

No. 25-233

In the Supreme Court of the United States

CATHARINE MILLER AND CATHY'S CREATIONS, INC.,
Petitioners,

v.

CIVIL RIGHTS DEPARTMENT,
Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FIFTH APPELLATE DISTRICT*

REPLY BRIEF FOR PETITIONERS

CHARLES S. LIMANDRI
PAUL M. JONNA
JEFFREY M. TRISSELL
LIMANDRI & JONNA LLP
P.O. Box 9120
Rancho Santa Fe, CA 92067

PETER BREEN
THOMAS MORE SOCIETY
309 W. Washington St.
Suite 1240
Chicago, IL 60606

ERIC C. RASSBACH
Counsel of Record
DANIEL H. BLOMBERG
ADÈLE A. KEIM
DANIEL L. CHEN
ANDREA R. BUTLER
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1919 Pennsylvania Ave.,
NW, Suite 400
Washington, D.C. 20006
(202) 955-0095
erassbach@becketfund.org

Counsel for Petitioners

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REPLY

To avoid this Court's review, California now abandons the facts and distorts state law.

On the facts, California oddly relies on what the Court of Appeal "held" about the cake in question rather than the detailed facts found by the trial court after a five-day bench trial. Indeed, California fails to cite the trial court record even once. And on the law, California relies not on the decision below—the Court of Appeal's amended opinion—but on an erroneous statement of California public accommodations law in the Court of Appeal's *original* opinion, which that court itself corrected after a petition for rehearing.

California further fails to rebut Petitioners' account of the splits, even conceding the split with respect to the Free Exercise question presented. As explained in the petition, there is a 3-3 split over whether individuals can be compelled to expressively participate in a ceremony they religiously object to, and a 7-4 split over the general applicability standard under *Fulton*. Pet.20-27; Pet.28-37. California has no response; it knocks down strawmen instead.

California has aggressively prosecuted Cathy Miller for eight years, all because *Employment Division v. Smith* empowers it to do so. This Court should grant the petition, reverse the decision below, and overrule *Smith*.

ARGUMENT

I. The Court should resolve the split over compelled expressive participation.

Petitioners have explained the entrenched, square 3-3 split over whether religious objectors can lawfully

be compelled to participate in a ceremony they religiously disagree with. Pet.20-27. California’s counter-arguments fail.

1. California “reimagines the facts of this case from top to bottom.” *303 Creative v. Elenis*, 600 U.S. 570, 597 (2023). Tellingly, its brief cites *no* testimony from the five-day bench trial. And it doesn’t include any facts found by the Superior Court based on that trial. See App.114a-122a, 143a-145a. Instead, California claims the Court of Appeal “held” that the requested cake was “a predesigned, plain white cake without any writing or adornments, regularly prepared and sold for several different occasions.” BIO.7.

That reveals California’s hand. The Court of Appeal claimed to conduct an “independent review” of the record, App.5a, disregarding the Superior Court’s explicit findings that “*all* of Miller’s wedding cake designs are intended as an expression of support for the sacrament of ‘marriage,’” that each cake is “labor intensive, artistic and require[s] skill to create,” and that the Rodriguez-Del Rios came to Tastries to “buy a *custom* wedding cake for their upcoming ceremony.” App.144a, 119a (emphasis added). Ignoring all this, the court below tried to make this a different case altogether—one about a “predesigned, plain white cake,” BIO.7—to allow it to reach the result it wants. See Manhattan Institute Br.10.

That error was not just factual, but legal. Appellate courts “make an independent examination of the whole record” only to ensure “that the judgment does not constitute a forbidden intrusion on the field of free expression.” *Bose Corp. v. Consumers Union*, 466 U.S. 485, 508 (1984). Put differently, independent review

should *protect* free expression, not stifle it. This doctrine exists precisely to curtail attempts by state courts to deny disfavored groups' First Amendment rights "in substance and effect" through creative fact-finding. *Norris v. Alabama*, 294 U.S. 587, 590 (1935); see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964); States Br.6 (courts' "subjective characterizations and arbitrary determinations about artistic merit and expressive value" under-protect First Amendment rights).

But even were the court below acting properly, the "simple fact is that First Amendment questions of constitutional fact compel *this* Court's de novo review." *Bose*, 466 U.S. at 508 n.27 (cleaned up) (emphasis added). And the evidence here is unequivocal: Every wedding cake Miller creates is custom, and Tastries takes every couple through a thorough design consultation explaining the religious meaning and significance of the wedding cakes she creates. Pet.7-11. Indeed, the incident here arose during just such a design consultation, where Miller planned to discuss the nuanced details of the custom cake, from the artistic design to the flavors to the dietary constraints. Pet.12-14. The couple testified that the cake they ultimately had at their wedding was "a three-layer cake" where the top layer was "real" for use in the cake cutting ceremony, while "the other two layers were * * * Styrofoam." App.372a. The evidence thus shows that the cake here, though simple, was to be a custom-designed and custom-made symbol to celebrate a same-sex wedding. A plain gold wedding band is no less powerful a symbol for being simple.

In short, this Court should not allow states and state courts to evade its review by re-fashioning facts to match their preferred result.

2. California next says the identified split is “illusory.” BIO.10. But it can do so only by erecting wooden distinctions between “pure speech” and “expressive conduct” that are wholly absent from *303 Creative*, this Court’s latest word on the subject. 600 U.S. at 587, 599, 600 (using both “speech” and “expressive activity”).

California dismisses *Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019), and *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019), as irrelevant because they involved “pure speech.” BIO.11. But in *Telescope*, the Eighth Circuit didn’t limit itself to that distinction, explaining that while videography “requires several actions that, individually, might be mere conduct,” “what matters” is that the finished product is a “medi[um] for the communication of ideas.” 936 F.3d at 752. The court concluded the videography merited First Amendment protection *without* considering whether a third party would understand a message of endorsement.

And while the court in *Brush & Nib* used the phrase “pure speech,” its analysis was similarly expansive: it held that the First Amendment could not abide a rule that “only protects messages that ‘endorse’ or ‘support’ same-sex weddings but not messages celebrating such weddings.” 448 P.3d at 912. This rule, which is not limited to pure speech, protected the designers from being compelled to lend their calligraphy “to express a celebratory message about [a] wedding” to which they had religious objections. *Id.* at 908. Miller’s creation of custom cakes easily fits

within this understanding, meaning the decision below directly conflicts with the Arizona Supreme Court.

California’s account of *Emilee Carpenter, LLC v. James*, 107 F.4th 92 (2d Cir. 2024), is likewise distorted. Despite acknowledging that the court “held that the plaintiff had plausibly alleged a free speech claim,” California asserts “the Second Circuit did not conduct *any* analysis of the free speech claim.” BIO.12. Apart from the blatant contradiction between those two statements, California ignores the relevant point: the Second Circuit set specific parameters the district court “must consider” on remand—none of which involved third-party perception of endorsement. See *Emilee Carpenter*, 107 F.4th at 106-107.

As for *Washington v. Arlene’s Flowers, Inc.*, California concedes that the Washington Supreme Court relied on what an “outside observer” would perceive in its First Amendment analysis, BIO.12-13, but doesn’t mention that the same paragraph evaluates whether “providing flowers for a wedding between Muslims would * * * constitute an endorsement of Islam” or whether “providing flowers for an atheist couple endorse[s] atheism.” 441 P.3d 1203, 1226 (Wash. 2019). And while California asserts that *Elane Photography LLC v. Willock*’s “analysis would necessarily be different” following *303 Creative*, BIO.13, it nowhere disputes that the Court of Appeal grafted the same endorsement requirement into its own analysis. See Pet.22-23. And there’s ample reason to believe that state courts will follow California’s lead in preserving this and other hair-splitting distinctions to find that religious objectors are not protected. Pet.38-39.

Indeed, California *never* distinguishes longstanding protections against compelled expressive participation in ceremonies. See Pet.25-26. It cites *Barnette* only in passing and offers no answer to *amici*'s charge that California is using public accommodations law to censor disfavored religious views. See First Amendment Scholars Br.4-5, 12-13.

3. Should the Court be disinclined to grant plenary review on the Free Speech question, this Court should summarily reverse. If California is right that *303 Creative* “already offered” the guidance needed to resolve this case, BIO.13, the Court of Appeal erred egregiously in applying it. As the trial court found, Miller’s creations are “original, customized’ creation[s]” that use “symbols” to “celebrate and promote” her understanding of marriage, and are therefore squarely within the scope of First Amendment protection. 600 U.S. at 587; App.119a, 144a. See also Pet.26-27.

The Court of Appeal awkwardly attempted to circumvent *303 Creative*, claiming that Miller’s custom cakes employ no “symbols or any other modes of expression.” App.64a. But this ignores that wedding cakes *themselves* are deeply symbolic within a ceremony of religious significance. Pet.27. The Court of Appeal’s mangling of *303 Creative*, which ought to control this case, is reason enough to summarily reverse.

II. The Court should resolve the split over the general applicability standard.

As the petition explains, there is an entrenched 7-4 split among the lower courts over whether the general applicability analysis looks to any comparable discretion or exemptions, or whether those invoking the

Free Exercise Clause must also show that the discretion was *unfettered* or the allowed exemptions are *identical* to the exemptions denied to religious people. Pet.28-37. In response, California whistles past the graveyard, claiming there are no exemptions and thus the Unruh Act is generally applicable. California is wrong.

1. California tries to distinguish away the Unruh Act’s many exemptions by saying that those are only available for *unenumerated* protected characteristics while “[d]iscrimination on the basis of an *enumerated* characteristic” is “per se” unlawful. BIO.1. (emphasis added). Not so. California made this argument below, and the court below accepted it—at first. But it is demonstrably wrong as a matter of California law. And after Petitioners raised that point, the Court of Appeal recognized its error and amended its opinion to take the opposite position. See *Civil Rts. Dep’t v. Cathy’s Creations, Inc.*, 108 Cal. App. 5th 869 (Cal. Ct. App. 2025), available at <https://www4.courts.ca.gov/opinions/archive/F085800.PDF> (prior opinion); App.101a-106a (order modifying opinion); App.2a-App.100a (modified opinion).

In its amended opinion, the court below said it was “*not* suggesting the lawfulness of a policy drawing a facial distinction based on a protected characteristic is assessed under a different or less stringent standard because it is unenumerated.” App.19a n.4 (emphasis added). California’s contrary argument is thus based on a mistaken legal premise.

The lower court also acknowledged that “facial” discrimination based on an “enumerated protected characteristic” has only “[g]enerally” been found un-

lawful. App.18a. And it admitted that Petitioners’ “decisional authority” showing exemptions were only “nearly” all from cases about “unenumerated characteristics.” App.45a.

“Generally” and “nearly” forfeit the game. While the outcome of specific cases may vary based on their facts, the “listing of possible bases of discrimination” in the Unruh Act “has no legal effect, but is merely illustrative,” and the “arbitrary discrimination” standard applies to *all* protected categories, enumerated and unenumerated alike. *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115, 123 (Cal. 1982). Thus in each case, courts must consider whether the distinction being made is “arbitrary” or “reasonable.” *Id.* at 128. This kind of flexible legal standard makes the Unruh Act not generally applicable under *Sherbert* and *Fulton*, and strict scrutiny should apply. Pet.34-35.

California caselaw on this point could not be clearer. In *Koire v. Metro Car Wash*, 707 P.2d 195 (Cal. 1985)—a leading Unruh Act case cited twenty times by the court below but not once in the BIO—the California Supreme Court applied the “arbitrary discrimination” standard to the enumerated category of sex. First, *Koire* considered whether offering discounts to women patrons was “arbitrary”—assessing the businesses’ reasons for giving the discounts, and rejecting each of them in turn. *Id.* at 197-203. Next, *Koire* considered whether there was any other “compelling social policy” to support “sex-based price differentials,” and concluded there was none. *Id.* at 203-204. Finally, *Koire* acknowledged that, in a future case, a different kind of sex-based distinction might survive. *Id.* at 203. (“[t]here may also be instances where public policy warrants differential treatment for men and women

* * * such as * * * public restrooms[.]”). As these exceptions demonstrate, *Koire* is entirely irreconcilable with California’s claim that the Unruh Act is generally applicable. See also *Angelucci v. Century Supper Club*, 158 P.3d 718, 726 (Cal. 2007) (citing *Koire* for proposition that “there might be public policies warranting differential treatment of male and female patrons under some circumstances,” despite Unruh Act’s ban on sex discrimination).

Given this longstanding caselaw, it is unsurprising that the court below revised its opinion to reject California’s claimed categorical distinction between enumerated and unenumerated grounds of discrimination. App.102a-104a. The only surprise is the lengths to which California has gone to persuade this Court that the Court of Appeal held otherwise. Compare BIO.1 (citing amended opinion at App.18a for claim that “[f]or purposes of *unenumerated* characteristics, courts consider whether the differential treatment at issue is ‘arbitrary, invidious, or unreasonable,’” but “[f]or *enumerated* characteristics * * * courts do not undertake any such inquiry”), with App.19a n.4 (amended opinion clarifying that unenumerated protected characteristics are not “assessed under a different or less stringent standard” than enumerated ones).¹

¹ California also appears to have altered quotations from the Court of Appeal in a way that changes their meaning. Compare App.18a (amended opinion stating “Generally, policies that make a facial distinction based on an enumerated protected characteristic have been held to be unlawful”), with BIO.15

Because the Unruh Act requires courts to evaluate, in every instance, whether a distinction based on a protected classification is “unreasonable, arbitrary or invidious,” it is not generally applicable and must pass strict scrutiny, which it cannot do. Pet.34-35.

2. On the merits, California does not contest Miller’s split, agreeing that it exists. BIO.15-17. Like the court below, California waves away the Unruh Act’s categorical exemptions for certain kinds of age discrimination because “they have nothing to do with discrimination based on sexual orientation.” BIO.16; see also *id.* (citing *Emilee Carpenter*, 107 F.4th at 110-111 for this point). And like the court below, California dismisses the Unruh Act’s categorical exemption for conflicts with other laws because Miller has pointed to “no *California* law that permits disparate treatment on the basis of sexual orientation.” BIO.16 (quoting App.91a) (emphasis added); compare *303 Creative v. Elenis*, 6 F.4th 1160, 1186 (10th Cir. 2021), reversed on other grounds, 600 U.S. 570 (2023) (demanding evidence that the state had exempted other instances of sexual-orientation discrimination).

(quoting App.18a as saying “[P]olicies that make a facial distinction based on an enumerated protected characteristic’ are categorically ‘unlawful’”) (brackets in BIO); compare also App.84a (amended opinion stating “Specifically, defendants point to a variety of cases that recognize certain judicially acknowledged public policy exceptions related to protected characteristics not expressly enumerated in the statute.”), with BIO.15 (characterizing App.84a as saying “a court considers reasonableness, public policy objectives, or arbitrariness only with respect to differential treatment based on characteristics ‘not expressly enumerated in the statute,’ such as age or parental status”) (emphasis added in BIO).

Rather than engaging Miller’s arguments, California punts. It refers the Court to BIOs filed by other states, in other cases, in a footnote. BIO.17 & n.3. It says there is “no need to consider [Miller’s] asserted conflict,” BIO.17, since the Court of Appeal “held as a matter of state law that there *are no* exemptions to the Unruh Civil Rights Act’s prohibition on sexual orientation.” BIO.14. But this conclusory assertion mischaracterizes both the Court of Appeal’s decision (*supra* 7-9), and the text of the Unruh Act itself. Pet.34-37. And in any event, this Court has never regarded itself as bound by “state court opinion[s]” that “adopt[] novel reasoning to stifle the ‘vindication in state courts of * * * federal constitutional rights.’” *Moore v. Harper*, 600 U.S. 1, 35 (2023) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958)). “Given the conflict between the Free Exercise Clause and the application” of the Unruh Act here, the court below “should have disregarded” the Unruh Act and “decided this case conformably to the Constitution of the United States.” *Espinoza v. Montana Dep’t of Revenue*, 591 U.S. 464, 488 (2020) (cleaned up).

In the end, California essentially admits the category-of-one split Petitioners identified. BIO.15-16; Pet.28. The Tenth Circuit has newly deepened this split, holding that a nondiscrimination law with exceptions for income-level and disability but not religion is generally applicable because the allowed discrimination “is not the same” as “discrimination based on sexual orientation and gender identity.” *St. Mary Catholic Parish v. Roy*, 154 F.4th 752, 773 (10th Cir. 2025) (cert. pet. to be filed Nov. 13, 2025).

3. California’s contortions also show why the Court should grant review on the third question presented.

As a precedent, *Smith* constantly invites legerdemain by lower courts and governmental defendants seeking to evade this Court's review. That's because *Smith*'s operative language is so manipulable, and because *Smith*'s focus is not on the religious exercise to be protected, but on the qualities of the law burdening that religious exercise.

If the Court of Appeal can get away with calling this exception-riddled law generally applicable, then almost every law would count as unassailable under the Free Exercise Clause, and religious defendants like Miller will be left without means to defend themselves.

That outcome is unacceptable. Miller has endured eight years of prosecution, suffering both intense harassment from others that California ought to stop and California's own scorn for her religious practices. See *Seventh-day Adventists* Br.12-20. If lower courts think the First Amendment allows states to mistreat religious dissenters in this way, it's past time for this Court to intervene.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

CHARLES S. LIMANDRI
PAUL M. JONNA
JEFFREY M. TRISSELL
LIMANDRI & JONNA LLP
P.O. Box 9120
Rancho Santa Fe, CA 92067

PETER BREEN
THOMAS MORE SOCIETY
309 W. Washington St.
Suite 1250
Chicago, IL 60606

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