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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, AND CATHARINE MILLER,
Defendants and Respondents; and

EILEEN RODRIGUEZ-DEL RIO AND MIREYA RODRIGUEZ-DEL RIO,
Real Parties in Interest.

APPEAL FROM KERN COUNTY SUPERIOR COURT
J. ERIC BRADSHAW, JUDGE – CASE NO. BCV-18-102633

RESPONDENTS' CONSOLIDATED ANSWER TO AMICI CURIAE

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INTRODUCTION

Plaintiff's Amici say the sky is falling. They variously claim that the Superior Court's decision "condon[es] a return to the Jim Crow" era, allows businesses to "publicly bar their doors to LGBTQ+ people," and "involves the very identity-based discrimination that the *303 Creative* majority insisted the First Amendment did not authorize."

But Plaintiff's Amici showed up in the wrong case. Their concerns might have some validity in a case involving an off-the-shelf cake, or in a case where the baker refused to sell a cake to someone based on their personal characteristics. And such a case may some day come before the California courts. But in *this* case, where the facts show that the cake is custom-designed and the baker serves LGBTQ customers all the time, the facts simply don't provide a basis for Amici's hyperbole.

Amici's approach is also at war with the substantial evidence standard of review, which requires this Court to defer to a trial court's findings of fact and consider the evidence in the light most favorable to the prevailing party. Here, the "evidence affirmatively showed" that Miller "serve[s], and employ[s], persons with same-sex orientations," "serve[s] each person—regardless of sexual orientation—who desires to purchase items in the bakery case," and "serve[s] each person—regardless of sexual orientation—who requests a custom bakery item, the design for which does not violate the design standards." Amici protest that the decision below means that LGBTQ people could "awaken each day knowing that, wherever they go, they might be turned away from public accommodations that deem them unfit and unworthy to be

served." But, as Mireya Rodriguez-Del Rio testified, Miller was willing to serve the Rodriguez-Del Rios cupcakes *in this case*. And she offered to help them place their order with another custom baker. In short, Amici have the facts all wrong.

In 2020 this Court suggested that the First Amendment analysis might depend on whether the cake that the Rodriguez-Del Rios sought from Cathy "more closely resembles the order of a grocery store cake or is more akin to the cakes originally designed and created by Phillips, the baker in *Masterpiece*." After a five-day trial and four more years of litigation, we know the answer: *all* of Miller's wedding cakes are custom-designed, not out-of-the-case.

Amici offer a grab bag of arguments attacking the Superior Court's careful and well-reasoned decision. None persuade. First, they argue the facts, claiming that the Rodriguez-Del Rios wanted nothing more than a plain white cake. But the record tells a different story entirely—as Mireya Rodriguez-Del Rio herself testified, they sought a custom-designed cake.

Then, Amici argue the law. They claim that the Superior Court misapplied the Unruh Act. But the court faithfully applied decades of California precedent to find that Miller's conduct did not fall within the Act's ambit. Amici also claim that a wordless wedding cake could not possibly convey a message of celebration, but in doing so ignore binding First Amendment precedent from the U.S. Supreme Court as well as common experience. Finally, Amici misapply Free Exercise law to claim that the Department's

actions targeting Miller's religious beliefs does not merit heightened review. But as explained below, if the Free Exercise Clause protects anything at all, it protects minority religious beliefs against government targeting.

* * *

Amici may wish that the facts were different or that this were a classic "culture war" case, but that does nothing to change the facts and law this Court must apply. The Court should affirm the judgment below.

ARGUMENT

I. Amici's arguments are premised on a false narrative.

When this Court first considered this case four years ago, it held that more facts were necessary to determine whether the Rodriguez-Del Rios sought a truly custom cake from Miller. (*Dept. of Fair Employment & Housing v. Superior Ct. of Kern County* (2020) 54 Cal.App.5th 356, 398.) In accordance with this Court's ruling, there was extensive discovery on the question and it was a central issue at trial. The Superior Court ultimately found that all of Miller's cakes are "labor-intensive, artistic and require skill to create" and that "*all* of Miller's wedding cake designs are intended as an expression of support for the sacrament of 'marriage,' that is, the marriage of a man and a woman." (13.AA.2557, original italics.) The court found that the Rodriguez-Del Rios sought a "custom" cake and that Miller would have been personally involved in the design process of that cake, and indeed was involved in their custom cake tasting on the day of the incident. (13.AA.2538, 2542.) This was enough for trial court to hold

that Miller's conduct was constitutionally protected activity. (13.AA.2556-2559.) This Court must evaluate this case based on the facts as the trial court found them and should decline Amici's invitation to decide cases far afield from this one.

A. Amici are wrong on the facts of this case.

Amici's main gambit is to present their own, radically reimagined version of the facts. But Amici's version is simply not what happened here. And Amici's newly-invented factual narrative cannot overcome a Superior Court's express factual findings: following a bench trial, this Court must apply the substantial evidence standard, "defer[] to a trial court's findings of fact by liberally construing them to support the judgment" and "consider[] the evidence in the light most favorable to the prevailing party and draw[] all reasonable inferences in support of the findings." (*Jackson v. LegalMatch.com* (2019) 42 Cal.App.5th 760, 767 [cleaned up].) The Superior Court's findings are supported by substantial evidence, and Amici's attempts to rewrite what happened between Miller and the Rodriguez-Del Rios must be rejected.

Amici maintain that the Rodriguez-Del Rios sought an "unadorned and standardized cake designed for use at a wide variety of parties" (NCLR Br. 30), that they "selected one of Tastries' on-display sample cake designs as the design they wanted to order" and that the cake they sought was "not custom" and "sat in the display case the day the Rodriguez-Del Rios visited Tastries." (ACLU Br. 14, 24-25.) They could not be more wrong.

1. The Rodriguez-Del Rios sought out a custom-designed wedding cake to celebrate their wedding.

There is no dispute that the Rodriguez-Del Rios did *not* want a pre-made cake already displayed and ready for purchase. Tastries was the third bakery they visited in their quest for a custom wedding cake. (5.RT.1060:10-21.) Miller keeps non-edible examples of possible designs around her store for customer inspiration, and the Rodriguez-Del Rios pointed to two different display cakes as a starting point for the design. (5.RT.1064:23-1065:2; 7.RT.1594:3-1596:11; 13.AA.2541.) In explaining the design process at Tastries Mireya testified:

> Q. And was there any design or decoration that you wanted on it?
>
> A. Nothing too elaborate. It was going to be simple. For me I like—from her two displays, I like one that had like a rustic kind of look, but the other one had like a scaly, so I didn't want it on too light or too thick. They had like a scaly, wavy kind of design.

(5.RT.1064:23-1065:2; see also 5.RT.1063:10-15.) Eileen, for her part, never testified at the trial as to how the couple settled on a design. She did not testify to pointing to a display cake at all during the initial consultation.

And while Amici maintain that the design of the Rodriguez-Del Rios' cake was effectively finalized at the end of their first visit (ACLU Br. 25), the Rodriguez-Del Rios' own actions confirm that the design process was not done. They had not determined how to best accommodate their diabetic family members—even though they later said that this was a major factor in their search

for a custom wedding cake. (5.RT.1061:9-21; 6.RT.1332:17-23.) They had not decided on the flavors or fillings for the cake. They had purchased two cake toppers, but had not decided whether to use them. And most telling of all, they signed up for a tasting and sought special permission to bring Eileen's mother and their two best men to help them make all these decisions. (6.RT.1341:7-1342:8; 5.RT.932:18-933:3.)

None of these actions make sense if the Rodriguez-Del Rios were truly looking for only a plain, fungible, standardized white cake that they could have bought at a grocery store. One does not bring parents and members of the wedding party to Vons or Costco to have a tasting for a sheet cake.

The Rodriguez-Del Rios' later conduct confirms this conclusion. At their wedding reception, the Rodriguez-Del Rios had a three-tiered white cake, only one tier of which was edible—in other words, a cake that was largely symbolic. (6.RT.1256:11-15.) They used the top layer to hold a traditional cake cutting ceremony, and they had their custom wedding cake baker come to their wedding reception to serve their guests from a custom cake bar. (6.RT.1243:17-21 [cake-cutting ceremony]; 6.RT.1249:8-21 [baker attended the reception]; contra ARB.32-33 [arguing delivery of the cake plays no role in the analysis].) And the baker who made their wedding cake testified in her deposition in this case that she considered herself a "cake artist" (1.Fees.AA.272, 285),[1]

[1] Citations to "Fees.AA" refer to the Appellant's Appendix filed in the related appeal *California Civil Rights Department v. Cathy's Creations, Inc.*, No. F086083.

that the wedding cake she designed and created for the Rodriguez-Del Rios was a beautiful cake of which she was proud, and that she wanted to promote it on Instagram, but that Department counsel advised her not to do so. (1.Fees.AA.270-272, 280, 288.)

Further, while Amici repeatedly insist that the Rodriguez-Del Rios ordered a cake from the display case (ACLU Br. 24), the record on appeal demonstrates this claim is false. The Tastries display case holds only single-tier pre-made cakes that the bakery sells on a first-come, first-serve basis to anyone. (7.RT.1594:15-23.) The Tastries display case is *incapable* of holding a three-tier cake like the one sought by the Rodriguez-Del Rios. (*Ibid.*)

2. Miller custom-designs her wedding cakes.

While the ACLU asserts that "Tastries regularly made and sold the same cake for various celebrations, including birthdays, baby showers, and quinceañeras" (ACLU Br. 24-25), the trial court made no finding of fact to that effect, and the record affirmatively demonstrates that *every* Tastries wedding cake is custom made. (See 7.RT.1611:20-1612:15.)

At Tastries, it is standard to have a cake tasting and design consultation for all wedding cake orders. (See 7.RT.1611:20-1612:15.) The wedding cake consultation generally takes between 20 and 60 minutes and is led by Miller or another trusted cake designer. (8.RT.1815:13-19; 7.RT.1663:17-25.) To prepare couples before they go through this detailed design process, Miller uses a Wedding Cake Worksheet that includes six different Bible passages about love and marriage and explains the symbolism and

role of the wedding cake in a traditional wedding celebration. (8.RA.2009-2011.) She also reviews the Design Standards, so they know what kinds of designs she can offer them. (12.AA.2287.)

The design consultation takes place in the "design center," a special area at the back of the bakery. (7.RT.1595:14-21; 7.RA.1747.) The design center includes sixteen glass domes; each glass dome has a different flavor of cupcakes, reflecting the sixteen different wedding cake flavors that Tastries offers. (7.RT.1595:14-21.) Underneath the sixteen cupcake domes is a shelf with the sixteen flavors of fillings and frostings. (*Ibid.*) Each tier in a three-tiered cake can have a different flavor of cake, and a different flavor of filling, so in addition to helping them select the cake size, style, and exterior decoration, the designers help couples decide which of the 786 possible flavor combinations will work best for their wedding. If the cake needs to be designed to accommodate particular dietary needs, the designer will talk with the couple about how to do that during the consultation. (See 7.RT.1613:26-1614:7.)

Further, Mary Johnson, a former Tastries employee called by the Department at trial, testified that the cake the Rodriguez-Del Rios requested was a form of "[e]dible art" and cake decorators such as herself can be described as "cake artists." (See 5.RT.1040:12-24.) Thus, while the design of two Tastries cakes can be similar, it is simply untrue that Tastries made "that precise cake" or the "same cake" for others. (ARB.24; ACLU Br. 24-25.)

As the trial evidence amply shows, the Rodriguez-Del Rios sought a custom wedding cake that would have required an individualized design process, in which Miller would have been personally involved. Indeed, the Rodriguez-Del Rios' *own conduct* confirms that they were not seeking a cake akin to a "grocery store cake." (*Dept. of Fair Employment & Housing*, 54 Cal.App.5th at 398.) Amici may wish the facts here were different, but they may not rewrite the record to support their preferred outcome.

B. Amici make odious comparisons that discredit their claims.

In addition to concocting facts, Amici also compare Miller's conduct to racism and other forms of invidious discrimination that have nothing to do with this case. Not only are these comparisons completely divorced from the facts at issue here, but in many instances these comparisons are also "odious" to the Constitution's respect for individuals of differing faiths and religious beliefs. (*Carson v. Makin* (2022) 596 U.S. 767, 779.) For example, SFLC asserts that the decision below "[c]ondon[es] a return" to "Jim Crow" and "threatens to revive an ugly chapter of constitutionally-upheld discrimination." (SFLC Br. 9-10.) In language reminiscent of Colorado's in *Masterpiece*, SFLC reminds the Court that "[r]eligious grounds have been used for centuries to justify and perpetuate wrongful racial and ethnic intentional discrimination." (SFLC Br. 16; compare *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n* (2018) 584 U.S. 617, 635 [quoting a Colorado commissioner saying that "religion has been used to justify all kinds of discrimination throughout history"].) AU also asserts

that exempting Miller would mean that LGBTQ people "would awaken each day knowing that, wherever they go, they might be turned away from public accommodations that deem them unfit and unworthy to be served." (AU Br. 20.) This claim is made without citation—and with good reason, since the evidence showed that Miller served and employed LGBTQ people and was willing to sell the Rodriguez-Del Rios cupcakes, cakes, or any other ready-made baked goods they wanted.

AU, SFLC, and NCLR also throw mud by citing the same news report about a wedding venue in Mississippi that turned away an interracial couple, claiming that the Superior Court has opened the door to similar conduct here.[2] But violating Miller's First Amendment rights in California will not end racism in Mississippi. Accusing the Superior Court of condoning racism and segregation because it ruled for Miller is absurd. It is also wholly unmoored from the facts of this case.

Amici's aspersions are of a piece with the hyperbolic accusations the Department has made. (See Miller Br. 62-63 [describing Department's hyperbole].) For example, the Department protests that it never said that "Miller and her beliefs" "harm[] the dignity of all Californians" but that it was instead Miller's "*policy*"

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[2] (P.R. Lockhart, *A venue turned down an interracial wedding, citing "Christian belief." It's far from the first to do so.* (Sept. 3, 2019) Vox <https://perma.cc/Q4JC-7FDU> [as of May 14, 2024].) After reading her Bible and talking with her pastor, the wedding venue owner realized that she was wrong to turn away the interracial couple. She publicly apologized and invited them to use her facility. *Id.*

that did so. (ARB.48.) But that is a distinction without a difference. Miller's policy is religious and explains her religious beliefs, so when it maligns the content of Miller's policy, the Department is maligning her religious beliefs as well.

The Department has spent nearly seven years aggressively investigating and prosecuting Cathy Miller for referring the Rodriguez-Del Rios to another willing baker. It has spent no time at all investigating the businesses that dropped their contracts with Miller after that day. (9.AA.1704-1705.) The Department has carefully documented the emotional turmoil the Rodriguez-Del Rios experienced. (AOB.19-20.) But it has fought vigorously to exclude all evidence regarding the harassment, death threats, rape threats, theft and assault suffered by Miller and her employees in the wake of the Department's prosecution, dismissing them in a footnote. (ARB.46, fns. 8-9.)

Thus, while the Department pays lips service to "respect[ing]" Miller's religious beliefs (ARB.11, 47), the aspersions from the Department and its Amici, taken together with the difference in treatment Miller received from the Department, illustrate that this prosecution has long been motivated by hostility to those beliefs. This Court should reject Amici's inflammatory rhetoric and decide this case on the facts actually before it, not far-fetched hypotheticals and comparisons. (Cf. *City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 448 [governmental entity "may not avoid the strictures of [the Constitution] by deferring to the wishes or objections of some fraction of the body politic"].)

II. The Superior Court properly applied the Unruh Act.

A. Miller's across-the-board policy is not intentional discrimination under the Act.

Plaintiff's Amici attack the Superior Court's ruling that Miller did not intentionally discriminate against the Rodriguez-Del Rios because of their sexual orientation. (See SFLC Br. 16-18; ACLU Br. 13-14.) But the Superior Court's holding was correct. Under California law, Miller's policy is "neutral on its face" because she only offers wedding cakes that celebrate weddings between a man and a woman. This policy applies to all customers and so it "is not actionable under the Unruh Act." (*Turner v. Assn. of American Medical Colleges* (2008) 167 Cal.App.4th 1401, 1408.) This is true even if Miller's policy "has a disproportionate impact" on LGBTQ customers. (*Ibid.*; see also *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 854; Miller Br. 25-26 [collecting cases].) Amici resist this conclusion by twisting both the law and the facts.

Amici first twist the applicable law by arguing that the Act does not require a showing of specific intent to discriminate. (See SFLC Br. 16-18; ACLU Br. 13-14.) Amici argue that they need show only that a defendant's action was "[w]illful," or that "the actor intended to carry it out, regardless of whether it was accompanied by malice." (SFLC Br. 13-14.) But this argument ignores a long line of California precedent requiring proof that a business "adopted [the challenged] policy *to accomplish* discrimination on the basis of sexual orientation," (*Koebke*, 36 Cal.4th at 854 [italics added].) In other words, "the discriminatory effect of a facially

neutral policy or action is not alone a basis for inferring intentional discrimination under the Unruh Act," even if the defendant acted intentionally in carrying out the policy. (*Martinez v. Cot'n Wash, Inc.*, (2022) 81 Cal.App.5th 1026, 1032.) While animus is not always required under the Act, specific intent to treat LGBTQ customers differently is required. (*Id.* at 1036.)

A rule that a business must only have intended to act, and that action had a discriminatory effect, would mean that *Koebke* and the other disparate impact cases would have come out differently. (See Miller Br. 25-26 [collecting cases].) In *Koebke*, the country club intentionally set membership standards that excluded non-married couples from certain club benefits. (36 Cal.4th at 833.) Likewise, in *Cohn*, the baseball stadium intended to give out Mother's Day gifts to all adult female attendees at the game. (*Cohn v. Corinthian Colleges, Inc.* (2008) 169 Cal.App.4th 523, 526.) The same is true *Belton* and *Turner*—the policies at issue were both intentionally implemented. (*Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal.App.4th 1224, 1229; *Turner*, 167 Cal.App.4th at 1405.) Moreover, such a rule would prove too much—*any* volitional act would meet Amici's standard, effectively reading the intent requirement out of the Act.

The question therefore is not whether Miller intentionally declined to sell the Rodriguez-Del Rios a custom wedding cake, but whether she did so because she specifically intended to exclude them due to their sexual orientation. The trial court applied the correct standard in determining the Department did not prove the intent required by the Unruh Act. (13.AA.2545.)

Amici next twist the facts to claim that—contrary to the trial court's findings—Miller did specifically intend to discriminate on the basis of sexual orientation. The ACLU, for example, claims that Miller had a "written policy [that] expresses an intent to deny certain services to same-sex couples," and "sexual orientation was the motivating reason" behind Miller's conduct. (ACLU Br. 14; see also SFLC Br. 16-17.)

Here, the Superior Court made specific findings of fact that directly contradict Amici's version of the story, triggering the substantial evidence standard:

- "Miller and Tastries serve, and employ, persons with same-sex orientations." (13.AA.2545; 7.RT.1629:11-16; 7.RT.1627:26-1628:13.)
- "Miller and Tastries serve each person—regardless of sexual orientation—who desires to purchase items in the bakery case." (13.AA.2545; 7.RT.1629:11-1630:19.)
- Miller and Tastries also "serve each person—regardless of sexual orientation—who requests a custom bakery item, the design for which does not violate the design standards." (13.AA.2545; 7.RT.1629:11-1630:19.)
- Miller will not create a custom wedding cake that "contradict[s] God's sacrament of marriage" in any way. (13.AA.2545; 12.AA.2287.)
- Miller applies this policy to *all* customers, regardless of their sexual orientation. (13.AA.2545.) For example,

> when a straight married man asked her to bake a custom cake for a surprise divorce announcement, she turned him down. (13.AA.2540; 7.RT.1629:14-1630:19.)

The court also specifically found that the Department "failed to prove": that Miller "intended to make 'a distinction between [her] gay and straight customers seeking marriage-related preordered baked goods;'" that "through the design standards, [Miller] 'willfully denies services to gay couples, thereby making a distinction on account of their sexual orientation;'" and that "'but for' gay customers' sexual orientation, [Miller] would sell them products." (13.AA.2545.)

In light of these findings, which are supported by substantial evidence, the trial court concluded that "Miller's *only* intent, her only motivation, was fidelity to her sincere Christian beliefs." (13.AA.2545, original italics; see 7.RT.1600:22-1601:7; 7.RT.1641:12-1642:4.) "The evidence affirmatively showed that at no time was Miller's conduct a pretext to discriminate or make a distinction based on a person's sexual orientation. … Miller's only motivation, at all relevant times, was to act in a manner consistent with her sincere Christian beliefs about what the Bible teaches regarding marriage." (13.AA.2546.) This Court must defer to these findings that Miller's policy was facially neutral, and that she did not specifically intend to discriminate.

Plaintiffs' Amici argue that Miller's religious motivations are of no legal significance, (ACLU Br. 14-16 SFLC Br. 17-18), claiming that the trial court's decision contradicts *North Coast Women's Care Medical Group, Inc. v. Superior Court* (2008) 44

Cal.4th 1145 and *Minton v. Dignity Health* (2019) 39 Cal.App.5th 1155 because the providers in those cases were also motivated by their religious beliefs. (See SFLC Br. 17-18.) But in those cases, there was no determinative finding that the religious objectors were applying a facially neutral policy without a specific intent to discriminate. (See *Minton*, 39 Cal.App.5th at 1163 [stating that whether objector had intentionally discriminated was an issue of fact "not susceptible to resolution by demurrer"].) By contrast, here the trial court made specific findings that Miller's policy was both facially neutral and applied neutrally. (13.AA.2545.)

Amici's argument suffers from a more fundamental problem: Nowhere do they grapple with U.S. and California Supreme Court precedent expressly stating that religious conscience protections apply in the context of LGBTQ protections. The U.S. Supreme Court, for instance, has maintained that "[m]any 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 [should be] disparaged." (*Obergefell v. Hodges* (2015) 576 U.S. 644, 672.) And the California Supreme Court in *In re Marriage Cases* (2008) 43 Cal.4th 757 likewise recognized the need to preserve space for religious objectors. The Court explicitly stated that its decision pertaining to equal protection did not create affirmative obligations overriding individuals' freedom according to their religious beliefs: "[A]ffording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, *or any other person*; no religion will be

required to change its religious policies or practices with regard to same-sex couples." (*Id.* at 854-855 [emphasis added].) This statement was a promise that the conscientious objections of religious Californians would still be respected. (Contra ARB.13.) The California Supreme Court thus disclaimed the affirmative obligations for Miller to violate her conscience that the Department and its Amici now seek to impose, and Amici's failure to address that holding is conspicuous. (See also *303 Creative LLC v. Elenis* (2023) 600 U.S. 570, 592 ["no public accommodations law is immune from the demands of the Constitution"]; Church-State Council Br. 20-23.)

B. The Superior Court properly determined that Miller satisfied the Act by referring the Rodriguez-Del Rios to another bakery.

Amici next challenge the Superior Court's holding that Miller's referral to another bakery constituted "full and equal" service under the Act. (ACLU Br. 12-19; SFLC Br. 22-29; NCLR Br. 28-41.) The trial court correctly held that Miller's referral to Gimme Some Sugar, another bakery that Miller had arranged in advance to send referrals to under these circumstances, satisfied the Act. (13.AA.2547-2548.) The court relied on the recognition by courts, notably in *North Coast* and *Minton*, that the Act must have a mechanism to provide accommodations when forcing compliance would violate business owners' First Amendment rights. (13.AA.2547-2550; see also Miller Br. 32-36 [explaining that constitutional avoidance principles require the Court to interpret the Act to allow referrals].) The U.S. Supreme Court has also recently reemphasized that religious objectors must be allowed to refer to

other non-objecting providers to avoid constitutional conflict. (See *Fulton v. City of Philadelphia* (2021) 593 U.S. 522, 530, 541 [city had no compelling interest in forcing Catholic adoption service to certify same-sex couples where organization "would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples"].)

Amici attempt several evasions of this constitutional requirement. First, they claim that *Minton* does not suggest that a referral can ever satisfy the Act, even if it is timely (SFLC Br. 22), and that allowing referrals would "lead to untenable results for anti-discrimination law" (ACLU Br. 18.) But this ignores the reality that, to this day, Dignity Health's Catholic hospitals *still* refer patients requesting care that would violate the organization's religious beliefs to non-Catholic hospitals.[3] For its part, the Department makes no argument that referrals are categorically impermissible.

Second, Amici suggest that Miller's referral was not quick enough (SFLC Br. 22), or that Miller didn't provide the "continuity of care" anticipated in *North Coast* (ACLU Br. 18). They also argue that a referral is insufficient because there may be "nowhere else to go." (NCLR Br. 35.) But Amici again ignore the facts *in this case*—found by the trial court after a week-long

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[3] (See Dignity Health, *Important Information About Transgender Health Care at Dignity Health* <https://perma.cc/RP76-ZRBE> [as of May 16, 2024] ["When a service is not available at a given location, care is transitioned to a provider within reasonable driving distance that offers the desired service."].)

trial—that "Miller's offer to refer Eileen and Mireya to *Gimme Some Sugar* was almost simultaneous with Miller's discovery that she was being asked to design a wedding cake at odds with her Christian faith and not offered under the Tastries design standards" and that Miller knew they would receive services because "Miller arranged, in advance, for *Gimme Some Sugar* to take referrals from Tastries in such circumstances." (13.AA.2547:3-6; 7.RT.1641:12-1642:4; 7.RT.1632:21-1634:14; 7.RA.1779-1781.)

Such a referral easily satisfies *North Coast*'s holding that a business owner can "avoid any conflict between their religious beliefs and the state Unruh Civil Rights Act's antidiscrimination provisions." (44 Cal.4th at 1159.) Indeed, the Act must have just such a safe harbor to avoid irreconcilable conflict with the First Amendment. Moreover, small businesses like Miller's should enjoy at least as much conscience protection as large hospital chains. If they can refer to sister entities, Miller should be able to refer to other bakeries, just as she did here.

Third, Amici complain that the trial court's decision will return California to a "separate but equal" regime and that allowing referrals "permits market stratification and social hostility" against marginalized groups. (SFLC Br. 23; NCLR Br. 33-34.) But these arguments ignore that a referral *satisfies* the Act's requirements when the owner has a valid First Amendment defense to compliance, as Miller did here. Amici's argument proves too much: under their approach, no conduct can be exempted from public accommodations laws under the First Amendment

without threatening an unstoppable backward slide to "Jim Crow-era discrimination against protected groups." (SFLC Br. 25.) But courts can respect "the vital role public accommodations laws play in realizing the civil rights of all Americans," while still recognizing "no public accommodations law is immune from the demands of the Constitution." (See *303 Creative*, 600 U.S. at 590, 592.) Indeed, this is precisely why governments *must* allow for "win-win" referral systems when there are significant rights at stake on both sides. (See Church-State Council Br. 26-31.)

C. Amici's parade of horribles is detached from the facts of this case and ignores the limited scope of the enforcement action at issue.

Throughout their attempts to undermine the trial court's holding, Amici insist that affirming the trial court's decision will immediately "thrust American society back into an era of racial segregation" (SFLC Br. 17) and undo decades worth of progress in eliminating discrimination against religious and racial minorities throughout the country (NCLR Br. 41). Amici make broad and entirely unsupported claims that taxi drivers would be able to refuse black passengers, a bakery could refuse to bake a cake for a person with a disability, and antisemitism and violence against racial minorities would go unchecked. (SFLC Br. 17; ACLU Br. 18; NCLR Br. 39-40; AU Br. 23-25.)

But Amici's reliance on absurd hypotheticals and comparisons to *Plessy v. Ferguson* are overwrought and simply not connected to the facts of this case. Both federal and state laws throughout the country include various express statutory religious accommodations and exemptions to anti-discrimination laws. (See, *e.g.*, 42

U.S.C. § 2000e-1(a) [religious exemption from Title VII employment requirements]; Cal. Gov. Code, § 12926(d) [religious exemption from Fair Employment and Housing Act]; D.C. Code, § 46-406(e) [express religious exemption related to certain anti-discrimination requirements]; Haw. Rev. Stat., § 572-12.1-12.2 [same]; 750 Ill. Comp. Stat., 5/209 [same]; Iowa Code, § 216.7, subd. (2)(a) [same]; Ky. Rev. Stat., § 344.130, subd. (3) [same]; Md. Code, Fam. Law, §§ 2-201, 2-202, 2-406 [same]; Minn. Stat., § 363A.26 [same]; Neb. Rev. Stat., § 20-137 [same]; N.H. Rev. Stat., § 354-A:18 [same]; N.M. Stat., § 28-1-9, subd. (B) [same]; N.Y. Exec. Law, § 296, subd. (11) [same]; R.I. Gen. L., § 15-3-6.1 [same]; Utah Code, § 13-7-3 [same]; Vt. Stat., 9 § 4502(l) [same]; Wash. Rev. Code, § 26.04.010 [same].)

Moreover, the federal government and more than half the states currently have Religious Freedom Restoration Acts, which can protect even private, for-profit entities from being compelled to take actions that substantially burden their religious beliefs.[4]

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[4] (See 42 U.S.C. § 2000bb et seq. [federal]; Ala. Const., art. I, § 3.01; Ariz. Rev. Stat., § 41-1493.01; Ark. Code, § 16-123-404; Conn. Gen. Stat., § 52-571b; Fla. Stat., § 761.01 et seq.; Idaho Code, § 73-402; 775 Ill. Comp. Stat., 35/1 et seq.; Ind. Code, § 34-13-9-8; Iowa Senate File 2095, 90th Gen. Assem., Reg. Sess. (Iowa 2024); Kan. Stat., § 60-5301 et seq.; Ky. Rev. Stat., § 446.350; La. Stat., § 13:5231 et. seq.; Miss. Code, § 11-61-1 ; Mo. Stat., § 1.302 et seq.; Mont. Code, § 27-33-101 et seq.; Neb. Legis. Bill 43, 108th Legis., 2d Sess. (Neb. 2024); N.M. Stat, § 28-22-3; Okla. Stat., tit. 51, § 251 et seq.; 71 Pa. Stat., § 2401 et seq.; R.I. Gen. L., § 42-80.1-4; S.C. Code, § 1-32-10 et seq.; S.D. Codified Laws, § 1-1A-4; Tenn. Code, § 4-1-407; Tex. Civ. Prac. & Rem. Code, § 110.001 et seq.; Va. Code, § 57-2.02; W. Va. Code, § 35-1A-1.)

Contrary to Amici's Chicken Little predictions, these laws have not caused the widespread return of rampant status-based discrimination, but rather provide a mechanism for resolving the conflicts of beliefs that are inherent to any pluralistic society.

As explained by Amicus Church-State Council, the law does not support Plaintiff's Amici's contention that the logic of allowing an exemption in this case would apply equally to race-based objections. (See Church-State Council Br. 28-30.) The U.S. Supreme Court has long recognized that race-based discrimination is particularly "odious" to our Constitution (*Loving v. Virginia* (1967) 388 U.S. 1, 11), and "violates deeply and widely accepted views of elementary justice." (*Bob Jones Univ. v. United States* (1983) 461 U.S. 574, 592.) But the Court has rejected attempts to categorize traditional views regarding marriage as cut from the same cloth, instead recognizing that religious individuals can hold such beliefs "based on decent and honorable religious or philosophical premises." (*Obergefell*, 576 U.S. at 672.) Amici's repeated comparisons to Jim Crow segregation and reminders that "[r]eligious grounds have been used for centuries to justify and perpetuate wrongful racial and ethnic intentional discrimination" (SFLC Br. 16), ignore the clear distinctions drawn by the Court in *Obergefell* and elsewhere.

Amici's parade of horribles also ignores the specific context in which this case arises. Miller raises only an affirmative defense to the Department's enforcement action and seeks only to avoid the government compelling her to make custom wedding cakes celebrating same-sex weddings (a product she does not currently

offer). She is content to refer customers seeking that product to other providers in Bakersfield. The Court should decide this case on the facts before it, not counterfactual hypotheticals that share little with Miller's specific defenses here.

III. The Department's enforcement action violates Miller's free speech rights.

Amici show their hand on free speech by repeating that the cake at issue here is nothing more than a "simple white cake" (ACLU Br. 20), an "unadorned and standardized cake" (NCLR Br. 30), and a "blank white cake[]—without messages, images, or cake toppers" (SFLC Br. 28). Amici protest too much: Amici's emphasis amounts to a concession that if Miller is deploying her skills to design and create custom wedding cakes imbued with message and meaning, then she must prevail on her Free Speech Clause defense. But that is precisely what the facts show—that Miller designs and creates each of her wedding cakes to celebrate God's sacrament of marriage. Amici's attempt to draw First Amendment lines based on whether a cake has enough flowers and intricate piping to clearly demarcate it as a wedding cake instead of a birthday or quinceañera cake is unprincipled and impossible for both courts and bakers to apply. (See ACLU Br. 24-25; SFLC Br. 28.) Given the deeply personal, cultural, and religious significance of wedding ceremonies, this Court should not compel Miller to endorse a ceremony in contravention of her sincere religious beliefs.

A. Amici's attempt to portray Miller's custom wedding cakes as devoid of an expressive meaning or message misrepresents the record and ignores common experience.

Miller's design and creation of a custom wedding cake, even the relatively simple design requested by the Rodriguez Del-Rios, constitutes pure speech, or at the very least, expressive conduct. (See Miller Br. 40-47.) As the trial court found as a matter of fact, Miller's cakes are "designed and intended—genuinely and primarily—as an artistic expression of support for a man and a woman uniting in the 'sacrament' of marriage, and a collaboration with them in the celebration of their marriage." (13.AA.2556; see 8.RA.2009-2011.) Miller uses custom cake design—in this case a three-tiered white cake, which is itself is an image of marriage—to "celebrate and promote" her understanding of marriage, which, under Supreme Court precedent, makes the product pure speech. (*303 Creative*, 600 U.S. at 587.) But even if it were not pure speech, Miller's creation of custom cakes is expressive conduct, because creating a three-tiered cake to be displayed at a wedding inherently expresses a message celebrating that marriage, as Miller intended. (See Miller Br. 44-47.) The Superior Court thus correctly held that Miller's conduct was protected by the First Amendment.

1. Miller's custom wedding cakes are inherently expressive.

Amici maintain that the Rodriguez-Del Rios sought nothing more than an "unadorned and standardized cake designed for use at a wide variety of parties," (NCLR Br. 30; see also ACLU Br. 14,

24). As explained above, these characterizations are simply wrong. (See § I.A, *supra*.)

Amici also attempt to rely on hypotheticals posed to Miller during her deposition about whether she would "make a macaron, cinnamon roll, or cookie … for a same-sex couple celebrating their anniversary." (ACLU Br. 25 [citing 11.AA.2142].) But these counterfactual hypotheticals serve only to prove the point that a wedding cake is uniquely expressive. Miller has never encountered a situation where she was asked to make custom cinnamon rolls for a same-sex marriage-related celebration. (See 2.AA.313-314 [Miller responding to counsel's hypothetical questions "It has never happened before."]; 2.AA.338 [Miller responding that she "[doesn't] know how to answer" counsel's hypothetical because she's never received orders like those described].) That is because there is no need for a design consultation to sell cinnamon rolls or snickerdoodles. By contrast, a wedding cake is inherently expressive and thus requires an extensive design process.

This Court has already acknowledged that there is a First Amendment difference between a "stock" cake an individual can order from Costco and one "specially designed for the event." (*Dept. of Fair Employment & Housing*, 54 Cal.App.5th at 398 [emphasis omitted].) While the Department has repeatedly attempted to re-write those facts throughout the course of this seven-year litigation—a tactic Amici now repeat—the record unambiguously shows that the Rodriguez-Del Rios sought a custom-designed and custom-made cake to celebrate their wedding. This Court should thus reject Amici's fanciful alternate history.

Given these well-established facts, the Department's concession that the presence of words or a topper would be enough to transform the cake at issue here into protected speech, which is echoed by Amici (see AOB.51; ACLU Br. 24; SFLC Br. 28), is enough to establish that Miller's conduct is also protected. First, and critically, none of the Supreme Court's precedent regarding pure speech or expressive conduct support drawing the First Amendment line where the Department or Amici propose—as requiring words or specific images to qualify for protections. Instead, the Supreme Court has repeatedly found protected speech and expressive conduct where the *surrounding context* allows a reasonable observer to understand the speaker's message, even where there were no "indicia of speech" the Department claims is necessary for First Amendment protections. (ARB.10.) The Department and Amici have failed to point to a single case to the contrary. (See Miller Br. 40-47; *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston* (1995) 515 U.S. 557, 568 [parades are a protected form of expression because of "the inherent expressiveness of marching"]; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (1969) 393 U.S. 503 [wearing wordless black armbands to protest the Vietnam war was protected]; *Stromberg v. California* (1931) 283 U.S. 359 [wordless red flag supporting communism was inherently expressive].)

The Department's argument that a wedding cake does not "contain[] any discernible message" (ARB.26) and is therefore not inherently expressive also belies common experience. The inherent message of celebration expressed by a wedding cake is so

well-known and culturally shared that a person could receive a card with just a picture of a wedding cake on it and understand the card to mean "Congratulations on your wedding."[5] The Department's attempts to argue otherwise strain credibility.

Amici, meanwhile, claim that the wedding cake at issue in this case is not distinctive *enough* to merit First Amendment protections. (ACLU Br. 20; NCLR Br. 30-31; SFLC Br. 28.) For example, the ACLU argues that the cake at issue here "cannot be inherently expressive if the message only exists when used for weddings, but not when used for a birthday party." (ACLU Br. 25.) This objection completely ignores the Supreme Court's holdings in cases like *Tinker* and *Stromberg*, where the wordless conduct at issue did not express some message inherent to the colors (black and red) at issue, but instead relied on context to convey that message. (See Miller Br. 45-46.) The same is true here—just because a white multi-tiered cake *can* be used to celebrate a birthday or quinceañera does not mean it lacks a discernible message when created for and displayed in the context of a wedding.

Amici's objections amount to a proposed rule that a custom cake must meet some objective standard of "wedding-ness" before a religious baker can decline to sell it for a same-sex wedding. But that rule is unworkable both for Miller and the courts. If

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[5] (See, *e.g.*, Wedding Cake Congratulations Card, Etsy <https://perma.cc/N2N6-25SH> [as of May 17, 2024]; Handmade Wedding/Anniversary Card, Etsy <https://perma.cc/BQ9B-PEYD> [as of May 17, 2024]; Wedding Cake Card, Target <https://perma.cc/56FS-5NV5> [as of May 17, 2024]; Wedding Cake Individual Note Card, Karen Adams <https://perma.cc/WTU7-3Y3G> [as of May 17, 2024].)

Amici have it their way, courts throughout California will have to evaluate how intricate the icing must be, and whether there must be hearts on a cake rather than just flowers before it qualifies as speech. Further, Miller would have broader protections for her work when "maximalist" cake designs are in style, and significantly less protections when "minimalist" designs are. She would have no way of knowing in advance of when she is legally allowed to decline to create a cake she believes expresses a message that violates her religious beliefs. Miller and other religious bakers throughout the state would be forced to ask California courts to decide whether each individual cake qualifies for protection. Amici's approach is unworkable and this Court should reject it.

2. Amici misapply binding free speech precedent.

Amici also all but concede that this issue was settled by *303 Creative*. (See ACLU Br. 19; cf. Miller Br. 40-44.) Amici's attempts to distinguish that case fail. The ACLU lays out specific facts that the Court relied upon in *303 Creative*, claiming this case is "easily distinguishable." (ACLU Br. 19.) But the facts the ACLU points out as legally relevant map almost directly onto this case:

- Smith was willing to work with anyone, regardless of sexual orientation. (ACLU Br. 22.) The same is true of Miller, as "Miller and Tastries serve, and employ, persons with same-sex orientations. Miller and Tastries serve each person—regardless of sexual orientation—who desires to purchase items in the bakery case. Miller and Tastries serve

each person—regardless of sexual orientation—who requests a custom bakery item, the design for which does not violate the design standards." (13.AA.2545.)

- Smith would "not produce content that 'contradicts biblical truth' regardless of who orders it." (ACLU Br. 22.) Likewise, "Miller and Tastries do not design and do not offer to *any* person—regardless of sexual orientation—custom bakery items that 'violate fundamental Christian principles.'" (13.AA.2545.)
- "Ms. Smith's websites promise to contain 'images, words, symbols, and other modes of expression.'" (ACLU Br. 22.) Similarly, Miller's wedding cakes are "designed and intended—genuinely and primarily—as an artistic expression of support for a man and a woman uniting in the 'sacrament' of marriage, and a collaboration with them in the celebration of their marriage. The wedding cake expresses support for the marriage." (13.AA.2556.)
- "[E]very website will be [Smith's] 'original, customized' creation." (ACLU Br. 22.) Similarly, "Miller is personally involved in every production-related aspect of her bakery, and, as it pertains to wedding cakes, she is personally involved in some aspect of the design and making of virtually every wedding cake." (13.AA.2538.)
- Smith 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.'" (ACLU Br. 22.) In this case, the incident

at issue took place during an individual consultation with the clients set to determine the client's preferences on the cake design, including the "number of tiers, type of cake, ingredients, flavors, colors, frosting, decorations and finish." (13.AA.2538; 8.RA.2009-2011.)

- The parties in *303 Creative* 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." (ACLU Br. 22.) Similarly, the trial court here found that "[t]he evidence shows that all of Miller's wedding cake designs are intended as an expression of support for the sacrament of 'marriage,' that is, the marriage of a man and a woman." (13.AA.2557.)

As this comparison shows, *303 Creative* dictates the outcome of the speech claim here. Miller's design and creation of custom cakes is speech, or at the very least expressive conduct, because she creates those cakes intending to and in fact expressing a message of celebration for the union.

The ACLU further insinuates that *303 Creative* is distinguishable because it was decided on stipulated facts. (ACLU Br. 22-23.) But the record in this case is better, not worse—coming as it does after over six years of investigation and a full trial on the merits. Further, it is hornbook law that parties cannot stipulate to the law, meaning the Supreme Court concluded *as a matter of law* that the expression at issue was protected speech. (See *Swift &*

Co. v. Hocking Valley Railway Co. (1917) 243 U.S. 281, 289 ["If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law."]; *Avila v. INS* (9th Cir. 1984) 731 F.2d 616, 620 ["A stipulation of law is not binding upon an appellate court."]; *People v. Singh* (1932) 121 Cal.App. 107, 111 ["We are not bound by an erroneous stipulation as to a conclusion of law."].)

Finally, SFLC's "logical extreme" argument overreaches. SFLC claims that the trial court's ruling could allow a business to deny black customers goods and services altogether, a landlord could refuse to rent an apartment to a black family, or a retailer could refuse to sell a cap and gown to an immigrant graduate. (SFLC Br. 29.) Yet, unlike this case, none of these examples involve the business owner creating a custom item expressing a specific message of celebration of a wedding. Each of these examples are precisely the type of speech that is "plainly incidental to the statute's regulation of conduct" that *Rumsfeld v. Forum for Academic Institutional Rights, Inc.* (2006) 547 U.S. 47, 48, held was not protected by the First Amendment. Because Miller was engaged in pure speech, or at least expressive conduct, these examples are irrelevant. (See Miller Br. 46-47 [distinguishing *FAIR*].)

B. Compelling Miller to speak the government's message regarding marriage triggers and fails strict scrutiny.

The Department's enforcement action against Miller attempts to compel her to speak the government's preferred message—to celebrate same-sex marriage—or to cease offering wedding cakes for sale at all. But the government may not "compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include." (*303 Creative*, 600 U.S. at 586.) Compelling speech in this manner fails strict scrutiny, nearly per se, and it certainly does so here. (See *id.* at 589 [holding that compelling merchant to create speech celebrating same-sex marriage was an "impermissible abridgment of the First Amendment's right to speak freely" without considering whether the government had a compelling interest or if its means were narrowly tailored]; Miller Br. 65-68 [explaining why the application fails strict scrutiny].)

The ACLU alternatively argues that intermediate scrutiny, not strict scrutiny, applies. (ACLU Br. 27.) But the Department has not raised this argument before this Court, and forfeited the argument that the enforcement action can even satisfy strict scrutiny by failing to address it in its brief. (See Miller Br. 49 [identifying strict scrutiny as the correct standard].) This Court need "not consider issues raised for the first time by an amicus curiae" and should not address this underdeveloped argument at this stage. (*California Bldg. Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1048, fn. 12.)

Even if this argument were properly before the Court, the Court should reject it. The ACLU claims that intermediate scrutiny applies because the Act generally prohibits identity-based discrimination, and so it is "unrelated to the suppression of expression." (ACLU Br. 29 [quoting *United States v. O'Brien* (1968) 391 U.S. 367].) But the *O'Brien* test applies only if the law is content-neutral *both* facially and as applied. (See, *e.g.*, *Waln v. Dysart School Dist.* (9th Cir. 2022) 54 F.4th 1152, 1163 [strict scrutiny applies "to an ordinance neutral on its face but content-based as applied"]; *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 295 [regulation was content-neutral because it "*is not being applied* because of disagreement with the message presented"] [italics added].)

Miller challenges the Department's enforcement of the Act *as applied to her*, which has not been content- or viewpoint-neutral. Where the government attempts to regulate speech based on "the opinion or perspective of the speaker," that restriction is not content-neutral and is unlawful. (*Rosenberger v. Rector & Visitors of the University of Virginia* (1995) 515 U.S. 819, 829.) Here, the Department brings this action against Miller precisely because it disagrees with her views on marriage, and it has consistently compared Miller's religiously motivated practices to race discrimination. (See Miller Br. 48.) Further, an action that uses a baker's "choice to talk about one topic—opposite-sex marriages—as a trigger for compelling them to talk about a topic they would rather avoid—same-sex marriages" is not content neutral. (*Telescope Media Group v. Lucero* (8th Cir. 2019) 936 F.3d 740, 753;

see also *Nat. Inst. of Family and Life Advocates v. Becerra* (2018) 585 U.S. 755, 766 [a regulation that compels the government's preferred speech is necessarily content-based because "compelling individuals to speak a particular message, … alte[rs] the content of [their] speech"].) Strict scrutiny thus applies, and the action violates Miller's free speech rights.

IV. The Department's enforcement action violates Miller's free exercise rights.

Americans United is the only amicus to engage Miller's Free Exercise arguments in any meaningful way. (AU Br. 8-17.) But AU conflates the standards that apply under the California and U.S. Free Exercise Clauses and urges this Court to adopt arguments that have already been rejected by the Ninth Circuit and the U.S. Supreme Court.

A. The Department's enforcement of the Act against Miller is subject to strict scrutiny.

The Superior Court explained that, under the California Free Exercise Clause, the key question is whether the burden on the religious believer is an "incidental burden" or a "substantial burden." (13.AA.2549-2553; citing *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 566.) If the burden is more than incidental, then strict scrutiny applies. (*Ibid.*) The Superior Court concluded that "the evidence in the present case proves clearly and convincingly" that the Department's application of the Unruh Act in this case "*substantially* burdens Miller's free exercise" and that the Department's arguments to the contrary were "sophistry," that "simply buried and paved over" Miller's faith. (13.AA.2550.) It then ruled against Miller because it

regarded itself as bound by *North Coast's* conclusion that the Unruh Act survived strict scrutiny.[6] (13.AA.2553.)

Under the U.S. Constitution, the Free Exercise analysis is similar but includes an additional step: after determining that a law burdens a religiously motivated action, the court must consider whether the law is neutral and generally applicable, and whether it has been applied with "hostility" in this case. AU asserts that *North Coast* "control[s]" and "should end the neutrality and general applicability analysis." (AU Br. 10.) But this argument "runs headlong into more recent Supreme Court authority." (*Fellowship of Christian Athletes v. San Jose Unified School Dist. Bd. of Education* (9th Cir. 2023) 82 F.4th 664, 685 ["*FCA*"] [en banc].) *North Coast*, which was decided in 2008, asserted that the Unruh Act was neutral and generally applicable in a single paragraph devoid of analysis. (44 Cal.4th at 1156.) Since that time, the U.S. Supreme Court has provided substantial additional guidance on how neutrality and general applicability must be addressed.[7] (*Fulton*, 593 U.S. at 533-534; *Tandon v. Newsom* (2021) 593 U.S. 61, 62; *Masterpiece*, 584 U.S. at 638.)

Just last year, in a case that AU does not cite (it represented the losing party), the en banc Ninth Circuit "[d]istilled" the Su-

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[6] As explained in Miller's opening brief, the holding regarding strict scrutiny was error. (Miller Br. 65-68; see IV.B, *infra*.)

[7] AU scolds Miller for not citing *North Coast* in the section of her brief regarding neutrality and general applicability—without mentioning that Miller cites and discusses *North Coast* seven times throughout her brief.

preme Court's recent Free Exercise decisions—*Masterpiece, Fulton,* and *Tandon*—into "three bedrock requirements of the Free Exercise Clause." (*FCA*, 82 F.4th at 686.) Miller discusses these requirements in detail, and they must guide the Court's analysis of the federal Free Exercise Clause here. (Miller Br. 56-65.)

1. The Department's application of the Unruh Act is not generally applicable.

Miller has already explained why the Department's application of the Unruh Act to Miller is not generally applicable. (Miller Br. 58-61.) "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" (*Fulton*, 593 U.S. at 533 [cleaned up] [quoting *Employment Div. v. Smith* (1990) 494 U.S. 872, 884].) The Department's application of the Act to Miller is not generally applicable because it requires consideration of "particular reasons for a person's conduct" both when determining whether the discrimination was "intentional" and when determining whether any intentional discrimination was "arbitrary, invidious, [or] unreasonable." (Miller Br. 24-32, 37-38, 58-60.)

AU protests that Miller provides "no support" for the principle that a "legal standard," rather than a policy, "qualifies as a system of individualized exemptions." (AU Br. 16.) But that defies both *Sherbert* and *Fulton*. *Smith* held that "the unemployment benefits law in *Sherbert* was not generally applicable because the *'good cause' standard* permitted the government to grant exemptions based on the circumstances underlying each application." (*Fulton*, 593 U.S. at 534 [citing *Smith*, 494 U.S. at 884] [emphasis

added].) *Fulton* is simply a specific case of the general rule announced in *Sherbert* and confirmed in *Smith*: if a law allows the government to pick and choose which reasons for an action are valid, then it is not generally applicable and must pass strict scrutiny. (Miller Br. 58-60.)

2. The Department also did not apply the Unruh Act neutrally in its action against Miller.

The Department's application of the Unruh Act is also not neutral under *Tandon*, because it treats "comparable secular activity"—age discrimination in housing, and any otherwise discriminatory action that is required to avoid a conflict with other laws—"more favorably than religious exercise." (See Miller Br. 60-61 [quoting *Tandon*, 593 U.S. at 62].) AU avoids citing *Tandon*, asserting instead that Miller must "show that the government has targeted specific religious conduct … for maltreatment." (AU Br. 10.) But "the Supreme Court has clearly rejected such a 'targeting' requirement for demonstrating a Free Exercise violation." (*FCA*, 82 F.4th at 686.) *Fulton* and *Tandon* "clarify that targeting is not required for a government policy to violate the Free Exercise Clause" and that merely "favoring comparable secular activity is sufficient." (*Ibid.*) The Department's application of the Act to Miller does just that. (Miller Br. 60-61.)

The Department's actions also trigger strict scrutiny because the Department applied a double standard, prosecuting Miller for more than six years over a brief, cordial interaction while turning a blind eye to the religious discrimination, violence, and harassment that Miller and her staff have endured since that time. (Miller Br. 61-65.) The Department's lawyers were informed

about these hate incidents and provided with extensive evidence about them. Although the Department has a specific mandate to assist "victims of hate" in filing complaints, they never once offered to do so. Its failure to offer Miller and her employees the same support and resources the Department offers to other California victims of hate demonstrates bias.

AU takes up the Department's "not my job" defense with gusto, claiming that the Department had no role to play in responding to lost contracts, death threats, rape threats, theft and assault because the Act does not cover them. (AU Br. 12.) This argument is dubious on its face: if a Jewish caterer hung up an Israeli flag after October 7 and promptly lost all his corporate contracts, the Department would certainly have grounds to investigate whether his former clients were acting out of antisemitism.

AU is of course correct that the *Act* applies to businesses, but the Department also investigates and prosecutes hate incidents under the Ralph Civil Rights Act, which applies to individuals,[8] and has a special mandate from the California Legislature to "support individuals and communities targeted for hate" as they navigate *all* of California's anti-hate laws, including those the Department does not enforce.[9] In short, the Department itself

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[8] (*California Law Protects You from Hate Violence: Fact Sheet* (Oct. 2022) Civil Rights Department, State of California, p. 1 <https://perma.cc/8DAF-Y5VT> [as of May 15, 2024] ["If you have been a victim of hate violence, you can file a complaint with CRD against the person who harmed you."].)

[9] (*Report a Hate Incident or Hate Crime*, Civil Rights Department, State of California <https://perma.cc/J8A2-H62W> [as of

does not share AU's narrow view of its own authority. And it is undisputed that the Department has never used any of this authority to protect Miller, only to prosecute her.

AU finally tries to wave away all of the hostile and unfair statements the Department has made during this case (Miller Br. 63-64) by asserting that "legal arguments against an opposing party made in the course of litigation" cannot be "evidence of hostility." (AU Br. 11.) This is simply untrue. When considering prosecutorial bias, California courts regularly evaluate statements made in the course of litigation; indeed California law requires them to do so. (See Cal. Pen. Code, § 745(a)(2) [requiring examination of whether "an attorney in the case … exhibited bias or animus against the defendant," including statements made during trial].) The Department "acts as a public prosecutor when it pursues civil litigation" under the Act (*Dept. of Fair Employment & Housing*, 54 Cal.App.5th at 373) and while the specific provisions of Section 745 do not apply here, the Department is accountable for its biased statements about Miller throughout this case.

B. The Department's enforcement of the Act against Miller cannot pass strict scrutiny.

Given the Department's hostility, Miller would win no matter the level of scrutiny. (See Miller Br. 65-68; *Kennedy v. Bremerton School Dist.* (2022) 597 U.S. 507, 525 fn.1.) And in any event the

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May 15, 2024].) The Department's "Community Specific Resources for People Targeted for Hate" includes links to support members of "Muslim, Sikh, Hindu, and Jewish communities," but nothing for members of various Christian faith traditions. (*Ibid.*)

Department cannot possibly meet strict scrutiny. (See Miller Br. 65-68.) The Department makes no serious effort to argue that it does (its strict scrutiny argument appears in a single footnote). And its Amici cannot raise arguments not made by the party supported. (*Cal. Bldg. Industry Assn.*, 4 Cal.5th at 1048, fn.12.)

AU tries anyway, but its assertions bear no relationship to the record facts in this case. AU speculates that any exemption for Miller "would presumably allow businesses to opt out of" the Act so long as they have a "religious justification" (AU Br. 19)—but such a categorical exemption would be the opposite of a "tailored" exemption, which is all Miller seeks. (Miller Br. 68.) AU also acts as if this case were winner-takes-all, such that allowing any protection for Miller would completely defeat both federal and state antidiscrimination laws. (AU Br. 19-20.) But *Hurley*, *Fulton*, and *303 Creative* have repeatedly taught otherwise—in fact, antidiscrimination laws and religious exemptions exist comfortably side by side.

* * *

This Court has already ruled once that the specific facts of this case are crucial. After more than six years of investigation and a trial on the merits, those facts are now established. Plaintiff's Amici's briefs might have some bearing on a different case, with different facts, but here they are simply beside the point.

CONCLUSION

The judgment of the Superior Court should be affirmed.

Respectfully submitted,

/s/ *Eric Rassbach*

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May 21, 2024

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by California Rules of Court rule 8.204(c)(1). The brief is 10,074 words, excluding the portions exempted by California Rules of Court rule 8.204(c)(3). The brief's type size and type face comply with California Rules of Court rule 8.204(b), because it uses a 13-point Century Schoolbook font.

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PROOF OF SERVICE

At the time of service, I was over 18 years old and not a party to this action. My business address is 1919 Pennsylvania Ave. NW, Suite 400, Washington, DC 20006. My electronic service address is mkrauter@becketlaw.org. On May 21, 2024, I served true copies of the document described as **RESPONDENTS' CONSOLIDATED ANSWER TO AMICI CURIAE** on the interested parties in this action as follows:

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Executed on May 21, 2024.

Matthew Krauter

SERVICE LIST

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California Court of Appeal, Fifth Appellate District
Case No. F085800

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