Superior Court of California
County of Kern
Bakersfield Department 11

Date: **02/05/2018** **Time:** **8:00 AM - 5:00 PM**

BCV-17-102855

Courtroom Staff

Honorable: David R. Lampe **Clerk:** Veronica D. Lancaster

Court reporter: None **Bailiff:** . NONE

PARTIES:	CATHY MILLER, Defendant, not present	CHARLES LIMANDRI, Attorney, not present
	CATHY'S CREATIONS, INC. DBA TASTRIES, A CALIFORNIA CORPORATION, Defendant, not present	CHARLES LIMANDRI, Attorney, not present
	DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, AN AGENCY OF THE STATE OF CALIFORNIA, Plaintiff, not present	GREGORY MANN, Attorney, not present
	EILEEN RODRIGUEZ-DEL RIO, Non-Party, not present	
	MIREYA RODRIGUEZ-DEL RIO, Non-Party, not present	

NATURE OF PROCEEDINGS: RULING ON ORDER TO SHOW CAUSE IN RE: PRELIMINARY INJUNCTION; FILED BY PLAINTIFF DEPARTMENT OF FAIR HOUSING; HERETOFORE SUBMITTED ON FEBRAURY 2, 2018

Introduction

The State of California brings this action under the Unruh Civil Rights Act, Civil Code section 51, against defendants Cathy's Creations, Inc. and Cathy Miller. Miller refuses to design and create wedding cakes to be used in the celebration of same sex marriages. She believes that such marriages violate her deeply held religious convictions. The State seeks to enjoin this conduct as unlawfully discriminatory. The State brings the action upon the administrative complaint of a same-sex married couple, complainants Rodriquez-Del Rios.

The State cannot succeed on the facts presented as a matter of law. The right to freedom of speech under the First Amendment outweighs the State's interest in ensuring a freely accessible marketplace.

The right of freedom of thought guaranteed by the First Amendment includes the right to speak, and the right to refrain from speaking. Sometimes the most profound protest is silence.

No public commentator in the marketplace of ideas may be forced by law to publish any opinion with which he disagrees in the name of equal access. No person may be forced by the State to stand and recite the Pledge of Allegiance against her will. The law cannot compel anyone to stand for the National Anthem. No persons may be forced to advertise a state-sponsored slogan on license plates against their religious beliefs.

The State's purpose to ensure an accessible public marketplace free from discrimination is a laudable and necessary public goal. No vendor may refuse to sell their public goods, or services (not fundamentally founded upon speech) based upon their perception of the gender identification of their customer, even upon religious grounds. A retail tire shop may not refuse to sell a tire because the owner does not want to sell tires to same sex couples. There is nothing sacred or expressive about a tire.

No artist, having placed their work for public sale, may refuse to sell for an unlawful discriminatory purpose. No baker may place their wares in a public display case, open their shop, and then refuse to sell because of race, religion, gender, or gender identification.

The difference here is that the cake in question is not yet baked. The State is not petitioning the court to order defendants to sell a cake. The State asks this court to compel Miller to use her talents to design and create a cake she has not yet conceived with the knowledge that her work will be displayed in celebration of a marital union her religion forbids. For this court to force such compliance would do violence to the essentials of Free Speech guaranteed under the First Amendment.

The Unruh Act prohibits discrimination on the basis of religion, as well as sexual orientation. Would this court force a baker who strongly favored GLBT rights to create and design a wedding cake she had refused to a Catholic couple, in her protest of the Catholic Church's proscription against same-sex marriage? The answer is "No." This court has an obligation to protect Free Speech, regardless of whose foot the shoe is on. The court takes judicial notice, not of the content, but of the fact, that before the hearing on this matter there was a gathering in front of the courthouse where both sides of the debate voiced their views. Would this court order one side or the other to be quiet? Such an order would be the stuff of tyranny. Both sides advocate with strong and heartfelt beliefs, and this court has a duty to ensure that all are given the freedom to speak them. The government must remain neutral in the marketplace of ideas.[1]

No matter how the court should rule, one side or the other may be visited with some degree of hurt, insult, and indignity. The court finds that any harm here is equal to either complainants or defendant Miller, one way or the other. If anything, the harm to Miller is the greater harm, because it carries significant economic consequences. When one feels injured, insulted, or angered by the words or expressive conduct of others, the harm is many times self-inflicted. The most effective Free Speech in the family of our nation is when we speak and listen with respect. In any case, the court cannot guarantee that no one will be harmed when the law is enforced. Quite the contrary, when the law is enforced, someone necessarily loses. Nevertheless, the court's duty is to the law. Whenever anyone exercises the right of Free Speech, someone else may be angered or hurt. This is the nature of a free society under our Constitution.

Facts

Complainants Eileen and Mireya Rodriguez-Del Rio met in the late 1990's at Bakersfield College, and

[1] *F.C.C. v. Pacifica Found.* (1978) 438 U.S. 726, 745–46, 98 S. Ct. 3026, 3038, 57 L. Ed. 2d 1073.

built a close and strong friendship before becoming a couple in 2015. They married in December 2016, in a ceremony before their immediate family, and set a date of October 7, 2017, for a vow exchange and traditional wedding reception with over 100 guests. They planned to order a wedding cake for their celebration. After tastings at other bakeries, Eileen and Mireya visited Tastries in August 17, 2017 to see sample wedding cakes. A Tastries employee named Rosemary met with the couple, showed them wedding cakes on display in the bakery, and recorded the details of the cake they wanted. Eileen and Mireya selected a design based on a display cake. The couple did not want or request any written words or messages on the cake. They booked a cake tasting at Tastries for August 26, 2017. On August 26, Mireya, Eileen, and others came to Tastries, where the owner, Cathy Miller, after apologizing, told them that she would provide their order to Gimme Some Sugar—a competitor bakery—because she does not condone same-sex marriage.

On October 18, 2017, Rodriguez-Del Rios filed an administrative complaint with the State, alleging that Defendants violated the Unruh Act by denying them full and equal services on the basis of sexual orientation. On the basis of its preliminary investigation, the State concluded that prompt judicial action was necessary, and this action ensued.

Cathy Miller is a creative designer who owns and operates Cathy's Creations, Inc., doing business as "Tastries," a small bakery in Bakersfield, California. As part of its business, Tastries creates specially designed custom cakes, including wedding cakes.

Miller is a practicing Christian and considers herself a woman of deep faith.

Miller is a creative artist and participates in every part of the custom cake design and creation process.

While Miller offers her services and products generally without discrimination, including her pre-made wares, she will not design or create any custom cake that expresses or celebrates matters that she finds offend her heartfelt religious principles. Thus, she refuses to create or design wedding cakes for same-sex marriage celebrations, because of her belief that such unions violate a Biblical command that marriage is only between a man and a woman.

Miller has entered into an agreement to refer same-sex couples to a competitor, Gimme Some Sugar, based upon her understanding that the owner of that bakery does not have any prohibitory policies.

Miller does not deny that she refused to design and create a custom wedding cake for Rodriguez-Del Rio.

Analysis

The right of freedom of thought protected by the First Amendment includes both the right to speak freely and the right to remain mute. (*Wooley v. Maynard* (1977) 430 U.S. 705, 714, 97 S. Ct. 1428, 1435, 51 L. Ed. 2d 752.) The relevant principles are well presented in the Court's *Wooley* decision.

In ruling that no child may be compelled by the educational system to perform the flag salute under

threat of state discipline, the Court held that such a ceremony so touched upon matters of opinion and political attitude that it could not be imposed under our Constitution, finding that "[t]o enforce those rights today is ... to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." (*W. Virginia State Bd. of Educ. v. Barnette* (1943) 319 U.S. 624, 636, 637, 63 S. Ct. 1178, 1184, 1185, 87 L. Ed. 1628.)

In the case of *Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730, the Court held a Florida statute unconstitutional which placed an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized. The Court concluded that such a requirement deprived a newspaper of the fundamental right to decide what to print or omit. (See also *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California* (1986) 475 U.S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 1.)

In *Wooley*, the Court held that the State of New Hampshire could not compel residents to display the state motto "Live Free or Die" upon their vehicle license plates against their religious principles.

This case falls well within the reach of the Supreme Court's "compelled speech" doctrine. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557 (1995), establishes that generally applicable public-accommodation laws violate the Free Speech Clause when applied to compel speech. In *Hurley*, the Supreme Court, by Justice Souter, held that a state courts' application of public accommodation law to essentially require defendants to alter the expressive content of their parade by permitting a group of participants to march behind a GLBT banner violated the First Amendment.

The State here makes two arguments against the application of the "compelled speech" doctrine. The State argues that Unruh Act enforcement here does not compel speech, but only conduct—the baking and selling of a cake, citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* (*FAIR*) (2006) 547 U.S. 47. The State also argues that this is not a compelled speech case because such case are limited to those occasions where government requires a speaker to disseminate another's message and here the State is not compelling any particular design, also principally citing *FAIR*, *Wooley*, and *Tornillo*. The State takes a far too narrow view of both the case law and the circumstances to satisfy constitutional scrutiny. The State does ask the court to limit Miller's design, because the State acknowledges that she cannot create any element of the design that would disparage same-sex marriage, because that design element would be unacceptable to Rodriguez-Del Rios. *FAIR* recognized, in considering *Wooley* and *Tornillo*, that when a speaker is engaged in expression, and the government allows or compels that another may co-opt it, it necessarily affects the speaker's expression. (547 U.S. at 63-64.) *FAIR* is also distinguishable because the law schools in that case did not speak when they hosted interviews and held recruiting receptions. (Id. at 64.)

A wedding cake is not just a cake in a Free Speech analysis. It is an artistic expression by the person making it that is to be used traditionally as a centerpiece in the celebration of a marriage. There could not be a greater form of expressive conduct. Here, Rodriguez-Del Rios plan to engage in speech. They plan a celebration to declare the validity of their marital union and their enduring love for one another. The State asks this court to compel Miller against her will and religion to allow her artistic expression in celebration of marriage to be co-opted to promote the message desired by same-sex marital partners,

and with which Miller disagrees.

Identifying the interests here as implicating First Amendment protections does not end the inquiry. The court must also determine whether the State's countervailing interest is sufficiently compelling to justify the intrusion into a protected right.

The State principally cites *United States v. O'Brien* (1968) 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672, for the proposition that the State's interest in compelling a marketplace free from discrimination outweighs Miller's First Amendment Free Speech interests. In *O'Brien*, the Supreme Court, by Chief Justice Warren, held that because of the government's substantial interest in assuring the continuing availability of issued selective service certificates, because the statute punishing knowing destruction or mutilation of such certificates was an appropriately narrow means of protecting such interest, and condemned only the independent non-communicative impact of conduct within its reach, and because the non-communicative impact of defendant's act of burning his registration certificate frustrated the government's interest, a sufficient governmental interest was shown to justify defendant's conviction, as against defendant's claim that his act was protected "symbolic speech."

Here, Miller is not burning her business license or refusing to display it to protest government regulation of the small bakery industry. She is not refusing to post any government requirement to display the caloric content of her pastries. (See *Beeman v. Anthem Prescription Mgmt., LLC* (2013) 58 Cal. 4th 329, 356.) The application of the Unruh Act in these circumstances requires "strict scrutiny" by the court. Under strict scrutiny, a law cannot be applied in a manner that substantially burdens a constitutional right unless the State shows that the law represents the least restrictive means of achieving a compelling interest. (*N. Coast Women's Care Med. Grp. Inc. v. San Diego Cty. Superior Court* (2008) 44 Cal. 4th 1145, 1158.)

The State cannot meet the test that its interest outweighs the Free Speech right at issue in this particular case, or that the law is being applied by the least restrictive means. The court cannot retreat from protecting the Free Speech right implicated in this case based upon the specter of factual scenarios not before it. Small-minded bigots will find no recourse in committing discriminatory acts, expecting to be sheltered from Unruh Act prohibitions by a false cry of Free Speech. No court evaluates Free Speech rights against the interest of the State in enforcing public access laws in a vacuum, without regard to circumstances, history, culture, social norms, and the application of common sense. Here, Miller's desire to express through her wedding cakes that marriage is a sacramental commitment between a man and a woman that should be celebrated, while she will not express the same sentiment toward same-sex unions, is not trivial, arbitrary, nonsensical, or outrageous. Miller is expressing a belief that is part of the orthodox doctrines of all three world Abrahamic religions, if not also part of the orthodox beliefs of Hinduism and major sects of Buddhism. That Miller's expression of her beliefs is entitled to protection is affirmed in the opinion of Justice Kennedy in *Obergefell v. Hodges* (2015) 135 S. Ct. 2584, 192 L. Ed. 2d 609 wherein the Court established that same-sex marriages are entitled to Equal Protection. Therein, the Court noted: "[f]inally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family

structure they have long revered." (*Id* at 2607.)

Furthermore, here the State minimizes the fact that Miller has provided for an alternative means for potential customers to receive the product they desire through the services of another talented baker who does not share Miller's belief. Miller is not the only wedding cake creator in Bakersfield.

The fact that Rodriguez-Del Rios feel they will suffer indignity from Miller's choice is not sufficient to deny constitutional protection. *Hurley* established that the State's interest in eliminating dignitary harms is not compelling where, as here, the cause of the harm is another person's decision not to engage in expression. The Court there recognized that "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are . . . hurtful." (*Hurley*, *supra*, 515 U.S. at 574.) An interest in preventing dignitary harms thus is not a compelling basis for infringing free speech. (See *Texas v. Johnson* (1989) 491 U.S. 397, 409; see also *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S. 46, 56.)

The defendants' argument that the case implicates the Free Exercise of Religion Clause is less clear. In light of the court's discussion above, the court does not reach the question of Free Exercise. In addressing the constitutional protection for free exercise of religion, a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. To determine the object of a law, the court begins with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. The Free Exercise Clause extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality." Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520,533- 534, 113 S. Ct. 2217, 2227, 124 L. Ed. 2d 472.)

It is difficult to say what standard of scrutiny the court should use to evaluate the application of the Free Exercise clause to the circumstances of this case after *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which largely repudiated the method of analyzing free-exercise claims that had been used in cases like *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and which resulted in Congress passing the Religious Freedom Restoration Act of 1993. (See *Burwell v. Hobby Lobby Stores, Inc.* (2014)134 S. Ct. 2751, 2760, 189 L. Ed. 2d 675.)

The Unruh Act is neutral on its face and does not per se constitute a direct restraint upon religion. In fact, by its terms, the Unruh Act itself protects religious discrimination in the marketplace. By its term it does not constitute an indirect restraint. There is also no evidence before the court that the State is targeting Christian bakers for Unruh Act enforcement under these circumstances. Designing and creating a cake, even a wedding cake, may not in and of itself constitute a religious practice under the Free Exercise clause. It is the use that Miller's design effort will be put to that causes her to object. Whether the application of the Unruh Act in these circumstances violates the Free Exercise clause is an open question, and the court does not address it because the case is sufficiently resolved upon Free Speech grounds.

Conclusion

For the reasons stated above, the application for preliminary injunction is denied. The State cannot succeed upon the merits, and the balance of hardships does not favor the State.

Ruling Upon Objections

The court rules as follows upon the evidentiary objections presented.

Defendant's Objections:

The court sustains objections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, and 18. The court overrules all other objections.

State's Objections:

The court sustains objections 8, 13, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 35, 36, 42, 43, and 44. The court overrules all other objections.

Moving party shall prepare and order after hearing consistent with this ruling and pursuant to California Rules of Court, Rule 3.1312.

Copy of minute order mailed to all parties as stated on the attached certificate of mailing.

MINUTE ORDER FINALIZED BY: VERONICA LANCASTER *ON:* FEBRUARY 05, 2018

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING VS CATHY'S CREATIONS, INC.
BCV-17-102855

CERTIFICATE OF MAILING

The undersigned, of said Kern County, certify: That I am a Deputy Clerk of the Superior Court of the State of California, in and for the County of Kern, that I am a citizen of the United States, over 18 years of age, I reside in or am employed in the County of Kern, and not a party to the within action, that I served the ***Minute Order dated February 05, 2018*** attached hereto on all interested parties and any respective counsel of record in the within action by depositing true copies thereof, enclosed in a sealed envelope(s) with postage fully prepaid and placed for collection and mailing on this date, following standard Court practices, in the United States mail at Bakersfield California addressed as indicated on the attached mailing list.

Date of Mailing: February 05, 2018

Place of Mailing: Bakersfield, CA

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

Terry McNally
CLERK OF THE SUPERIOR COURT

Date: February 05, 2018

By: _____
Veronica Lancaster, Deputy Clerk

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