SUPREME COURT OF ARIZONA

BRUSH & NIB STUDIO LC, et al., Plaintiffs/Appellants/ Cross-Appellees, v. CITY OF PHOENIX, Defendant/Appellee/ Cross-Appellant.	Arizona Supreme Court No. CV-18-0176-PR Court of Appeals Division One No. 1 CA-CV 16-0602 Maricopa County Superior Court No. CV2016-052251

CITY OF PHOENIX'S RESPONSE TO AMICUS BRIEFS

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INTRODUCTION

This brief responds to the amicus briefs filed by (the "amici"):

- The C12 Group, LLC ("C12")
- The Cato Institute et al. ("Cato")
- The Center for Religious Expression
- Certain Arizona Legislators ("Legislators")
- The Ethics & Religious Liberty Commission of the Southern Baptist Convention et al. ("Ethics & Religious Liberty Commission")
- Law & Economics Scholars
- The National Center for Law & Policy ("National Center")
- Professor Adam J. MacLeod
- The State of Arizona et al. ("States")
- Tyndale House Publishers et al. ("Tyndale House")

ARGUMENT*

I. Amici do not explain how Brush & Nib can prevail on its facial challenge.

Brush & Nib's challenge does not arise from an actual request for services for a same-sex couple. Instead, Brush & Nib challenges the ordinance prospectively, to prohibit Phoenix from applying it if anyone ever asks Brush & Nib to create any kind of custom wedding product (whatever that term means) for any same-sex couple with any words or designs (or

* Citations to APP### refer to the Appendix attached to Phoenix's Response to the Petition for Review.

none at all). That is a facial challenge of amorphous scope. Amici ignore this fact and the problems it creates.

All of the amici follow this pattern, perhaps best illustrated by the opening line of Tyndale House's argument section (at 3): "The City of Phoenix has passed a local ordinance which seeks to force the speech of its citizens about certain topics." The ordinance does not seek that at all, and the amici cannot point to any time when Phoenix ever enforced the ordinance in that manner, even though the ordinance has existed in some form for more than 50 years. This entire case, like all of the examples the amici use, is completely hypothetical. But in a facial challenge, courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 450 (2008).

The amici also unintentionally illustrate the difficulties of a facial challenge in a fact-bound domain. Brush & Nib and its amici argue that Brush & Nib has a right to refuse to make any custom wedding goods for any same-sex couple. But the Legislators also argue (at 14) that "the meaning of words changes with context." Yet they expect the Court to rule without any context. Surely the context changes between place cards (which have as

few as four words, including a table number) and an elaborate invitation, or between a menu merely listing food items versus a product with religious overtones.

In light of these uncertainties, the Court should rule that the ordinance has at least some constitutional applications within the scope of Brush & Nib's requested relief. That is sufficient to affirm; the Court need not go further. Whether the ordinance can validly be applied to this or that exotic hypothetical is a question the Court may safely save for the day when that exotic species arrives on its doorstep (if that day ever comes).

II. The ordinance does not infringe the freedom of speech.

A. Businesses that speak are not immune from generally applicable regulations that incidentally affect speech.

Many amici spend pages and pages making points that Phoenix has never disputed. For example, many amici argue that Brush & Nib engages in protected speech. Phoenix does not contest that calligraphy and painting warrant constitutional protection. But that misses the true issue in the case, which is whether the ordinance implicates the freedom of speech, e.g., by altering a message in a constitutionally significant way. Determining

whether a business engages in protected speech is the beginning of the inquiry, not the end.

For example, many amici (e.g., C12 at 17) use newspapers as examples of protected speech. The government of course may not require newspapers to print someone else's substantive message. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 243, 258 (1974). But newspapers must still follow antidiscrimination laws, even if that affects the paper's content—after all, the government may forbid printing discriminatory advertisements even though that unquestionably alters the words on the page. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 384-88 (1973).

The principle that speech-based businesses have no blanket immunity from regulation has particular importance in today's information economy, when everyone from computer programmers to advertisers and business consultants principally engage in some form of protected speech. Thus, even though this Court held that "the business of tattooing is constitutionally protected," it nevertheless explained "[t]hat . . . does not mean, of course, that the business of tattooing is shielded from governmental regulation. . . . [G]enerally applicable laws, such as taxes, health regulations, or nuisance

ordinances, may apply to tattooing businesses." *See Coleman v. City of Mesa*, 230 Ariz. 352, 360, ¶ 31 (2012).

B. Properly interpreted, the ordinance is a generally applicable regulation of conduct that, at most, incidentally affects speech.

The ordinance provides that a public accommodation may not refuse service "because of . . . sexual orientation." Phoenix City Code § 18-4(B)(2). This is a general regulation of conduct. It requires only that Brush & Nib "perform the same services for a same-sex couple as it would for an opposite-sex couple." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 66, ¶ 35 (N.M. 2013); *see also* Amicus Brief of Professor Adam J. MacLeod at 4 (acknowledging that customers and licensees have a "common-law right of ancient origin" to "be excluded only for a valid reason related to the purpose of the license"), 17 (acknowledging that Phoenix's ordinance merely "extends the licensee's rights by adding a few prohibited reasons for action").

The ordinance does not affect Brush & Nib's artistic freedoms. Consider the invitation that Brush & Nib made for Kathryn and Joseph. (APP116.) They were getting married at a waterfront venue; the "main color theme" of the wedding was blue; and the bride "really liked artistic kind of

abstract looking pieces." (APP171, line 23 to APP 172, line 3.) So, Brush & Nib painted a "very abstract dark blue background bearing shades of blue [that] kind of mimics the water in the ocean a little bit." (APP172, lines 7 to 9.) As Brush & Nib concluded, with evident satisfaction, "all together it really expresses the style of [the bride's] event." (APP172, lines 11-12.)

The ordinance simply means that Brush & Nib could not refuse to sell a similar invitation to Kathryn and Josephina. This does not require Brush & Nib to go through a fundamentally different design process. As the Kathryn and Joseph invitation illustrates, and the other invitations in the record confirm, Brush & Nib's designs are based on factors—such as the wedding's venue and color scheme and the couple's aesthetic preferences—that have nothing to do with the couple's sexual orientation. (APP116; APP119; APP122; APP171, line 23 to APP 172, line 12.) Nor do Brush & Nib's invitations necessarily include any religious overtones or words about the couple purporting to be from Brush & Nib.

The only incidental effect on Brush & Nib's speech is that it will have to write two names of the same gender. Brush & Nib does not want to do that because it does not think same-sex couples should marry. It is entitled to that view and to speak freely about that view. But *Rumsfeld v. Forum for*

Academic & Institutional Rights, Inc., 547 U.S. 47 (2006), teaches that requiring a party to write a name on an invitation, as an incidental effect of an otherwise-valid equal-access policy, does not offend the freedom of speech, even if the organization does not want to be associated with the activities of the named persons. *Id.* at 62.

The Center for Religious Expression points out (at 5) that context matters, and that "*Trump* for President" sends a different message than "*Hillary* for President." That's true, but not every name-based substitution necessarily changes the message in a *constitutionally relevant* way, or else the law schools would have prevailed in *Rumsfeld*. Drafting and distributing "The U.S. Army recruiter will meet interested students in Room 123 at 11 a.m." is not far from telling guests that Natalie and Beth will marry at the Four Seasons on April 28, even if you oppose either the Army's policies or Natalie and Beth's marriage.

It may be difficult in some cases to distinguish between message-based discrimination and status-based discrimination. But those potentially tough questions necessarily would turn on their unique facts, which make them poor candidates for resolving on a pre-enforcement challenge. Moreover, the ordinance prohibits discrimination based on certain enumerated

characteristics, not message. Consequently, determining that a particular refusal was based on message rather than status would simply mean that the ordinance does not apply; it should not render the ordinance unconstitutional.

C. The ordinance does not require Brush & Nib to convey any message or provide any particular good or service.

Many amici point out that people who oppose same-sex marriage should not be forced to write messages celebrating, promoting, praising, or endorsing same-sex marriage. But *Rumsfeld* teaches that courts must look at the particular textual alteration in context. For example, a print shop could legitimately refuse to make a "Black Lives Matter" banner without violating the ordinance's prohibition on race-based discrimination, just like a wedding invitation company could refuse to print "Marriage equality for all" on an invitation. But if the print shop would print a birth announcement for a white baby, then it would have no constitutional right to refuse to print a birth announcement for a black baby, even though that would require changing a name, and even if the print shop thought that the announcement conveyed the message that black lives mattered. If the only difference in the

announcement is whether the baby is white or black, then the refusal is race-based, not message based.

Likewise for wedding invitations, where the message in a wedding invitation for "Pat and Pat" does not change in a constitutionally significant way if the Pats are the same or different genders. People may sincerely believe that the Pats' *marriages* are categorically different, but the invitations are not. This principle also applies to all of the other custom products Brush & Nib wants to avoid making, such as a guest's place card for "Anne / Table 3" that does not even have the engaged couple's name on it.

These examples show why this case is different from the compelled-speech cases the amici cite, which held that the government cannot require:

- Students to salute the flag and recite the Pledge of Allegiance. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).
- Drivers to have "Live Free or Die" on their license plates. *Wooley v. Maynard*, 430 U.S. 705, 707, 717 (1977).
- Newspapers to give political candidates equal space to reply to critics. *Tornillo*, 418 U.S. at 243, 258.
- A utility to include a public interest group's pamphlet in quarterly mailings to customers. *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 4, 20-21 (1986).

In contrast to the "Live Free or Die" and Pledge of Allegiance requirements at issue in *Wooley* and *Barnette*, § 18-4(B) does not require

Brush & Nib to carry a government-selected message. That explains why many of amici's analogies—including Cato's analogy (at 4) to requiring a Christian to tattoo Satanist symbols—do not apply.

The ordinance is also unlike the right-to-reply law in *Tornillo* and the pamphlet law in *Pacific Gas* because the ordinance does not limit a company's ability to refuse to include certain messages in its products. That explains the problem with several of the amici's other analogies. For example, the Ethics & Religious Liberty Commission analogizes (at 4) to forcing "a Muslim grocer to serve pork" or "a Jewish website designer to develop a website for pornography." But the ordinance does not require grocers to stock any product a customer requests, or website designers to design any type of website a client demands, just as it does not require Brush & Nib to write or paint any phrase or image its customers want. The ordinance simply requires that if the Muslim grocer sells bread, he cannot refuse to sell bread to Jews; if the Jewish website designer makes websites for grocers, he cannot refuse to make them for Muslim grocers; and if

Brush & Nib makes waterfront-themed wedding invitations for opposite-sex couples, it cannot refuse to make them for same-sex couples.[1]

Similarly, contrary to the C12 group's suggestion (at 18), the ordinance would not require a Jewish choreographer "to stage a dramatic Easter performance." The ordinance does not require artists to choreograph Easter performances on demand, just as it does not require them to choreograph the Nutcracker or West Side Story. All it requires is that if Ballet Arizona stages an Easter performance, it cannot bar non-Christians at the door.

Using Cato's tattoo analogy (at 4), if a tattoo artist would willingly tattoo a butterfly on a white customer, she has no constitutional right to refuse to tattoo the same butterfly on an African American customer. But

[1] Cato argues (at 20) that public accommodation laws cannot apply to artists like Brush & Nib because the freedom of speech does not "allow rules providing that, when people voluntarily choose to create some art, they must then create other art at the state's command." The ordinance doesn't do that. Creating art does not trigger an obligation to produce more art. Phoenix's briefs rely on past invitations because those are the only things in the record and they serve as a useful shorthand in this pre-enforcement challenge that lacks any other facts. As a technical matter, if Brush & Nib made a waterfront-themed invitation for one couple, it would not have to make a waterfront-themed invitation for anyone else. But Brush & Nib cannot refuse to make a same-sex couple's (or interracial couple's) wedding invitation if Brush & Nib would be willing to make the invitation had an opposite-sex (or white) couple requested the same one.

the ordinance does not require a tattoo artist to tattoo any particular words or symbols; she could legitimately refuse to tattoo symbols such as  or  .

Likewise, the ordinance does not require Brush & Nib to write any endorsement of same-sex marriage, nor does it require Brush & Nib to write any message requested by a customer. The company can legitimately refuse to write "Marriage Equality," can refuse to include a quote from *Obergefell*, and can refuse to draw the  symbol. The ordinance merely requires that if Brush & Nib will make a waterfront-themed invitation for a white Catholic, then it cannot refuse to make one for an Asian Lutheran.[2] For these reasons, the Center for Religious Expression is simply wrong when it claims (at 7) that the ordinance would require Brush & Nib to "generate words praising a same-sex union."

Brush & Nib and its amici claim that merely by preparing wedding invitations for same-sex couples, Brush & Nib would send the implicit message that it supports same-sex marriage. But a wedding invitation for a

[2] Cato also analogizes (at 10) to "Matlack, the calligrapher behind the Declaration of Independence." The ordinance would not compel Matlack "to transcribe royal proclamations condemning the colonists as traitors." It would merely prohibit Matlack from refusing to write a new copy of the Declaration to sell to a woman if he would willingly sell one to a man.

same-sex couple does not communicate that the calligrapher approves of same-sex marriage, just as a wedding invitation for a Hindu couple (which Brush & Nib will create) does not communicate that the calligrapher approves of Hindu theology or Hindu teachings about marriage. (APP229, lines 20 to 22.); *see Elane Photography*, 309 P.3d at 69, ¶ 47 ("Reasonable observers are unlikely to interpret Elane Photography's photographs as an endorsement of the photographed events."); *Gifford v. McCarthy*, 137 A.D.3d 30, 42 (N.Y. App. Div. 2016) ("[R]easonable observers would not perceive the Giffords' provision of a venue and services for a same-sex wedding ceremony as an endorsement of same-sex marriage.").

Moreover, the implicit-message argument proves too much. It would mean that any business, whether creative or not, could refuse service to any undesirables because serving them would implicitly communicate that they were equals. That is not the law, nor should it be.

Furthermore, Brush & Nib and the amici's protestations about message are belied by the fact that Brush & Nib will refuse to make any custom wedding product for a same-sex couple, regardless of what the product says. Brush & Nib will even refuse to make wedding items such as place cards, menus, and maps that make no mention of the couple and send

no message, explicit or implicit, about their marriage. That suggests that Brush & Nib's real objection is not about messages—implied or otherwise—but about complicity, which is about conduct, not speech.

D. The ordinance does not require Brush & Nib to express that same-sex unions are marriages as it understands that term.

Some amici, including the States (at 10), offer a variant on this "implicit message" objection: that the ordinance forces Brush & Nib to "express[] the message that particular unions are marriages, despite their sincerely held religious beliefs that such unions are *not* marriages." But in our pluralistic society, a wedding invitation does not communicate that the couple is getting married according to the vendor's understanding of that term; it communicates that the couple is getting married according to the couple's understanding of that term. For example, a Jewish wedding calligrapher who makes an invitation for a Christian couple is not vouching that the couple is having a valid Jewish wedding. A Mormon calligrapher writing an atheist couple's invitation does not put that marriage on equal footing with a proper Mormon marriage, whether under the eyes of God or otherwise. Nor does Brush & Nib vouch for *any* of its clients' marriages.

Consider the common scenario of a destination wedding. An Arizona couple plans to invite family and friends to their "wedding" in Costa Rica, officiated by an unordained friend. Unsure whether the Costa Rican marriage would be valid in America, the couple also plans an informal and anticlimactic courthouse "wedding" in Phoenix (officiated by an Arizona judge) upon return from Costa Rica. By designing an invitation for the destination wedding, the stationer and calligrapher do not communicate that the Costa Rican "wedding" is valid under the laws of God or man.

E. The creative process not does not give Brush & Nib a constitutional right to refuse service.

Both Cato (at 10) and the Legislators (at 11) invoke the phrase "artistic energy." But "artistic energy" is not speech. Brush & Nib may not want to spend its energy serving same-sex couples, but that does not make the ordinance a compulsion of speech. And although the Legislators praise the "freedom of mind," they cite no authority suggesting that a business can refuse to serve a customer because it does not like the mental process that it will have to go through to provide adequate service.

Nor do the amici explain how courts could cabin such a rule. After all, a caterer may not want to spend his "artistic energy" catering a graduation

party for a black student and may want the "freedom of mind" to pick a different customer. But the free-speech clause does not protect those desires, whether for "creative" businesses or otherwise. Selecting the menu to fit the occasion and spending an entire day preparing the beautiful and delicious spread may be onerous if the caterer objects to the customer, but that does not give the caterer a constitutional right to reject the business.

The Legislators claim (at 13) that Brush & Nib has a right to refuse service to same-sex couples because otherwise it would have to "join with all the others at the wedding, by giving a creative artistic message of celebration." Other amici offer similar examples involving participation in the wedding ceremony itself. But Brush & Nib does not join the guests at the wedding or offer a communal blessing. Nor does the invitation have to indicate that Brush & Nib is celebrating the wedding at hand. (None of those in the record do. *See* APP116; APP119; APP122.) After all, Brush & Nib may hardly know the couple.

F. The differences between the text of the U.S. and Arizona Constitutions do not change the result.

The National Center improperly tries to transform this case by arguing that the Court should set aside the federal caselaw on which the parties have

relied, and instead focus on the text of Arizona's constitutional provisions. This argument fails for two reasons.

First, Brush & Nib waived this argument. Although Brush & Nib asserted Arizona constitutional claims, it never explained "how, in this case, our analysis under Arizona's free speech clause would differ from our analysis under federal free speech jurisprudence." Op. ¶ 23. And "[m]erely referring to the Arizona Constitution without developing an argument is insufficient." *State v. Jean*, 243 Ariz. 331, 342, ¶ 39 (2018). Amici cannot undo this waiver because this Court decides cases "solely on legal issues advanced by the parties themselves." *Ruiz v. Hull*, 191 Ariz. 441, 446, ¶ 15 (1998).

Second, although the National Center asserts that the Arizona Constitution provides greater speech protection than the U.S. Constitution, it does not explain how the different wording affects the analysis *in this case*. Here, the central question is whether § 18-4 (B) regulates conduct or speech. Nothing in Art. II, § 6 suggests a different answer than the First Amendment. That is because neither Art. II, § 6 nor the First Amendment provides any guidance on what types of regulations implicate their protections. *See* Ariz. Const. Art. II, § 6 ("Every person may freely speak, write, and publish on all

subjects . . . ."); U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

The National Center also urges the Court to take a textual approach to Ariz. Const. Art. XX, ¶ 1, which requires "[p]erfect toleration of religious sentiment." But although Brush & Nib advanced an Art. XX, ¶ 1 claim below, Brush & Nib's Petition did not assert that as an issue for this Court's review. Neither did its Supplemental Brief. As an amicus, the National Center cannot resuscitate this abandoned argument. *See Ruiz*, 191 Ariz. at 446, ¶ 15; ARCAP 23(d)(1) (petition must present the issues "that the petitioner is presenting for Supreme Court review.").[3] Moreover, this Court has confirmed that under the Arizona Constitution, "[*b*]*eliefs* are absolutely protected, whereas *practices* are not absolutely protected." *In re Cochise Cty. Juvenile Action No. 5666-J*, 133 Ariz. 157, 163 (1982) (emphases added; citation omitted).

[3] Other amici likewise reference constitutional provisions that Brush & Nib did not assert in the Petition. The States cite (at 3, 15, 18-19) Art. XX, ¶ 1 and Art. II, § 12, and the Law & Economics Scholars cite (at 7, 8, 10) the Fourteenth Amendment and the freedom of association, even though none of those provisions are at issue in the Petition.

G. The free-speech clause does not incorporate economic theory.

The Law & Economics Scholars insist that antidiscrimination laws are economically inefficient. Although economic efficiency may be good public policy, it is not constitutionally required under the free-speech clause. Many economists oppose all sorts of market interventions, including import tariffs, insider-trading laws, and antitrust laws. Even broad economic consensus, however, does not render those policies unconstitutional. Arizona's Constitution has not yet incorporated all of Milton Friedman's ideas.

Moreover, the arguments the Law & Economics Scholars advance simply are not the law in Arizona or elsewhere. Their arguments on discrimination would apply with equal force to other types of discrimination, such as gender-based employment discrimination or race-based public accommodation discrimination. Yet laws prohibiting those forms of discrimination have repeatedly survived constitutional challenges.

The Law & Economics Scholars also argue that markets work best when businesses have the freedom to choose their customers. But "[t]he Constitution does not guarantee a right to choose . . . customers. . . ." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring).

III. The ordinance does not violate the Free Exercise of Religion Act.

Our laws have long sought to balance protection for religiously motivated conduct with the requirements of civil government. *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145, 167 (1878) (rejecting free-exercise challenge to polygamy conviction). If courts create religious exemptions for everything, then "every citizen" would become "a law unto himself." *Id.* As this Court recognized last year, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Hopi Tribe v. Ariz. Snowbowl Resort Ltd. P'ship*, 245 Ariz. 397, ___, 430 P.3d 362, 367, ¶ 20 (2018) (citation omitted).

Arizona's framework for resolving this age-old question is the Free Exercise of Religion Act, A.R.S. § 41-1493.01 ("FERA"). The ordinance complies with FERA because it does not substantially burden Brush & Nib's exercise of religion, and even if it did, it is the least restrictive means of furthering the compelling government interest of eliminating discrimination in the public marketplace. *See* Phoenix's Response to Petition for Review, Reasons § II; Phoenix's Supplemental Brief, Argument § III. Amici's arguments do not change that.

A. The ordinance does not substantially burden Brush & Nib's exercise of religion.

The States note (at 14-15) that FERA defines the "exercise of religion" broadly, as "the ability to act or refusal to act in a manner substantially motivated by a religious belief." A.R.S. § 41-1493(2). But nothing in the record indicates that Brush & Nib's religion has anything to say about wedding invitations or about providing goods and services for an event in which the religious person could not herself participate. Thus, Brush & Nib has not met its burden to establish that its ability to exercise its religion would be substantially burdened by making place cards or drafting a waterfront-themed invitation for a same-sex couple's wedding. *See State v. Hardesty*, 222 Ariz. 363, 366, ¶ 10 (2009) (stating that the party raising a claim or defense under FERA has the burden to make such a showing).

Several amici suggest that a law triggers FERA if it provides for jail time or a significant fine. Not so; the Court must necessarily evaluate the importance of the religious exercise at issue. FERA looks to whether the "infraction[]" (i.e., the burden on the religious exercise) is substantial (or "trivial"), not whether the *penalty* is significant. A.R.S. § 41-1493.01(E). Otherwise a trivial fine on an important religious practice (e.g., a 50¢/person

fine on administering Holy Communion) would pass muster under FERA. Conversely, a substantial penalty on an inessential religious practice (e.g., harsh criminal penalties on cannabis use) would violate FERA. For these reasons, courts look to the importance of the religious practice before considering the severity of the penalties. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (concluding that the contraceptive "mandate demands that [plaintiffs] engage in conduct that *seriously violates* their religious beliefs" before turning to the penalties (emphasis added)); *Oklevueha Native Am. Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012, 1016-17 (9th Cir. 2016) (ruling that federal drug laws with criminal penalties did not impose a substantial burden on defendants' religious practice because cannabis was not essential to the religious practice).

The Ethics & Religious Liberty Commission emphasizes that religion teaches people how to conduct themselves in their everyday lives, including in their business dealings. Of course that is true. But it does not mean that the ordinance substantially burdens Brush & Nib's religion.

In fact, the prevalence of religious teachings related to the commercial marketplace shows why courts must be careful before concluding that a commercial regulation substantially burdens a person's religion. The

Ethics & Religious Liberty Commission notes (at 10) that "[t]he Catholic Church offers specific directives for how believers should act in the market with respect to advertising, fair wages, employee ownership of companies, and workplace hours." (Citations omitted). But no one suggests that any governmental regulation of "advertising, fair wages, employee ownership of companies, and workplace hours" has to pass FERA's strict scrutiny test before being applied to a Catholic company. *See Hopi*, 430 P.3d at 368, ¶ 20 ("[T]he judiciary 'cannot . . . reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.'") (citation omitted).

The Ethics & Religious Liberty Commission also notes (at 19) that numerous religious leaders have called for "respectful public witness supporting the historic understanding of marriage." But the ordinance does not prevent Brush & Nib, or anyone else, from engaging in such witness. Brush & Nib is free to announce its belief that marriage is between a man and a woman while following the law of the city in which it works.

B. Any burden here is justified.

Even if a law imposes a substantial burden on the exercise of religion, the government can sustain the law by showing that it is "[t]he least restrictive means of furthering [a] compelling government interest." A.R.S. § 41-1493.01(C)(2). The ordinance easily meets this test. Courts have repeatedly held that "public accommodations laws 'plainly serv[e] compelling state interests of the highest order,'" *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (citation omitted), and typically "abridge[] no more speech or associational freedom than is necessary to accomplish that purpose," *U.S. Jaycees*, 468 U.S. at 629 (1984). Amici do not and cannot refute these principles.

Without acknowledging this authority, the Law & Economics Scholars argue (at 8-14) that, absent monopoly or de jure segregation, market forces will make discrimination unusual and antidiscrimination laws unnecessary. That is a nice theory, but reality has shown it not to be true. Minorities of all sorts historically have been excluded from places of public accommodation without the presence of any monopoly or legal requirement of segregation. Moreover, even if efficient markets might solve the problem in the long run,

the government need not wait to protect its citizens against discrimination. It may accelerate the transition by law.

Moreover, the Law & Economics Scholars suggest that as long as a person who suffers discrimination eventually finds a willing seller, no meaningful harm has been done. But as the U.S. Supreme Court recognized five decades ago, the "fundamental object" of public accommodation laws is to prevent the "deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (citation omitted). This object is not accomplished by a "go elsewhere" approach of sending customers on a search for a non-discriminatory vendor. Op. ¶ 50. "Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

If amici are suggesting that public accommodation laws could be justified only in those locales where alternatives are unavailable to particular protected classes, this would result in an unworkable standard. Businesses would have to keep tabs on the discriminatory practices of their competitors with respect to each protected class. Minorities of all sorts would have to revive something like *The Negro Motorist Green Book*. And governments and

courts would have to determine, for each town and neighborhood, whether insufficient service existed to justify requiring equal treatment. No court has adopted this approach, and for good reason.

The Legislators argue (at 17) that, because Phoenix allows "bona fide religious organizations" to discriminate on the basis of sexual orientation, *see* Phoenix City Code § 18-4(B)(4)(a), it could extend this exemption to religious business owners. Phoenix could allow more discrimination, but it is not obligated to do so. Exempting religious businesses would be a major exemption that would substantially undermine the goal of "eliminating" discrimination, *Rotary*, 481 U.S. at 549, and the government is not required "to carve out a patchwork of exceptions for ostensibly justified discrimination." *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543, 566, ¶ 77 (Wash. 2017), *cert. granted, judgment vacated*, 138 S. Ct. 2671 (2018). Indeed, the Legislators cite no case adopting this standard.

The States suggest (at 18-20) that the liberty of conscience provision of the Arizona Constitution protects the right to discriminate because discrimination is not "licentiousness" and does not endanger "peace and safety." *See* Ariz. Const. Art. II, § 12 ("The liberty of conscience secured by the provisions of this constitution shall not be so construed as to excuse acts

of licentiousness, or justify practices inconsistent with the peace and safety of the state."). Brush & Nib waived this argument by failing to include it in the Petition. (*See* Argument § II.F.) Moreover, the argument gets Art. II, § 12 backwards. The clause "provides limitations on the liberty of conscience protected by the Arizona Constitution by defining what it does not protect." *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 278, ¶ 49 (App. 2011). It does not *expand* the liberty of conscience by providing that it protects *everything else*. Tellingly, the States cite no case granting a religious exemption based on Art. II, § 12.

The States' argument also proves too much. If it were right, then nearly every law regulating commerce would be subject to a religious exemption and the commercial marketplace would cease being a predictable space of uniform rules. Moreover, if Art. II, § 12 provided religious exemptions to all laws not related to licentiousness or peace and safety, there would have been little need for the legislature to enact FERA.

IV. None of the amici confront what Brush & Nib's position would mean for race-based discrimination.

The amici do not dispute that a wedding vendor has no constitutional right to refuse to make an invitation merely because it announces an interracial couple's wedding, even if, to use the States' wording (at 10), the vendor has "sincerely held religious beliefs that such unions are *not* marriages." In fact, Arizona and all but one of the other states signing the States' brief have public-accommodations laws that are essentially identical to Phoenix's when it comes to race.[4] Presumably the States would defend their laws against constitutional attack when applied to race.

But for free-speech purposes, the analysis for race is no different than the analysis for sexual orientation. For someone who opposes interracial marriage, an invitation for the wedding of Jack (black) and Jill (white) is just as disturbing as the wedding of Pat (male) and Pat (male) to someone who opposes same-sex marriage. And for free-speech purposes, it does not matter whether the opposition to interracial marriage is motivated by religion or something else. The free-speech clause, after all, protects

[4] A.R.S. § 41-1442; Ark. Code § 16-123-107; Ky. Rev. Stat. § 344.120; La. Rev. Stat. § 51:2247; Neb. Rev. Stat. § 20-134; Okla. Stat. tit. 25, § 1402; W. Va. Code § 5-11-9(6).

abhorrent ideas just as much as it protects views held "in good faith by reasonable and sincere people" or views "based on decent and honorable religious or philosophical premises." *Obergefell*, 135 S. Ct. at 2594, 2602. Similarly, FERA protects unpopular religions just as much as it protects mainstream religions.[5]

There is simply no limiting principle to the argument that Brush & Nib should be able to refuse custom wedding invitations for same-sex couples. Brush & Nib's arguments would equally support allowing discrimination based on race and gender, and in a wide variety of other domains. This Court should reject the invitation to undo a half-century of progress merely because Brush & Nib does not want to write the names of two people of the same gender.

[5] Moreover, not long ago many Americans believed the Bible prohibited interracial marriage. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting trial judge who wrote in 1959, "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.").

CONCLUSION

Brush & Nib seeks a blank check allowing it to refuse service to same-sex couples based on a legal theory that no court has credited and that would wreak havoc on longstanding principles of antidiscrimination law. The Court should decline that invitation. The judgment should be affirmed.

RESPECTFULLY SUBMITTED this 11th day of January, 2019.

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