Court of Appeal
No. 5 Civ. F085800
Superior Court
No. Civ. BCV-18-102633

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,

Defendant and Respondents

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

Real Parties in Interest.

On Appeal from Kern County Superior Court
Case No. BCV-18-102633, Hon. J. Eric Bradshaw

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE, THE RECONSTRUCTIONIST RABBINICAL ASSOCIATION, THE GLOBAL JUSTICE INSTITUTE, AND SIKH COALITION IN SUPPORT OF PLAINTIFF-APPELLANT

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT

Americans United for Separation of Church and State, Bend the Arc: A Jewish Partnership for Justice, the Reconstructionist Rabbinical Association, the Global Justice Institute, and Sikh Coalition (collectively, "Amici") request leave to file the accompanying brief as *amici curiae* in support of Plaintiff-Appellant Civil Rights Department.

Americans United for Separation of Church and State is a national, nonpartisan organization that for over seventy-five years has brought together people of all faiths and the nonreligious who share a deep commitment to religious freedom as a shield to protect but never a sword to harm others.

The Sikh Coalition is the largest community-based organization working to protect Sikh civil rights across the United States. The Sikh Coalition's goal is working towards a world where Sikhs, and other religious minorities in America, may freely practice their faith without bias and discrimination. Since its inception, the Sikh Coalition has worked to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and educate the broader community about Sikhism.

The Global Justice Institute partners with LGBTQIA faith-based activists around the world to bring social change.

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The Reconstructionist Rabbinical Association is a 501(c)(3) organization that serves as the professional association of 380 Reconstructionist rabbis, the rabbinic voice of the Reconstructionist movement, and a Reconstructionist Jewish voice in the public sphere. Based on the understanding of Jewish teachings that every human being is created in the divine image, the Reconstructionist Rabbinical Association has long advocated for public policies of inclusion, antidiscrimination, and equality.

Bend the Arc is the nation's leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

This case represents a question of critical importance to *amici* and their members. *Amici* are religious and civil-rights organizations that are united in respecting the distinct roles of religion and government. *Amici* represent diverse faiths and beliefs while sharing a commitment to ensuring that LGBTQ+ people remain free from officially sanctioned discrimination. *Amici* believe that the right to exercise religion freely is fundamental but that it is not a right to cause harm to third parties. *Amici* also recognize and oppose the threat to religious freedom that would result if the U.S. or California Constitutions were understood to require religious exemptions from antidiscrimination laws and counterproductively *enable* religion-based

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discrimination (*e.g.*, denying ordinary services based on a religious objection to interfaith couples).

Amici believe that this brief will assist the Court in resolving the free-exercise arguments in this case. As the brief demonstrates, neither state nor federal free-exercise protections require the exemption from the Unruh Act sought by Tastries.[1] The Unruh Act is a neutral law of general applicability and therefore does not trigger strict scrutiny. And even if strict scrutiny were applicable, the Act would survive that more exacting review. Moreover, the brief explains that religious exemptions from public-accommodations laws like the Unruh Act, far from furthering religious freedom, would put that freedom in jeopardy by sanctioning discrimination against individuals because of their religious beliefs.

No party or counsel for a party in the pending case authored the proposed amicus brief in whole or in part or made any monetary contribution intended to fund its preparation or submission. *See* Cal. Ct. R. 8.200(c)(3).

[1] *Amici* refer to the Respondents—Catharine Miller and Miller's company, Cathy's Creations, a bakery doing business as Tastries—collectively as "Tastries."

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DATED: April 11, 2024

Respectfully submitted,

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This certificate of interested entities or person required by California Rules of Court, rule 8.208 is submitted on behalf of Amici Curiae for Plaintiff/Appellant in the above-listed matter.

The undersigned certifies that there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, rule 8.208.

DATED: April 11, 2024

/s/ Samantha Lachman
SAMANTHA LACHMAN

Counsel for Amici Curiae

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INTRODUCTION

The Unruh Act requires that business establishments serve all people regardless of their sexual orientation. The Act thereby ensures that when LGBTQ+ people seek to buy goods and services on the same terms as everyone else, they do not suffer the stigma and degradation caused by discrimination.

In a nation defined by its religious pluralism, the people's varied beliefs make it inevitable that secular laws will at times offend some people's religious sensibilities. But while religious practices may not be specifically disfavored, there is no Free Exercise Clause violation when a law that regulates conduct for valid secular purposes and in a nondiscriminatory manner incidentally burdens some religious exercise. That is exactly the kind of law that the Unruh Act is.

Despite Tastries's insistence otherwise, exempting businesses from the law so that they may refuse service to LGBTQ+ people based on the businesses' religious views would undermine, not advance, religious freedom.[2] Under Tastries's reading of the Unruh Act, businesses could rely on their religious beliefs to deny service to people of the "wrong" religion (to say nothing of race, or gender, or any other protected characteristic). The upshot is that a ruling in Tastries's favor would hamstring California's ability to ensure that its

[2] *Amici* refer to the Respondents—Catharine Miller and Miller's company, Cathy's Creations, a bakery doing business as Tastries—collectively as "Tastries."

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residents may live as equal members of their community regardless of faith or belief. Put simply, religious and philosophical objections "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 631 (2018).

The trial court was thus emphatically correct in rejecting Tastries's misplaced and misguided federal and state free-exercise arguments, *see* AA02553-54, which Tastries reasserts here, *see* Resp'ts' Br. 49-69. This Court should also reject those arguments.

ARGUMENT

I. Neither state nor federal free-exercise protections require the exemption sought by Tastries.

Religious freedom is a value of the highest order. But the constitutional guarantee of religious freedom is not an entitlement to "general immunity from secular laws." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2060 (2020). Put another way, the Free Exercise Clause is not, and never has been, a free pass to violate the law. And neither federal nor state free-exercise protections compel California to exempt Tastries from the state's prohibition against discrimination in public accommodations on the basis of sexual orientation.

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A. The Unruh Act does not trigger strict scrutiny.[3]

Though government cannot regulate a religious practice because it is religious, *see*, *e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-33 (1993), religion-based disagreement with the law does not excuse noncompliance. "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)). And that would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," from drug laws to traffic laws. *Id.* at 888-89.

The U.S. Supreme Court therefore has held that laws that apply generally and are neutral with respect to religion do not trigger heightened scrutiny, even if they "ha[ve] the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531; *Smith*, 494 U.S. at 878-79. And as the U.S. Supreme Court has decided on these same facts, religious and philosophical

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[3] "To date," the California Supreme Court "has not determined the appropriate standard of review" for a challenge to a neutral, generally applicable law under the state constitution's free exercise clause. *N. Coast Women's Care Med. Grp., Inc. v. Super. Ct.*, 189 P.3d 959, 968 (Cal. 2008). The Court has, however, confirmed that the "appropriate test for free exercise of religion claims under article I, section 4 of the California Constitution" is not "stricter than strict scrutiny." *Id.* at 969. The appropriate standard need not be resolved here because, as detailed below, *see infra* Part I.B, the Unruh Act would survive even strict scrutiny.

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objections "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 631 (2018).

1. The California Supreme Court has already held that the Unruh Act "is a valid and neutral law of general applicability." *N. Coast Women's Care Med. Grp., Inc. v. Super. Ct.*, 189 P.3d 959, 966 (Cal. 2008) (internal quotation marks omitted). Tastries does not even mention *North Coast* in its arguments regarding neutrality and general applicability, nor does it make any argument for why *North Coast*'s First Amendment analysis should not control the decision here. But, as the Superior Court correctly held, AA02553, *North Coast* does control here and should end the neutrality and general applicability analysis.

2. Even setting *North Coast* aside, however, the Unruh Act is neutral and generally applicable.

First, the Unruh Act is neutral. Neutrality means that a law must not "restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. To trigger strict scrutiny, the claimant must show that the government has targeted specific religious conduct or beliefs for maltreatment. *See id.* Discriminatory intent may be apparent on the face of a law, or it may be revealed through the law's practical effects, as when legal requirements have been "gerrymandered with care to proscribe" religious conduct. *See id.* at 533-

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34, 542. But the neutrality requirement is not violated simply because a law affects a claimant's religious exercise.

Far from intentionally "target[ing] religious conduct for distinctive treatment," *id.* at 534, the Unruh Act bars sexual-orientation discrimination "in all business establishments of every kind whatsoever," Cal. Civ. Code § 51(b). A business's motivations for denying service, religious or otherwise, are immaterial under the Act. And Tastries offers no evidence that the Unruh Act was enacted with the intent of discriminating against religion. *See Lukumi*, 508 U.S. at 534.

Failing to show any lack of neutrality, Tastries asserts that legal arguments made by the Department in court filings demonstrate impermissible hostility toward its religion under *Masterpiece*. *See* Resp'ts' Br. 62-63. But the comments in *Masterpiece* were made "by an adjudicatory body deciding a particular case," *Masterpiece Cakeshop*, 584 U.S. at 636, not, as here, by attorneys in court filings as part of the adversarial legal process. Tastries presents no authority for the contention that legal arguments against an opposing party made in the course of litigation could be evidence of hostility, and we are aware of none.

Nor can Tastries point to one whit of evidence of a "difference in treatment" between Tastries and similarly situated nonreligious actors. *See id.* Instead, Tastries argues that the Department's bias is shown by how the Department treated conduct that is not covered by the Unruh Act. For example, Tastries

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alleges that the Department declined to prosecute corporate clients that dropped contracts with the bakery after Tastries discriminated against the Rodriguez-Del Rios. Resp'ts' Br. 64. But it does not violate the Unruh Act for one business to decline to patronize another business because it discriminates against a protected class. *See* Cal. Civ. Code § 51.5(a). Similarly, any harassment experienced by Tastries and its staff cannot serve as evidence of the Department's preferential treatment because the Act prohibits discriminatory conduct by business establishments, not by individuals. *See* Cal. Civ. Code § 51(b).

Second, the Unruh Act is generally applicable. General applicability is the requirement that the "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. Government thus may not burden religious conduct while affording more favorable treatment to nonreligious conduct that is as detrimental to the underlying governmental interests. *See Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam). Nor may the government utilize a "formal system of entirely discretionary" and "individualized" exemptions to favor requests for secular exceptions over religious ones. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 533, 536 (2021) (quoting *Smith*, 494 U.S. at 884).

The Unruh Act does not treat comparable secular activity more favorably than religiously motivated activity. *See Tandon*, 593 U.S. at 62; *Fulton*, 593 U.S. at 534. A "comparable" activity is one that equally conflicts with the

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underlying "government interest that justifies the [law] at issue." *Tandon*, 593 U.S. at 62. The Covid-related public-health law at issue in *Tandon*, for example, was not generally applicable because it severely restricted in-home religious gatherings while exempting nonreligious gatherings that posed greater or equal risks of transmission of Covid. *See id.* at 63. So if the Unruh Act prohibited religiously motivated denials of service but permitted nonreligious denials that equally interfered with the law's purpose of eradicating sexual-orientation discrimination by business establishments, it would not be generally applicable.

But Tastries has failed to identify any comparable secular exemptions from the Unruh Act's prohibition against sexual-orientation discrimination by business establishments. That's because there are none. Instead, Tastries argues that the Unruh Act is not generally applicable because it provides some exemptions for age discrimination in housing. Resp'ts' Br. 60. That is wrong for three reasons.

First, the senior-housing provisions are irrelevant because they are not exemptions from the prohibition at issue in this case—discrimination based on sexual orientation by business establishments. The pertinent question in a free-exercise analysis is whether the *challenged* prohibition is neutral and generally applicable, not whether some *other* prohibition falls short. Thus, for example, the Supreme Court held in *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 700 (1989), that the Free Exercise Clause did not entitle

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a religious group's members to a tax exemption for payments made in exchange for spiritual-training sessions. The Court explained that the tax code contains a general prohibition against tax deductions for money paid to nonprofits in exchange for services. *See id.* at 689-90. It made no difference to the Court that other provisions of the tax code allow taxpayers to deduct charitable contributions to nonprofits when the taxpayer receives nothing in return. *See id.* at 683-84, 689-90, 699-700. For the same reason, it makes no difference here that another provision of the Unruh Act contains an age-discrimination carveout.

Second, even if other kinds of discrimination were relevant, the senior-housing provisions are not exemptions that apply to secular conduct and not religious conduct. They simply establish that businesses that provide housing that is "designed to meet the physical and social needs of senior citizens" are permitted to "establish and preserve that housing for senior citizens." Cal. Civ. Code § 51.2(a). Unlike the Covid restrictions in *Tandon*, 593 U.S. at 63, which disfavored religiously motivated conduct, the senior-housing carveout does not disfavor religion because it allows all businesses that provide housing "designed to meet the physical and social needs of senior citizens" to discriminate based on age, without any consideration whatever of religious or secular justifications.

Third, the senior-housing provisions do not undermine the interests supporting the Unruh Act in the same way that the exemption sought by

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Tastries would. *See id.* at 62. The senior-housing provisions are extremely limited—they apply only to those housing providers whose housing stock meets the definition of senior housing under the Act. *See* Cal. Civ. Code § 51.2(a), (d). By contrast, Tastries seeks an exemption that, if granted, would permit any business to discriminate as long as it provided a religious basis for that discrimination. That kind of sweeping exemption would dramatically undermine the Unruh Act's goal of protecting Californians from the stigma and degradation of being denied equal access to goods and services in the public marketplace.

Tastries also cites the Unruh Act's provision clarifying that it is not meant to supplant or supersede other laws, Cal. Civ. Code § 51(c), as evidence of a secular exemption. Resp'ts' Br. 60-61. But that provision is not an exemption at all—rather, it merely "anticipates that if there is a conflict between [the Act's] provisions and those of another statute, the former defers to the latter." *Lazar v. Hertz Corp.*, 82 Cal. Rptr. 2d 368, 375 (Cal. Ct. App. 1999).

Nor does the Act include a system of individualized, discretionary exemptions. *Cf. Fulton*, 593 U.S. at 536. Tastries argues that the Unruh Act contains individualized exemptions because California courts impose liability only for discrimination that is "arbitrary, invidious or unreasonable." Resp'ts' Br. 58 (quoting *Javorsky v. W. Athletic Clubs, Inc.*, 195 Cal. Rptr. 3d 706, 712 (Cal. Ct. App. 2015)). But the "arbitrary, invidious or unreasonable" language relied on by Tastries is a legal standard—"a qualitative description of the

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intent required to violate the [Unruh Act]," AA02554—not a system of individualized, discretionary exemptions presided over by a government administrator, *cf. Fulton*, 593 U.S. at 533. Tastries provides no support for its contention that a legal standard qualifies as a system of individualized exemptions requiring strict scrutiny.

* * *

California seeks to eradicate discrimination based on sexual orientation in the marketplace by prohibiting all business establishments from engaging in it. Tastries does not plausibly allege that California has singled out for unfavorable treatment those businesses that refuse to serve LGBTQ+ people for religious reasons while allowing others to refuse to serve them for nonreligious reasons. Neither does Tastries plausibly allege that California has in any other respect treated it worse than similarly situated covered entities. Nor does Tastries identify any comparable secular exemptions from the Unruh Act's bar against sexual-orientation discrimination. And there is no religious animus, either on the law's face or in its application. Neither *Masterpiece*, nor *Tandon*, nor *Fulton*, nor any other authority supports application of heightened scrutiny under these circumstances.

Because the Unruh Act is neutral and generally applicable and evinces no disfavor or animus toward any religion, it is subject only to rational-basis review. *See N. Coast*, 189 P.3d at 966 (citing *Smith*, 494 U.S. at 879). And the statute more than satisfies this test—for, as we next explain, it would satisfy

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even strict scrutiny if that were the applicable test under the Free Exercise Clause or its state constitutional counterpart, Cal. Const. art I, § 4.

B. The Unruh Act would survive even strict scrutiny.

1. A statute "can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests." *Fulton*, 593 U.S. at 541 (quoting *Lukumi*, 508 U.S. at 546). The Unruh Act fulfills both requirements.

First, the Unruh Act's prohibition against discrimination by business establishments based on sexual orientation serves a compelling governmental interest by preventing the harms that would result from depriving, among others, LGBTQ+ California residents and visitors of fair and free access to goods and services in the marketplace. The Supreme Court explained in *Roberts v. U.S. Jaycees* that "eliminating discrimination and assuring . . . citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order." 468 U.S. 609, 624 (1984). Similarly, in *Fulton*, the Court recognized that the government's interest in preventing sexual-orientation discrimination "is a weighty one, for '[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.'" 593 U.S. at 542 (quoting *Masterpiece Cakeshop*, 584 U.S. at 631); *see also 303 Creative LLC v.*

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Elenis, 600 U.S. 570, 590-91 (2023).[4] The Unruh Act uniformly ensures that discrimination is not a barrier to LGBTQ+ consumers "acquiring whatever products and services [one] choose[s] on the same terms and conditions as are offered to" everyone else. *Masterpiece Cakeshop*, 584 U.S. at 632. And in doing so, it protects LGBTQ+ people "from a number of serious social and personal harms," including deprivation "of their individual dignity." *Roberts*, 468 U.S. at 625.

Allowing discrimination by public accommodations also inflicts economic harms beyond the standalone discriminatory event. *See* Christy Mallory et al., Williams Inst., *The Impact of Stigma and Discrimination Against LGBT People in Texas* 56-57 (2017), https://bit.ly/3LQWkfE; *see also id.* at 56 (explaining that "state economies benefit from more inclusive legal and social environments"); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53, 257 (1964).

Put simply, "acts of invidious discrimination in the distribution of publicly available goods [and] services . . . cause unique evils," *Roberts*, 468 U.S. at 628, which California has chosen to exorcise.

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[4] To be sure, the Court ultimately concluded in *Fulton* that a city did not have a compelling interest in denying a foster-care agency a religious exemption from an antidiscrimination rule in a city contract because the contract permitted secular exemptions from the same rule on a discretionary basis. *See Fulton*, 593 U.S. at 542. But the Unruh Act does not allow discretionary exemptions from its ban on sexual-orientation discrimination by business establishments. *See supra* Part I.A.

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Second, the Unruh Act is narrowly tailored to achieve California's interest. "[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest[.]" *Tandon*, 593 U.S. at 63; *see also Lukumi*, 508 U.S. at 546. Here, less restrictive measures, like those proposed by Tastries, *see* Resp'ts' Br. 68, would "not be as effective" in achieving the state's objective to eradicate sexual-orientation discrimination, *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). For one, a "tailored exemption," Resp'ts' Br. 68, which would presumably allow businesses to opt out of the Unruh Act's ban on sexual-orientation discrimination so long as they have a religious justification, would put an untold number of people at risk of suffering the harms associated with discrimination based on sexual orientation—the very harms that the Act is meant to prevent.

Moreover, Tastries is wrong that an exemption permitting businesses to refer LGBTQ+ customers to other establishments would still fulfill the goals of the Unruh Act. *See* Resp'ts' Br. 68. Most obviously, there is no guarantee that another establishment to which a customer is referred will not also refuse service. Allowing any business to refuse to serve LGBTQ+ customers raises the distinct possibility that, eventually, there could be nowhere left for those customers to go.

But more importantly, even assuming that there are comparable bakeries elsewhere in California, telling a person suffering the pain and humiliation of discrimination to "just go someplace else" is no remedy for the grave stigmatic

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harms that discrimination inflicts. "Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public[.]" *Heart of Atlanta*, 379 U.S. at 292 (Goldberg, J., concurring). Antidiscrimination laws "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Id.* at 250 (majority opinion) (quoting S. Rep. No. 88-872, at 16-17 (1964)).

That some (or even most) bakeries in California might create the Rodriguez-Del Rios's requested cake would do nothing to alleviate the "serious stigma," *Masterpiece Cakeshop*, 584 U.S. at 634, of living in a community in which businesses can publicly bar their doors to LGBTQ+ people. Were the requested exemption granted, 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, and that they would have no legal recourse if the denials are explained in religious terms.

2. The Constitution does not require the government to impose such grave harms in the name of religious accommodation. Indeed, free-exercise jurisprudence makes clear that while the rights to believe (or not) and to practice one's faith (or not) are sacrosanct, they do not entail a right to impose one's own beliefs on others.

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Even prior to *Smith*, when strict scrutiny was the default test for free-exercise claims, *see Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972), the Supreme Court repeatedly rejected claims for religious exemptions that would have imposed harms or burdens on others. In *United States v. Lee*, for example, the Court rejected an Amish employer's request for an exemption from paying social-security taxes partly because the exemption would have "operate[d] to impose the employer's religious faith on the employees." 455 U.S. 252, 261 (1982). In *Braunfeld v. Brown*, the Court declined to grant an exemption from Sunday-closing laws partly because it would have provided Jewish businesses with "an economic advantage over their competitors who must remain closed on that day." 366 U.S. 599, 608-09 (1961) (plurality opinion). And in *Prince v. Massachusetts*, the Court denied an exemption from child-labor laws that would have allowed minors to distribute religious literature, because parents are not free "to make martyrs of their children." 321 U.S. 158, 170 (1944).

In contrast, the Court recognized a Seventh-Day Adventist's right to an exemption from a restriction on unemployment benefits in *Sherbert* because the exemption would not have "serve[d] to abridge any other person's religious liberties." 374 U.S. at 409. And the Court partially exempted Amish parents from state compulsory-education laws in *Yoder* only after the parents demonstrated the "adequacy of their alternative mode of continuing informal

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vocational education" to meet their children's educational needs. 406 U.S. at 235.

Holding that Tastries is entitled to an exemption from the Unruh Act—despite the profound harms that such an exemption would cause—would thus fly in the face of decades of free-exercise jurisprudence. Tastries does not, and could not, justify such a massive change in the law here.

II. Public-accommodations laws, like the Unruh Act, protect religious freedom.

Although Tastries objects only to the Unruh Act's protections against sexual-orientation discrimination, the drastic revision of free-exercise law that Tastries seeks is much broader. Under Tastries's view of state and federal free-exercise protections, all manner of discrimination would become permissible. After all, antidiscrimination laws "protect[ ] against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). And according to Tastries, anyone could be denied those "almost limitless number of transactions," *id.*, because they are LGBTQ+, Black, have a disability, or have any other protected characteristic, if the proprietor states a religious reason for barring the doors to them. *Cf., e.g.*, *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam) (restaurant owner's refusal to serve Black patrons was based on belief that federal public-accommodations law "contravenes the will of God").

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Tastries justifies this extreme result as furthering religious freedom. But public-accommodations laws like California's advance strong governmental interests in preventing discrimination of all kinds, including *religious* discrimination, thereby ensuring that all people may believe and worship according to their conscience, without fear that they will be denied equal treatment in the public marketplace. *See* Cal. Civ. Code § 51(b) (listing religion as a protected characteristic). The religious freedom of all is therefore threatened, not served, by efforts to misuse the First Amendment and its state constitutional counterparts to license discrimination.

Though all religious groups are at risk of the harms associated with discrimination, religious minorities—who are already more prone to experiencing discrimination—are likely to bear the brunt. These harms are not merely theoretical. The case law shows—and the experiences of *amici* and our members confirm—that religious discrimination occurs with disturbing regularity. In *Paletz v. Adaya*, No. B247184, 2014 WL 7402324 (Cal. Ct. App. Dec. 29, 2014), for example, a hotel owner closed a poolside event after learning that it was hosted by a Jewish group. The hotelier told an employee, "I don't want any [f—ing] Jews in the pool," *id.* at *2 (alteration in original); said that her family would cut off funding to the hotel if they learned of the gathering, *id.* at *4; and directed hotel staff to remove the Jewish guests from the property, *id.* at *2. In *Khedr v. IHOP Restaurants, LLC*, 197 F. Supp. 3d 384 (D. Conn. 2016), a restaurant refused service to a Muslim family because of

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their faith. The father recounted: "The restaurant manager started to look at us up and down with anger, hate, and dirty looks because my wife was wearing a veil, as per our religion of Islam." *Id.* at 385. In front of the family's twelve-year-old child, the manager told his staff "not to serve 'these people' any food." *Id.* And in *Fatihah v. Neal*, the owners of a gun range posted a sign declaring the facility a "MUSLIM FREE ESTABLISHMENT," armed themselves with handguns when a Muslim man wanted to use the range, and accused him of wanting to murder them because "'[his] Sharia law' required" it. *See* Compl. ¶¶ 24, 32, 34, No. 16-cv-58 (E.D. Okla. Feb. 17, 2016), ECF No. 3. Under Tastries's conception of free-exercise protections, the discrimination in these examples would be given legal sanction so long as the businesses had religious justifications for their actions.

And those examples are just the starting point. If Tastries's view were to become the law, the door would be opened to all types of religious discrimination. For example, suppose that a couple had children that, in the opinion of a business owner, should not exist because the parents are of different faiths or were married within a faith that the merchant's religion rejects. Under Tastries's conception of the law, those children could be denied a birthday cake or a cake celebrating a bar or bat mitzvah or a first communion. A restaurant could turn away a Muslim woman who wears a hijab because the owner's religion forbids associating with members of other faiths. And what about a recently widowed Catholic whose Protestant spouse wanted a

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Protestant funeral? A Protestant funeral director could bar the widow from the memorial, leaving her unable to say goodbye in a way that respects her beloved's faith.

If the Free Exercise Clause licenses religion-motivated denials of service to LGBTQ+ customers, as Tastries contends, then it also sanctions all other religion-motivated denials, including exclusions based on a customer's faith. One could be barred entry at a store, thrown out of a hotel, or prevented from purchasing a hamburger just for being of the "wrong" religion. And no state or local authority or law could do anything to remedy the situation. Such a system would devastate religious freedom, not protect it.

CONCLUSION

For these reasons, this Court should reject Tastries's free-exercise arguments under the U.S. and California constitutions.

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CERTIFICATE OF COMPLIANCE

In accordance with California Rules of Court Rule 8.204(c)(1), I certify that this brief:

(i) complies with the type-volume limitation of Rule 8.204(c)(1) because it contains 4,453 words including footnotes and excluding the parts of the brief exempted by Rule 8.204(c)(3); and

(ii) complies with the typeface and type style requirements of Rule 8.74(b) because it has been prepared using Microsoft Word 365 and set in Century Schoolbook font in a size measuring 13 points.

/s/ *Samantha Lachman*

Samantha Lachman

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PROPOSED ORDER

This Court, having read and considered Amici's Application, and good cause appearing therefore, IT IS HEREBY ORDERED that the Application is GRANTED, and the concurrently–lodged Amici Curiae Brief is FILED.

IT IS SO ORDERED.

Dated: ___________________, 2024

____

PRESIDING JUSTICE

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PROOF OF SERVICE

Case No. F085800

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I declare under penalty of perjury under the laws of the State of California that the below is true and correct.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Davis Wright Tremaine LLP, 865 S. Figueroa Street, Suite 2400, Los Angeles, CA 90017.

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