SUPREME COURT OF ARIZONA

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

BRIEF OF CENTER FOR RELIGIOUS EXPRESSION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REVIEW

WRITTEN CONSENT OF PARTIES OBTAINED

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus Curiae Center for Religious Expression ("CRE") is a national non-profit legal organization based in Memphis, Tennessee. Its mission is to defend religious expression and conscience of people of faith so they can speak and act in accordance with their sincerely-held beliefs. CRE represents such individuals in federal and state courts all over the country, including Arizona, in securing these fundamental liberties. The *amicus* is interested in this particular case before the Court due to its firm conviction that citizens should never be forced to write, speak, or otherwise express messages they cannot in good conscience support.

INTRODUCTION

Freedom of expression "includes…the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Yet, the City of Phoenix ("Phoenix") intrudes on this fundamental guarantee, commanding artistic entrepreneurs Joanna Duka and Breanna Koski (hereinafter "Joanna and Breanna")[1] to write, draw, and paint messages violative of their conscience. (Def./Appellee's Court of Appeals Answering Brief ["COA Answering Br."], pp. 36-37, 52-53; Def./Appellee's Response to Petition for Review [Petition Resp.], pp. 19-21). According to Phoenix and the Court of Appeals, Joanna and Breanna must forfeit their freedom as the going price for doing business. (COA Answering

[1] Because briefing identify Appellants by their first names, *amicus* adopts the same reference to avoid any possible confusion.

Br., p. 53). *Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426, 438 (Ct. App. 2018). And this Court must consider whether the asking price is too high.

The appeal follows *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a U.S. Supreme Court decision concerning a cake artist named Jack Phillips and whether he could be forced to create custom wedding cakes designed to celebrate same-sex marriages. 138 S.Ct. 1719, 1724 (2018). Like Joanna and Breanna, Mr. Phillips gladly sells his pastry creations to anyone regardless of status, but he declines to promote events with his art that conflict with his religious beliefs, a position running afoul of the state's antidiscrimination law. *Id.* The Supreme Court ultimately ruled that the pervasive hostility shown by the Colorado Civil Rights Commission toward Mr. Phillips' religious beliefs in adjudicating his case violated Mr. Phillips' free exercise of religion. *Id.* at 1732. Evading the free speech issue altogether, the Supreme Court left open the question of whether bakery items without text are sufficiently communicative to render them protected speech. *Id.* at 1723-24, 1732.

Here, the expressive nature of the products – employing words – is not in doubt. Part of the collaborative process with their customers, Joanna and Breanna craft and publish words in their materials. And, since the existence of – and protection afforded to – this form of expression is well-settled, so is the right to avoid communication of it. Accompanying the right to speak freely is the equally

important right to remain silent. Phoenix cannot compel Joanna and Breanna to create artwork conveying messages or words they do not wish to say.[2] Contrary to how the appellate court views the issue, such laws do not transform pure speech into conduct undeserving of protection. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572-73 (1995) (held application of antidiscrimination law regulated speech, not conduct). Antidiscrimination laws cannot compel written messaging without violating the First Amendment.[3]

ARGUMENT

I. Selection and Writing of Words Constitutes Pure Speech and Can Not be Rightly Compelled

The selection and writing of words is pure speech, entitled to the highest level of constitutional shielding. *Bigelow v. Virginia*, 421 U.S. 809, 817 (1975). And, where "[t]he only 'conduct' which the State [seeks] to punish is the fact of communication [or refusal to do so]," the restriction necessarily targets pure speech. *Cohen v. California*, 403 U.S. 15, 18 (1971). *See Bartnicki v. Vopper*, 532 U.S. 514, 526-27 & n. 11 (2001) (holding that statute restricted "pure speech" where "what gave rise to statutory liability in this suit was the information communicated"). That the expression is conveyed on merchandise for sale does

[2] This case does not implicate any potential exception to this rule since the disclosure of accurate consumer product information is not at issue. *See Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (upholding regulation requiring businesses to disclose the country of origin of their products).

[3] *See infra*, sec. III.

not diminish its expressive nature. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

Phoenix wants to control pure speech by applying its antidiscrimination ordinance to the creative, expressive activity of Joanna and Breanna. As Phoenix confirms in this litigation, Joanna and Breanna are obliged to author and design a specific message celebrating and promoting same-sex marriage using the same words and messages they author and design to celebrate and promote opposite-sex marriage. (COA Answering Br., pp. 36-37; Petition Resp., pp. 19-21). Thus, if Joanna and Breanna have written that God has joined together and blessed an opposite-sex couple, they are forced to write the same for opposite-sex couples upon request – despite disagreeing with the sentiment. (COA Answering Br., pp. 52-53).[4] Upholding this compulsion, the Court of Appeals conceived that pure speech – written words – downgrades to mere "conduct" exempt from free speech principles whenever the restriction's purpose is to curb conduct. *Brush & Nib Studio*, 418 P.3d at 437-38.

However, Supreme Court precedent requires consideration of a law's impact on speech, not necessarily the platitude behind it. In *West Virginia State Bd. of Educ. v. Barnette*, the Supreme Court held unconstitutional an attempt to compel

[4] These undisputed facts demonstrate that the Court of Appeals' description that this case is "not a First Amendment challenge to a specific message," *Brush & Nib Studio*, 418 P.3d at 438, is utterly contrary to the record.

schoolchildren to recite words of the Pledge of Allegiance with their own voices. 319 U.S. 624, 628-29, 642 (1943). That the law punished this nonconformity as "insubordination" did not transform the pure speech involved into conduct of a child that could validly be compelled. *Id.* at 631. Correspondingly, in *Wooley v. Maynard*, New Hampshire's attempt to force an individual to bear the words "Live Free or Die" on a license plate attached to his vehicle unconstitutionally compelled pure speech, not the conduct of displaying a license plate without obstruction. 430 U.S. 705, 707, 714-17 (1977). The Court of Appeals' circular reasoning cannot be reconciled with these cases.

Nor can the Court of Appeals' decision be squared with *Hurley*, where Supreme Court held antidiscrimination law infringed on speech, not conduct, though the ordinance's purpose was to prevent the conduct of discriminating. 515 U.S. at 572-73. The same is true here: Phoenix makes it painfully clear that Joanna and Breanna are required to write and paint the same words promoting same-sex weddings as they would to promote opposite-sex weddings. (COA Answering Br., pp. 36-37, 52-53; Petition Resp., pp. 19-21). The rationale behind the ordinance does not determine whether words are pure speech; they simply are. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 339, 345 (1995) (regulation with the purpose of identifying the source of written materials regulated "pure speech" by compelling words disclosing their source). The Court of Appeals' logic threatens

to eliminate the compelled speech doctrine altogether, since laws necessarily have the purpose of regulating "conduct." *Cf. Hurley*, 515 U.S. at 578 (antidiscrimination law's purpose to prevent conduct of "denial of access" and "discriminatory treatment" nonetheless unjustifiably compelled speech).

The Court of Appeals likewise jettisoned binding constitutional precedent in holding Joanna's and Breanna's art cannot qualify as speech because it is produced via for-profit business. *Brush & Nib Studio*, 418 P.3d at 438; *cf. Simon & Schuster*, 502 U.S. at 116 (sale of book produced for-profit was speech). Straining to avoid the pure speech depiction, the Court of Appeals denigrated Joanna's and Breanna's activities as mere operation of a "stationary store," the "primary purpose" of which it judged to be "to engage in commercial sales activity." *Brush & Nib Studio*, 418 P.3d at 437-439, 441. Under this skewed analysis, the Court of Appeals concluded that "creating design-to-order wedding announcements, invitations, and the like is not inherently expressive." *Id.* at 439. But the dubious nature of this conclusion is self-evident. All announcements are inherently expressive: announcing is expressing. And the process of designing and creating the words of the announcement is part and parcel of that expression. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010) ("[T]he processes of writing words down on paper [and] painting a picture are purely expressive activities…").

Working conjointly with their clients to select and design words and messages they can support, Joanna and Breanna properly invoke full protection under the First Amendment. (Pl./Appellants' Court of Appeals Opening Brief ["COA Opening Br."], pp. 7-10, 13). Though their clients provide input in framing the commission and approve the finished product for disbursement, Joanna and Breana exercise editorial discretion in selecting which words to write and which messages to promote. (COA Opening Br., pp. 9-10, 13-14). The First Amendment places such decisions beyond government oversight and control. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). *See also Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 675 (1998) (acknowledging that exercise of editorial discretion itself constitutes "speech activity"). Since Joanna and Breanna retain legal ownership of the artistic message, they retain artistic discretion on how to best convey that message. (COA Opening Br., pp. 13-14). *See Anderson*, 621 F.3d at 1062 (tattoo artists retain artistic discretion despite collaborating with the customer regarding the design). This process entails "esthetic and moral judgments about art," which judgments are "for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011). Joanna's and Breanna's hands are not "a passive receptacle or conduit" for reproducing

messages on behalf of the State or anyone else. *Tornillo*, 418 U.S. at 258.[5] They utilize intimately personal resources to write, draw, and paint messages that fit their own esthetic and moral judgments. The speech is and remains theirs.

II. Antidiscrimination Law Cannot Justify Compulsion of Pure Speech

Antidiscrimination laws do not necessarily transgress into the free speech realm when they focus on "the act of discriminating against individuals," and not speech. *Hurley*, 515 U.S. at 572. But where the government applies antidiscrimination laws to punish private citizens for refusing to promote objectionable messages, First Amendment rights are at play.

Hurley is instructive. In that case, a parade organizer excluded the Irish-American Gay, Lesbian, and Bisexual Group of Boston ("GLIB"), a group seeking to "express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals," from marching in its parade. *Id.* The parade organizer did not exclude by virtue of sexual orientation, allowing anyone to participate. *Id.* Still, Massachusetts equated refusal to include and promote GLIB's message with illegal discrimination based on GLIB's members' status. *Id.* at 562. Recognizing that

[5] Joanna and Breana are not selling blank cardstock for others to put messages on them. (*See* COA Opening Br., p. 50). Consequently, the issue is not, as Phoenix postures, refusal to sell based on "how the *customer* will use the products" (Petition Resp., p. 29, emphasis in original), but refusal to handwrite and paint words and messages they oppose. Indeed, Joanna and Breanna willingly sell pre-made items regardless of how the customer will use them and regardless of the customer's status (Petition for Review, p. 4), because such sale does not conscript them to create a message they find objectionable.

this "peculiar" interpretation "essentially require[ed] petitioners to alter the expressive content of their parade," the Supreme Court unanimously held that the forced inclusion violated the First Amendment. *Id.* at 572-73.

In the same vein, Joanna and Breanna do not consider the sexual orientation of their clients when determining whether to create a product for them; they are happy to sell all their products to anyone. (COA Opening Br., pp. 7-8, 55). What they decline to do is write and paint words that promote objectionable causes, including a same-sex wedding – regardless of the client's sexual orientation or status. (COA Opening Br., pp. 7-8, 55). Joanna and Breanna have a First Amendment right "not to propound a particular point of view," maintaining the autonomy to decide what events "merit[] celebration," for this choice "lie[s] beyond the government's power to control." *Hurley*, 515 U.S. at 574-75. To be sure, the pure speech at issue here – handwriting and painting words promoting events and causes – prompts even greater protection than the expressive parade discussed in *Hurley*. *See Cox v. Louisiana*, 379 U.S. 536, 555 (1965) (the First Amendment affords more protection to "pure speech" than to expressive marching).

(Mis)casting Joanna's and Breanna's pure speech as a violation of its antidiscrimination ordinance, Phoenix adopts the same rationale as Massachusetts in *Hurley*: equating and confusing refusal to promote a message with refusal to

provide services to certain people based on status. (COA Answering Br., pp. 33-38). The Court of Appeals upheld this semantic sleight of hand, equating "refusal to create custom-made work for same-sex weddings" with "discrimination based on someone's conduct of publicly committing to a person of the same sex," which it in turn concluded was the equivalent of "discrimination based on sexual orientation." *Brush & Nib Studio*, 418 P.3d at 436. This syllogism fails at the first step. Joanna and Breanna create art for any person without any regard for sexual orientation, and without regard for whether a person marries or plans to marry someone of the same sex. (COA Opening Br. 7-8, 55; ROA-68, pp. 57-58).[6] They decline to create art promoting an objectionable event for anyone, regardless of status (COA Opening Br. 7-8, 55), which is not an invalid basis. *See Lexington Fayette Urban Cnty. Human Rights Comm'n v. Hands on Originals, Inc*., No. 2015-CA-000745-MR, 2017 WL 2211381, at *7 (Ky. Ct. App. May 12, 2017), *review granted* (Oct. 25, 2017) ("[C]onveying a message in support of a cause or belief…cannot be deemed conduct that is so closely correlated with a protected status that it is engaged in exclusively or predominantly by persons who have that particular protected status…"). In holding the contrary, the Court of Appeals unconstitutionally treats Joanna's and Breanna's "speech itself to be the public accommodation." *Hurley*, 515 U.S. at 573.

[6] As in Appellants' Brief, the number following "ROA-" refers to the document number on the Superior Court's Electronic Index of Record.

The impact on Joanna's and Breanna's speech is not "incidental," as the Court of Appeals suggests. *Brush & Nib Studio*, 418 P.3d at 437-38. A law's impact on speech is more than incidental where in its "practical operation" it is "directed at certain content." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). The city tries to downplay this egregious effect as "routine," requiring only a substitution of logistical information and names. (Petition Resp., pp. 18-22). But as the Supreme Court has held, speech regulations are content-based whenever such described logistical information is regulated. *See Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2231 (2015) (regulation targeting signs that announced an event location and time was content-based). A change in context can alter the substantive content of the message. *See City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (noting the phrase "Peace in the Gulf" carries very different meanings when associated with a child versus a military veteran).

The only justification the Court of Appeals suggests in forcing Joanna and Breanna to handwrite and paint words promoting same-sex marriage is that of "eradicating the construction of a second-class citizenship and diminishing humiliation and social stigma." *Brush & Nib Studio*, 418 P.3d at 445. Were Phoenix's application of its ordinance limited to actual status-based discrimination, this interest might carry weight. But instead of focusing on the recipient of the service, Phoenix targets the content of what Joanna and Breanna wish to write.

Treating refusal to write certain words as discrimination itself, the Court of Appeals' proffered interest amounts to "nothing less than a proposal to limit speech in the service of orthodox expression" in order to "produce thoughts and statements acceptable to some groups." *Hurley*, 515 U.S. at 579. That objective is "a decidedly fatal" one. *Id*.

III. Wide Consensus Agree that Antidiscrimination Laws Can Not be Wielded to Compel Words

A wide consensus recognizes that antidiscrimination laws cannot, consistent with the First Amendment, compel pure speech like written words.

For example, a group of free speech scholars who opposed Mr. Phillip's position in *Masterpiece Cakeshop* acknowledged that "serious constitutional questions would be raised if [an antidiscrimination] statute compelled a baker to affix an offensive message to a cake he or she was asked to bake." Brief for Freedom of Speech Scholars as *Amici Curiae* supporting Respondents at 8, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, *available at* http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/. Similarly, the National League of Cities, "a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans," distinguished *Masterpiece Cakeshop* from a case where a printer was punished for declining to print a message promoting a gay pride festival because in *Masterpiece Cakeshop* "[n]o actual images, words, or design

celebrating same-sex marriage or the rights of LGBT individuals were ever at issue." *Amici Curiae* Brief of the National League of Cities in support of Respondents at 1, 27, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, *available at* http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/. *See also* Brief of Floyd Abrams et al. as *Amici Curiae* in support of Respondents at 6, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (antidiscrimination law cannot "compel a baker to inscribe a cake with a unique message he has not produced and would not produce for any other customer – say, 'God Bless This Gay Wedding.'"), *available at* http://www.scotusblog.com/case-files/cases /masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/. Additionally, although the Court in *Masterpiece Cakeshop* declined to address the free speech issue, all of the opinions from the justices in the case intimate that words raise free speech concerns in this context. *See Masterpiece Cakeshop*, 138 S.Ct. at 1723 ("If a baker refused to design a special cake with words [] celebrating [a same-sex] marriage…that might be different from a refusal to sell any cake at all…these details might make a difference [in the free speech context]."); *id.* at 1733 (Kagan, J., concurring) (distinguishing the refused cake in Phillips' case from cases where cakes were refused due to the words on them); *id.* at 1738 (Gorsuch, J., concurring) (opining written words are unnecessary for protection, implicitly

recognizing they make the speech issue apparent); *id.* at 1741, 1743 n. 2 (Thomas, J., concurring) (same); *id.* at 1749-51 (Ginsburg, J., dissenting) (distinguishing the refused cake in Phillips' case from cases where cakes were refused due to the words on them).

State courts entertaining analogous issues have also recognized the constitutional danger of stretching antidiscrimination rationale to engulf words. The Colorado appellate court that ruled against Mr. Phillips suggested the inclusion of "written inscriptions" on a cake could trigger a different outcome. *See Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. App. 2015). Similarly, in *State v. Arlene's Flowers, Inc.*, a case where a florist declined to arrange flowers for a same-sex wedding, the Washington Supreme Court reasoned that words are "forms of pure expression," triggering stricter constitutional scrutiny. 389 P.3d 543, 559 n.13 (Wash. 2017) (quotation omitted). In *Hands on Originals, Inc.*, the Kentucky Court of Appeals held a human rights commission could not wield an antidiscrimination ordinance to make a printer print t-shirts containing words and messages promoting a gay pride festival because such expressions qualify as "pure speech." 2017 WL 2211381, at *7. And, in *Klein v. Oregon Bureau of Labor and Industry*, – P.3d –, 289 Or. App. 507, 2017 WL 6613356, *16 (2017), the Oregon state court, holding against bakers that refused to bake same-sex wedding cakes, opined the case would have turned out differently

had the bakers been punished "for refusing to decorate a cake with a specific message…that they found offensive or contrary to their beliefs."

As this consistently espoused rationale reflects, the selection and composition of expression featuring words garners constitutional protection, and antidiscrimination laws cannot justify government action compelling people to write or otherwise engage in pure speech that expresses messages they would rather not convey.

CONCLUSION

For the reasons set out herein and in Appellants' Petition, this Court should grant Appellants' petition for review to correct the Court of Appeals' flawed reasoning and restore important rights.

Respectfully submitted,

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