committed long-term relationship." (*Kaahumanu v. Hawaii* (9th Cir. 2012) 682 F.3d 789, 799.) Cathy also declined the Rodriguez-Del Rios' request for a wedding cake because either she or her husband would have to attend and participate in their wedding by delivering and setting up the wedding cake – the temporary sculpture designed to celebrate the union – and guests can be expected to know when a wedding cake is provided by Tastries. Indeed, Cathy, like many adherents of the Abrahamic faiths, believes that marriage has a "spiritual significance," (*Turner v. Safley* (1987) 482 U.S. 78, 96), to the point of being "sacred," (*Obergefell, supra*, 135 S. Ct. at 2594.) What she expresses through her custom wedding cakes carries great religious meaning for her. Consequently, she considers sacrilegious the ideas that she would express if coerced into creating custom wedding cakes that celebrate same-sex marriages.

Ignoring *Hurley*, the DFEH relies instead on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (2006) 547 U.S. 47 ("*FAIR*"). But the DFEH misses the most significant distinction between *FAIR* and this case: the statute there required the law schools to engage in non-expressive conduct – providing access to rooms – whereas the DFEH seeks to force Cathy to create and to promote expression and to participate in an expressive event. Weddings and weddings cakes convey messages; empty rooms do not. (See *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, 457, n. 10 [distinguishing the "[f]acilitation of [someone else's] speech" in *Rumsfeld* from situations where government requires "parties to reproduce another's speech against their will" or "co-opt the parties' own conduits for speech."].)

The DFEH also focuses on what the "observers" at the wedding would reasonably interpret from the presence of one of Cathy's wedding cakes. The DFEH states that a reasonable observer would not understand Cathy's sale of a wedding cake for a same-sex marriage to communicate an endorsement of the marriage, but rather simple compliance with civil rights laws applicable to all businesses, and cites *Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329. *Beeman*, however, exclusively and abstractly addresses the California constitution, not the federal constitution, which "is an independent document [whose] constitutional protections are separate from and not dependent upon the federal Constitution." (*Id*. at 341.) Third party perceptions are not necessary to establish a compelled speech claim under the federal constitution. The government could not force someone to write a book anonymously, for example, even though no one would attribute that book to the writer. The case law interpreting the federal constitution bolsters this point. Courts have repeatedly declined to rely on third party perceptions in the compelled speech context under the federal constitution. (See *Pacific Gas and Elec. Co. v. Public Utilities Com'n of California* (1986) 475 U.S. 1, 6-7, 15, n.11; *Wooley v. Maynard* (1977) 430 U.S. 705, 722; *Frudden v. Pilling* (9th Cir. 2014) 742 F.3d 1199, 1205.) Indeed, since all compelled speech is mandated by law, the DFEH's

reasoning would negate compelled-speech protection entirely. It would transform legal coercion from a predicate of a compelled-speech violation to its antidote. If "the government made me do it" eliminates compelled-speech concerns, the doctrine itself would cease to exist.

As with violating individuals' freedom of religion rights, ordering citizens to engage in unwanted artistic expression is such an affront to First Amendment freedoms that no less than strict scrutiny will do. (See *Pacific Gas and Elec. Co., supra*, 475 U.S. 1, 19-20; *Riley v. National Federation of the Blind of North Carolina, Inc.* (1988) 487 U.S. 781, 795.)

d. The DFEH Cannot Satisfy Strict Scrutiny.

Under strict scrutiny, "a law c[an] not be applied in a manner that substantially burdens [freedom of speech rights or] a religious belief or practice unless the state shows that the law represents the least restrictive means of achieving a compelling interest." (*North Coast, supra*, 44 Cal.4th at 1158.) The burden of showing this rests with the government and the government does not get "the benefit of the doubt." (*U.S. v. Playboy Entertainment Group, Inc.* (2000) 529 U.S. 803, 818.)

Without particularized analysis, the DFEH states that non-discrimination statutes serve the compelling state interest of "ensuring equal access to public accommodations," and that the Unruh Act is generally the least restrictive means of achieving that interest. The DFEH also states that Cathy's religious liberties are not being substantially burdened because she could simply stop creating and selling wedding cakes altogether. This latter argument is absurd in light of *Hobby Lobby, supra*, 134 S.Ct. 2751. In *Hobby Lobby*, the Supreme Court stated that "a law that operates so as to make the practice of religious beliefs more expensive in the context of business activities imposes a burden on the exercise of religion" for purposes of strict scrutiny analysis. (*Id*. at 2770 [quotation marks and ellipses omitted].) Here, if Cathy stopped selling wedding cakes, she would be forced to give up 25-30% of Tastries' gross revenue, a very expensive decision. (Miller Decl., ¶20.)[7]

Moreover, the DFEH's characterization of California's interest is far too broad. Strict scrutiny "look[s] beyond broadly formulated interests justifying the general applicability of government mandates" to see whether that standard "is satisfied through application of the challenged law" to "the particular" party. (*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (2006) 546 U.S. 418, 430-31; see also *Attorney Gen. v. Desilets* (Mass. 1994) 636 N.E.2d 233, 238 [Interpreting federal constitution: "The general objective of eliminating discrimination of all kinds . . . cannot alone provide a compelling State interest"].) Therefore, the Court must focus not on the Unruh Act's general purpose of preventing "all forms of stereotypical discrimination" (*Koire, supra*, 40 Cal.3d at 36), but on its "apparent object" when "applied to expressive activity in the way it was done here." (*Hurley, supra*, 515 U.S. at 578.) Thus, the DFEH must show that it has a compelling interest in forcing cake artists who otherwise serve homosexual customers to violate their consciences by

[7] To the extent the DFEH's older cases disagree with *Hobby Lobby*, they are necessarily overruled.

creating custom wedding cakes that celebrate same-sex marriages. Unlike most applications of the Unruh Act, this one would force Cathy to create artistic expression and thus "modify the content" of her speech. (*Id*.) But as *Hurley* explained, permitting the DFEH to compel speech in that manner would "allow exactly what the general rule of speaker's autonomy forbids." (*Id*.)

In support of its argument, the DFEH primarily relies on a mere citation to *North Coast*, *supra*, 44 Cal.4th 1145. In *North Coast*, the California Supreme Court engaged in a strict scrutiny analysis and stated that a medical practice could not appeal to their religious objections as a basis for discriminating against a lesbian couple because "[t]he Act furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal." (*North Coast*, *supra*, 44 Cal.4th at 1158.) That rationale, however, was expressly limited to the interest in ensuring full and equal access to ***medical treatment***. (*Id*. at 1162 [Baxter J., concurring] ["the state [does not have] a compelling interest in eradicating every difference in treatment based on sexual orientation" only "in ensuring full and equal access to medical treatment"].) *North Coast* stated that "the state's interest in full and equal medical treatment would [not] compel a physician in solo practice to provide treatment to which he or she has sincere religious objections," "where the patient could be referred with relative ease and convenience to another practice[.]" (*Id*. at 162-63 [Baxter, J., concurring].) Here, Cathy is not a medical provider, she is the 100% shareholder of Tastries, and she is involved in the creation and design of every wedding cake it bakes. (Miller Decl., ¶¶3, 8.) *North Coast* is no basis for finding that strict scrutiny is satisfied here.

Although not referenced in its strict scrutiny analysis, elsewhere in its brief the DFEH raises "dignitary interests" generally and numerous cases dealing with racial discrimination where strict scrutiny was satisfied.[8] The racial discrimination cases are completely inapposite. A religious belief that marriage is solely the union of one man and one woman is not akin to discrimination against persons because of the color of their skin. The United States Supreme Court has stated that its "decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns" distinct from all other bias. (*Pena-Rodriguez v. Colorado* (2017) 137 S.Ct. 855, 868.) The cases in which strict scrutiny was satisfied despite religious objections to interracial marriage, or the mixing of the races in general, stand for the proposition that racism is such an invidious evil with such strong historical roots, that the government has a compelling state interest in stamping it

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8 Here, again, the briefing in *Masterpiece Cakeshop* is perhaps the best resource for understanding why racial discrimination is a poor analogy to make to this case, and how the *balancing* of both Cathy's and the Rodriguez-Del Rios' dignitary interests requires the Court to not punish Cathy. (See Ex. 2, Masterpiece Opening Brief, pp. 52-61 [dignity analysis]; Ex. 5, FCDF Amicus Curie Brief filed on behalf of African-American and Civil Rights Leaders, pp. 6-40 [arguing historical and sociological distinction between opposition to interracial marriage and support for marriage as the union of one man and one woman].)

out wherever it appears: "the Government has a fundamental, overriding interest in eradicating racial discrimination . . . – discrimination that prevailed, with official approval, for the first 165 years of this Nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." (*Bob Jones University v. U.S.* (1983) 461 U.S. 574, 604.) These cases cannot translate to eradicating sexual orientation discrimination by punishing individuals who believe that marriage is the union of one man and one woman. Some who hold that belief may do so out of animus towards homosexual persons, but Cathy does not. Indeed, the existence of both Cathy and the hypothetical bigot shows that Cathy's beliefs about marriage have no direct relationship with sexual orientation discrimination. And, of course, those who have animus against homosexual persons and seek to not engage with them whatsoever, should not be protected. But that is not this case.

Looking beyond the non-analogy to racial discrimination, the dignity analysis cuts both ways. For the DFEH to brand as discriminatory Cathy's core religious beliefs, compel her to stop creating her wedding designs, and ostracize her as a member of the community, inflicts untold dignitary harm not only on her, but also on her fellow believers. (*Hobby Lobby*, *supra*, 134 S.Ct. at 2785 [Kennedy, J., concurring] [explaining that "free exercise is essential in preserving the[] . . . dignity" of religious adherents].) People of faith endure extreme emotional turmoil when their government orders them to do something that they sincerely believe will be displeasing to the sovereign God of the universe. Unlike the dignitary harm that the DFEH raises, which results from a private actor's decision not to create expression, the government itself is threatening to inflict the dignitary harm that Cathy must endure. (Cf. *Obergefell*, *supra*, 135 S.Ct. at 2596 [emphasizing that "the state itself" was interfering with the dignity of same-sex couples].) Hence, the dignitary interests of Cathy and all others who share similar religious beliefs about marriage weigh strongly against applying the Unruh Act under these circumstances.[9]

Moreover, in the free speech context, *Hurley* established that the state's interest in eliminating dignitary harms is not compelling where, as here, the cause of the harm is another person's decision not to engage in expression. The Court there recognized that "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are . . . hurtful." (*Hurley*, *supra*, 515 U.S. at 574.) An interest in preventing dignitary harms thus is not a compelling basis for infringing free speech. (Cf. *Texas v. Johnson* (1989) 491 U.S. 397, 409 ["It would be odd" to conclude that the hurtfulness of an expressive decision is the reason both "for according it constitutional protection" and for stripping it of that protection]; see also *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S. 46, 56 [some harms must be tolerated in order to provide

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9 And if not stopped here, the DFEH's request would ultimately lead to even worse infringement of speech. (See Ex. 1, 75:18-76:18 [ACLU counsel arguing Christian baker should be required to write "God Bless the union of Craig and Mullins" on a wedding cake].)

"adequate 'breathing space' to the freedoms protected by the First Amendment."]; *Snyder v. Phelps* (2011) 562 U.S. 443, 458 ["If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."].)

B. <u>The Balance of Hardships Favors Cathy.</u>

In adjudicating the balance of hardships prong, a Court should ask whether the plaintiff is likely to suffer greater injury from denial of the injunction than the defendant is likely to suffer if it is granted. (*IT Corp.*, *supra*, 35 Cal.3d at 69-70.) Here, the DFEH presents no evidence regarding the Rodriguez-Del Rios' – or the public's – injury, and instead relies on the argument that when the DFEH brings a claim, the Court should presume this prong in favor of the DFEH. This argument betrays that there is no actual harm to either the Rodriguez-Del Rios (whose wedding ceremony already occurred in October), or to the public. Even assuming the DFEH's interpretation of the law is correct, there is no evidence of an *actual* threat of sexual orientation discrimination. Nor is there any *potential* harm (including dignitary harms) because Justice Kennedy in *Obergefell* and Justice Baxter in *North Coast* have both approved Tastries' policy of accommodating Cathy's religious freedom rights by referring same-sex wedding customers to another bakery, as striking the appropriate balance between the rights of religious individuals and the rights of same-sex couples.

Moreover, there is an exception to this presumption. Where "the defendant shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties." (*IT Corp.*, *supra*, 35 Cal.3d at 72.) "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (*Elrod*, *supra*, 427 U.S. at 373; see also *Smith v. Novato Unified School Dist.* (2007) 150 Cal.App.4th 1439, 1465 [same]; *Ketchens v. Reiner* (1987) 194 Cal.App.3d 470, 480 [same].) In light of this black letter law, the DFEH spends five pages of its brief arguing why Tastries' free speech rights are not threatened, and another two pages arguing why Tastries' freedom of religion rights are not threatened. With respect to freedom of speech, the parties disagree over whether Tastries' employees' wedding cakes are expression covered by the free speech clause, but there can be no dispute that weddings themselves are expression, and that Tastries employees have to participate in those weddings by delivering and setting up the cake. Thus, Tastries' free speech rights are necessarily at issue in this case.

Similarly, with respect to the freedom of religion, there can be no reasonable dispute that Tastries' employees' religious freedom rights are at issue. The cases the DFEH cite stand for the proposition that although Tastries' religious rights will be burdened, that is the necessary cost of citizenship and entering the marketplace. (*Elane Photography, LLC v. Willock* (N.M. 2013) 309 P.3d 53, 80 [Bosson, J., concurring] ["it is the price of citizenship"].) Thus, there can be no dispute that Cathy would suffer irreparable harm by having her religious rights burdened by a preliminary injunction – only whether that harm can ultimately be justified once a decision is reached on the

merits. (Compare *Hobby Lobby, supra*, 134 S.Ct. at 2770 [The scope of religious exercise extends beyond "belief and profession" to "the performance of (or abstention from) physical acts that are engaged in for religious reasons" and even to "[b]usiness practices" that are "compelled or limited by the tenets of a religious doctrine"].)

Finally, independent of Tastries First Amendment rights, it is likely to suffer irreparable injury. 25-30% of Tastries' sales revenue comes from designing custom wedding cakes. Should the Court grant the DFEH's preliminary injunction, and force Tastries to stop selling wedding cakes, the Court would essentially destroy Tastries. (Miller Decl., ¶20.) This constitutes irreparable harm. (*Dingley v. Buckner* (1909) 11 Cal.App. 181, 183 [irreparable injury where "the whole of said creamery business will be destroyed" by lack of injunction].)

C. The Court Should Exercise Its Discretion and Stay this Case Pending the decision in *Masterpiece Cakeshop*.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. (*Landis v. North American Co.* (1936) 299 U.S. 248, 254-55.) "Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." (*Id.* at 255.) But "in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted," especially where "[o]n the law there will be novel problems of far-reaching importance to the parties and the public." (*Id.* at 256.) This remains the case even though "a decision in [one] cause . . . may not settle every question of fact and law in suits by other companies," because "in all likelihood it will settle many and simplify them all." (*Id.*)

This ability to stay cases applies equally in California state court: "It is well established, in California and elsewhere, that a court has both the inherent authority and responsibility to fairly and efficiently administer all of the judicial proceedings that are pending before it, and that one important element of a court's inherent judicial authority in this regard is the power to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." (*Briggs v. Brown* (2017) 3 Cal.5th 808, 852 [quoting *Landis, supra*, 299 U.S. 248] [quotation marks and ellipses omitted].) "Granting a stay in a case where the issues in two actions are substantially identical is a matter addressed to the sound discretion of the trial court. In exercising its discretion the court should consider the importance of discouraging multiple litigation . . . and of avoiding unseemly conflicts with the courts of other jurisdictions. It should also consider whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter[.]" (*Thomson v. Continental Ins. Co.* (1967) 66 Cal.2d 738, 746-47 [citations and quotation marks omitted].)

Here, the *Masterpiece Cakeshop* case is one of "extraordinary public moment" which will settle "novel problems of far-reaching importance to the parties and the public." (*Landis, supra*, 299 U.S. at 256.) That opinion will issue sometime before the end of June 2018 – so a stay would only issue for approximately five months. At that time, the entire landscape of this case will change, one way or another, making all of the attorney hours incurred in the interim – by the DFEH, by Tastries and Cathy, and the Rodriguez-Del Rios – an absolute waste. Efficiency requires a stay. At least one other court has already concluded as much specifically with reference to *Masterpiece Cakeshop*. (See *303 Creative LLC v. Elenis* (D. Colo., Sept. 1, 2017, No. 16-CV-02372-MSK-CBS) 2017 WL 4331065, at *7.)

Of note, the DFEH's original ex parte application asked for a 20 day temporary restraining order and a 60 day preliminary injunction. Unlike most cases where the preliminary injunction is designed to remain in effect for the entire duration of the case, until judgment is obtained, the DFEH only sought a preliminary injunction with an outside time limit of 80 days. This outside time limit was requested because the DFEH only sought an injunction pending the DFEH's investigation. Assuming the DFEH would have been successful in its ex parte application for a temporary restraining order, and the subsequent motion for a preliminary injunction, the outside date for the injunction would have been Sunday, March 4, 2018 (80 days after the ex parte hearing). With the preliminary injunction hearing now set for February 2, 2018, there are only 30 days left between the hearing and when the DFEH requested the injunction to expire. As the Rodriguez-Del Rios' complaint was filed with the DFEH on October 18, 2017 (arising from an August 26 event), the preliminary injunction hearing date of February 2, 2018, will have given the DFEH 107 days to investigate the matter. The point is that, at the outside, there is a 30 day window for which the DFEH's requested injunction could be in place, and which would be mooted should the Court issue a stay. Sacrificing a 30-day injunction should not be viewed by the Court as a barrier to it exercising its inherent right to order its docket, especially when it appears that this whole case was initiated for the purpose of creating an "unseemly conflict[] with the courts of other jurisdictions". (*Thomson, supra*, 66 Cal.2d at 746-747.)

For these reasons, the Court should issue a stay in this case, and wait to adjudicate the DFEH's request for a preliminary injunction until the opinion in *Masterpiece Cakeshop* is issued.

V. CONCLUSION.

For all of the foregoing reasons, the Court should deny the DFEH's petition for a preliminary injunction.

Respectfully submitted,

FREEDOM OF CONSCIENCE DEFENSE FUND

Dated: January 18, 2018 By: _____

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