Kathleen E. Brody (Bar No. 026331)
ACLU FOUNDATION OF ARIZONA
3707 North 7th Street, Suite 235
Phoenix, Arizona 85014
Telephone: (602) 650-1854
kbrody@acluaz.org

Brian Hauss
American Civil Liberties Union Foundation
(*pro hac vice application forthcoming*)
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
bhauss@aclu.org
Telephone: (212) 549-2500

Attorneys for proposed Amici Curiae

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

BRUSH & NIB STUDIO, LC, a limited liability company; BREANNA KOSKI; and JOANNA DUKA,STATE OF ARIZONA, Plaintiffs, Vs. CITY OF PHOENIX, Defendant.	Case No. CV2016-052251 **MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*** (Assigned to the Hon. Karen Mullins)

The American Civil Liberties Union and the American Civil Liberties Union of Arizona (collectively, "ACLU") move the Court for leave to appear as *amici curiae* and file an amicus brief in opposition to Plaintiffs' Motion for Preliminary Injunction. Proposed *amici* have read all the relevant pleadings and documents in this case. Their proposed brief is attached to this motion as Exhibit 1.[1] Defendant City of Phoenix has

[1] While Arizona has no rule governing *amicus curiae* briefs in its trial courts, Arizona courts have permitted the appearance of *amici curiae* before trial courts. *See, e.g.*, *Home*

consented to the filing of the proposed brief. Plaintiffs refused to give consent.

Interests of Proposed *Amici*

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The American Civil Liberties of Arizona is the Arizona state affiliate of the national American Civil Liberties Union. Both proposed *amici* are committed to fighting discrimination and inequality, including discrimination against lesbian and gay people in places of public accommodation. In addition, both *amici* regularly advocate for protecting the rights to religious exercise and free expression. Thus, *amici* have an interest and particular expertise in the constitutional issues raised in this case, and the appropriate balance of the rights at stake.

***Amici*'s Proposed Brief Will Aid the Court**

Amici are experts in the law of free speech, religious exercise, and equal protection, and have experience in the intersection and balance of these important rights. As such, *amici* are well positioned to provide important legal information and resources about these subject areas to the Court. Given the interests at stake in this case, it is imperative that the Court hear all relevant information surrounding the validity and constitutionality of Phoenix City Code Section 18-4.

Conclusion

Amici respectfully request that this Court grant their motion for leave to file the attached *amicus curiae* brief.

Builders Ass'n of Cent. Ariz. v. City of Apache Junction, 148 Ariz. 493, 497 n.4, 11 P.3d 1032, 1035 n.4 (Ct. App. 2000). Federal courts have explicitly recognized that trial courts have inherent authority to permit appearance of *amici curiae* in trial courts in the absence of a rule. *See Hoptowit v. Ray*, 692 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *see also Wilderness Soc'y v. U.S. Bureau of Land Mgmt.*, No. 09-CV-08010, 2010 WL 2594853 at *1 (D. Ariz., June 21, 2010).

Respectfully submitted this 15th day of August, 2016.

By:/s/*Kathleen E. Brody*

Kathleen E. Brody, 026331
American Civil Liberties Union
Foundation of Arizona
3707 North 7th Street, Suite 235
Phoenix, AZ 85014
(602) 650-1854
kbrody@acluaz.org

/s/ *Brian Hauss*

Brian Hauss (*pro hac vice application forthcoming*)
American Civil Liberties Union
Foundation
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2500
bhauss@aclu.org

Attorneys for Proposed Amici Curiae

THE FOREGOING has been electronically filed this 15th day of August, 2016.

COPY of the foregoing emailed, by agreement of the parties, this 15th day of August, 2016 to:

Colin F. Campbell
David B. Rosenbaum
Eric M. Fraser
Hayleigh S. Crawford
OSBORN MALEDON, P.A.
2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793
ccampbell@omlaw.com
drosenbaum@omlaw.com
efraser@omlaw.com
hcrawford@omlaw.com

Attorneys for Defendant City of Phoenix

Jeremy D. Tedesco
Jonathan A. Scruggs
Samuel D. Green
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, Arizona 85260
jtedesco@adflegal.org
sgreen@adflegal.org
jscruggs@adflegal.org

Roberta S. Livesay
HELM, LIVESAY &WORTHINGTON, LTD
1619 E. Guadalupe, Suite One
Tempe, Arizona 85283
Livesay.roberta@hlwaz.com

Attorneys for Plaintiffs

/s/ Gloria Torres

EXHIBIT 1

Kathleen E. Brody (Bar No. 026331)
ACLU FOUNDATION OF ARIZONA
3707 North 7th Street, Suite 235
Phoenix, Arizona 85014
Telephone: (602) 650-1854
kbrody@acluaz.org

Brian Hauss
American Civil Liberties Union Foundation
(*pro hac vice application forthcoming*)
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
bhauss@aclu.org
Telephone: (212) 549-2500

Attorneys for proposed Amici Curiae

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

BRUSH & NIB STUDIO, LC, a limited liability company; BREANNA KOSKI; and JOANNA DUKA,STATE OF ARIZONA,

Plaintiffs,

Vs.

CITY OF PHOENIX,

Defendant.

Case No. CV2016-052251

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF ARIZONA IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

(Assigned to the Hon. Karen Mullins)

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union and the American Civil Liberties Union of Arizona (collectively, "ACLU") submit this *amicus* brief in opposition to Plaintiffs' Motion for Preliminary Injunction. The right to practice one's religion, or no religion, is a core component of our civil liberties and is of vital importance to the ACLU. For this reason, the ACLU regularly brings cases aimed at protecting the right to religious exercise and expression. At the same time, the ACLU is committed to fighting discrimination and inequality, including discrimination against lesbian and gay people in places of public accommodation.

Amici oppose the Motion for Preliminary Injunction filed by Plaintiffs Joanna Duka ("Duka"), Breanna Koski ("Koski"), and Brush & Nib, LC (collectively, "Brush & Nib"). *Amici* submit this brief to explain why Brush & Nib—an acknowledged public accommodation that provides custom wedding invitations, among other things—does not have a free speech or religious exercise right to deny service for same-sex couples' weddings. *Amici* take no position on the other issues presented by the parties in their briefing on Plaintiffs' Motion for Preliminary Injunction or Defendant's Motion to Dismiss.

INTRODUCTION

This lawsuit asks whether a business offering goods and services to the general public has a free speech or religious exercise right to discriminate against a protected class of customers. No such right exists. In case after case, courts around the country have held that places of public accommodation—and wedding vendors in particular—may not invoke free speech or religious exercise protections to discriminate against same-sex couples.[1] Brush & Nib's claims fare no better.

[1] *See Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016) (rejecting a wedding venue's challenge to New York's anti-discrimination law); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015) (rejecting a cake business's challenge to Colorado's anti-discrimination law), *cert. denied*, 2016 WL 1645027 (Colo. Apr. 25, 2016), *petition for cert. filed*, (U.S. July 25, 2016); *State v. Arlene's Flowers, Inc.*, 2015 WL 720213 (Wash. Sup. Ct. Feb. 18, 2015) (rejecting a flower business's challenge to

First, Section 18.4(B) does not violate Brush & Nib's rights under the Arizona Constitution's Free Speech Clause. Like other anti-discrimination laws throughout the country, Section 18.4(B) permissibly regulates the business operations of goods and services providers open to the general public. The Supreme Court has repeatedly upheld such public accommodations laws on the ground that they regulate conduct, not speech. Brush & Nib attempts to distinguish these precedents by arguing that public accommodations may not be compelled to provide goods or services involving speech to customers they deem objectionable, even if they provide the same goods or services to others. To the contrary, numerous courts have recognized that businesses open to the general public may be compelled to serve customers without regard to protected characteristics, even if the goods and services at issue involve expression and artistic creativity. Moreover, because the government may prohibit Brush & Nib from discriminating against its gay and lesbian customers, it may also constitutionally prohibit Brush & Nib from publishing or advertising its unlawful discrimination policy.

Second, Section 18.4(B) does not violate Arizona's Free Exercise of Religion Act. The Act provides that government may not substantially burden religious exercise, unless doing so is the least restrictive means for furthering a compelling government interest. Requiring public accommodations to abide by anti-discrimination measures like Section 18.4(B) does not substantially burden religious exercise. Even if Section 18.4(B) did substantially burden religious exercise, it would nonetheless pass muster as the least restrictive means for furthering Phoenix's compelling interest in preventing discrimination, including discrimination based on sexual orientation.

BACKGROUND

Phoenix City Code Section 18.4(B) prohibits places of public accommodation

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Washington's anti-discrimination law), *appeal pending*; *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (rejecting a photography business's challenge to New Mexico's anti-discrimination law), *cert. denied*, 134 S. Ct. 1787 (2014).

from discriminating based on race, color, religion, sex, national origin, marital status, sexual orientation, gender identity, or disability. Section 18.4(B) also prohibits public accommodations from publishing communications stating or implying that they will discriminate based on one of these protected categories.

Plaintiffs Joanna Duka ("Duka") and Breanna Koski ("Koski") own and operate Brush & Nib Studio, LC ("Brush & Nib"). Brush & Nib is an acknowledged public accommodation that sells, among other things, custom wedding invitations. Brush & Nib filed this pre-enforcement challenge against Section 18.4(B), claiming that the ordinance impermissibly infringes its constitutional and statutory rights to refuse to provide custom wedding invitations for same-sex couples. In its Motion for Preliminary Injunction and Memorandum in Support ("Motion for PI"), Brush & Nib argues that Section 18.4(B) violates Arizona's Free Speech Clause, Ariz. Const. art. II, § 6, as well as the State's Free Exercise of Religion Act, A.R.S. § 41-1493.01(C).

ARGUMENT

I. Section 18.4(B) Does Not Violate the Arizona Constitution's Free Speech Clause.

Brush & Nib argues that the Arizona Constitution's Free Speech Clause, Ariz. Const. art. II, § 6, creates a right to deny service for same-sex couples' weddings. Motion for PI at 7–11. To the contrary, numerous courts—up to and including the U.S. Supreme Court—have repeatedly held that laws prohibiting invidious discrimination by businesses open to the general public do not violate free speech rights, even if they require businesses to provide goods or services involving speech to customers on a nondiscriminatory basis. In so holding, these courts have recognized that prohibiting public accommodations from engaging in invidious discrimination regulates these businesses' commercial operations.[2]

[2] Arizona's Free Speech Clause offers broader protections than the First Amendment to the U.S. Constitution, *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354–55 (1989). But, because Arizona courts "have had few opportunities to develop Arizona's free speech jurisprudence," they often follow "federal interpretations of the United States Constitution," *State v. Stummer*, 219 Ariz. 137, 142

Brush & Nib also argues that Section 18.4(B) imposes an impermissible content-based regulation on speech because it prohibits Brush & Nib from announcing its policy of discrimination against same-sex couples. Motion for PI at 5–7. But businesses have no free speech right to publish or advertise their intention to engage in unlawful conduct. Thus, because Phoenix may constitutionally prohibit Brush & Nib from discriminating against same-sex couples, it may also prohibit Brush & Nib from publishing or advertising its policy of unlawful discrimination.[3]

A. The Free Speech Clause does not protect the right to deny service to same-sex couples.

The Supreme Court has repeatedly explained that anti-discrimination laws permissibly regulate conduct, not speech. In *Roberts v. U.S. Jaycees,* for instance, the Court held that a Michigan anti-discrimination law requiring private clubs to accept women members "does not aim at the suppression of speech, [and] does not distinguish between prohibited and permitted activity on the basis of viewpoint." 468 U.S. 609, 623 (1984). Rather, the law "reflect[ed] the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order." *Id.* at 624. Similarly, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, the Court concluded that a law requiring a law school to admit military recruiters regulates conduct, not speech, because "it affects what law schools must *do* . . . not what they may or may not *say*." 547

(2008).

[3] Additionally, Brush & Nib argues that the Free Speech Clause protects its right to publish statements explaining its beliefs concerning marriage equality for same-sex couples. The City of Phoenix has stated that such statements would not violate Section 18.4(B). Def.'s Bench Br. re: Preliminary Injunction at 6. The ACLU therefore does not address the issue further, except to note that although free speech principles apply to a business owner's private speech, a business's officially expressed opposition to a protected class's rights may, in some circumstances, amount to discriminatory treatment. No one would suggest, for example, that a business proprietor may loudly denounce the integration of the races in the midst of conducting a commercial transaction with an interracial couple.

U.S. 47, 60 (2006) (emphases in original). To illustrate that distinction, the Court noted that Congress "can prohibit employers from discriminating in hiring on the basis of race," and that such a prohibition relates to conduct even though it would "require an employer to take down a sign reading 'White Applicants Only.'" *Id.* at 62. So too here, Section 18.4(B) does not require Brush & Nib to sell goods and services for weddings, but simply requires Brush & Nib to offer its goods and services to all customers, irrespective of their sexual orientation, race, color, religion, sex, national origin, marital status, gender identity or expression, or disability. Section 18.4(B) is thus focused on ensuring equal treatment in Brush & Nib's chosen business conduct, not on regulating Brush & Nib's speech.

Brush & Nib argues that because its business involves artistic expression, it cannot be subject to public accommodations laws. To be sure, speech does not lose constitutional protection whenever it is created or sold for profit. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964). Conversely, though, "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). In other words, although the government cannot regulate a commercial service or product involving speech based on its expressive elements or qualities, it undoubtedly can regulate such a business's commercial operations. For example, because tattoos are protected speech, the government cannot dictate which designs a tattoo parlor may offer, ban tattoo parlors entirely, *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1063 (9th Cir. 2010), or arbitrarily deny a tattoo parlor's request for a zoning permit, *Coleman v. City of Mesa*, 230 Ariz. 352 (2012). But the government may require tattoo parlors and other businesses involving speech to comply with laws imposing sanitation standards, setting a minimum wage for employees, or prohibiting discrimination in employment. *See id.* at 360 (stating that although tattooing is protected speech, "[t]his does not mean, of course, that the business

of tattooing is shielded from government regulation," including "generally applicable laws, such as taxes, health regulations, or nuisance ordinances"); *see also, e.g.*, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–70 (1991) (press must obey generally applicable regulations, such as copyright laws, antitrust laws, and the Fair Labor Standards Act); *Hishon v. King & Spalding*, 467 U.S. 69, 71–78 (1984) (rejecting a law firm's First Amendment challenge to Title VII).

By the same token, "because [Brush & Nib] is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work." *Elane Photography*, 309 P.3d at 66 (holding that a wedding photography business does not have a free speech right to refuse service to same-sex couples, in violation of New Mexico's anti-discrimination law). Lawyers, accountants, and travel agents all engage in speech while serving their customers, and yet each of these professions may be regulated as public accommodations when they solicit business from the general public. *See* 42 U.S.C. § 1218(7)(f) (public accommodations under the Americans with Disabilities Act include travel services and offices of accountants and lawyers); *Butler v. Adoption Media, LLC*, 486 F. Supp.2d 1022, 1059 (N.D. Cal. 2007) (holding that the First Amendment does not immunize an adoption-related services agency from liability under California's public accommodations law, even though "there may be some speech involved in that business); *Nathanson v. Mass. Comm'n Against Discrimination*, No. 199901657, 2003 WL 22480688, at *6–7 (Mass. Super. Sept. 16, 2003) (attorney could not refuse to represent prospective client based on gender because she "operates more as a conduit for the speech and expression of the client, rather than as a speaker for herself"). The same rule applies to wedding card vendors, such as Brush & Nib, that have voluntarily chosen to serve as places of public accommodation. Brush & Nib may no more claim a constitutional right to deny services to same-sex couples than a tattoo parlor may claim a constitutional right to deny service to a person of color.

Likewise, the amount of artistic judgment involved in creating Brush & Nib's

wedding cards is irrelevant. Countless businesses provide goods or services that involve expression or artistry. For example, hair salons, tailors, restaurants, architecture firms, florists, jewelers, theaters, and dance schools use artistic skills when serving customers or clients. That these businesses make artistic and creative choices does not insulate them from public accommodations laws when they offer goods and services for hire to the general public. *See, e.g.*, *Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 429 (4th Cir. 2006) (applying anti-discrimination law to beauty salon that provided hair styling and "makeup artistry"). The critical factor is whether the business chooses to open its doors to the public, not whether the services provider creates art or is able to command a high price. *Elane Photography*, 309 P.3d at 66. Those who wish "to create art consistent with their artistic vision," Motion for PI at 1, may preserve their autonomy by declining to solicit business from the general public. *See Elane Photography*, 309 P.3d at 66 ("If Elane Photography took photographs on its own time and sold them at a gallery, or if it was hired by certain clients but did not offer its services to the general public, the law would not apply to Elane Photography's choice of whom to photograph or not."). Having opened its doors to the public at large, however, Brush & Nib is subject to the same anti-discrimination measures as any other place of public accommodation.

Any speech component of Brush & Nib's services—offered for hire—is therefore significantly different from the speech at issue in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In *Hurley*, the private non-profit group in charge of organizing the Boston St. Patrick's Day parade denied the Gay, Lesbian and Bisexual Group of Boston's (GLIB) application to march in the parade. *Id.* at 561. The Massachusetts courts concluded that the parade sponsors violate the State's law prohibiting discrimination in places of public accommodation. *Id.* at 561, 563–64. In its decision, the Supreme Court noted that most public accommodations laws "do not, as a general matter, violate the First or Fourteenth Amendments," because they are focused "on the act of discriminating against individuals in the provision of publicly available

goods, privileges, and services on the proscribed grounds." *Id.* at 572. In *Hurley*, however, the state courts' "peculiar" application of the public accommodations law "had the effect of declaring the sponsors' speech itself [i.e., the parade] to be the public accommodation." By requiring the parade sponsors to include GLIB, the state courts were effectively requiring them "to alter the expressive content of their parade," in violation of the First Amendment. *Id.* at 572–73. Here, by contrast, Brush & Nib is a business open to the general public. And Section 18.4(B) "applies not to [the design of Brush & Nib's wedding cards] but to its business operations, and, in particular, its business decision not to offer its services to protected classes of people." *Elane Photography*, 309 P.3d at 68; *Butler*, 486 F. Supp. 2d at 1059–60 ("Defendants cite no reported decision extending the holding of *Hurley* to a commercial enterprise carrying on a commercial activity."). That commercial decision is not entitled to protection under the Free Speech Clause. *See Roberts*, 468 U.S. at 624.

Brush & Nib's reliance on *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), is similarly misplaced. In both of those cases, the government inappropriately required a speaker to disseminate a specific third-party message along with its *own* protected speech. *See Pac. Gas & Elec. Co.*, 475 US. at 9–14 (rejecting state law compelling a utility company to include copies of a particular environmentalist publication with bills sent to customers); *Miami Herald Publ'g Co.*, 418 U.S. at 257–58 (rejecting state law compelling newspapers to print responses from political candidates who had been criticized in editorials). In this case, on the other hand, Section 18.4(B) merely provides that any business in Phoenix that provides goods or services to the general public must offer the same goods or services to all customers, regardless of sexual orientation and other protected characteristics. By the same token, a public accommodations law may require a restaurant to treat its guests with the same degree of courtesy—including by asking questions such as "May I help you?" or "What

would you like to order?"—without respect to race. *See, e.g.*, *Brooks v. Collis Foods, Inc.*, 365 F. Supp. 2d 1342, 1347 (N.D. Ga. 2005) (public accommodation case where restaurant employees greeted white customers when they entered but not black customers). Requiring businesses open to the general public to treat their customers equally, without regard to protected characteristics, simply does not amount to compelled speech.[4]

Even if it could be said that enforcement of Section 18.4(B) would somehow impact Brush & Nib's own speech, Phoenix's interest in eradicating discrimination nonetheless justifies such an incidental burden. As the Supreme Court declared in *Roberts*, "even if enforcement of [an anti-discrimination statute] causes some incidental abridgment of . . . protected speech, that effect is no greater than [is] necessary to accomplish the State's legitimate purposes." 468 U.S. at 628. Acts of "invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit." *Id.*; *cf. United States v. O'Brien*, 391 U.S. 367, 376 (1968) (holding that the government may regulate expressive conduct: "if [the regulation] furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest"). As explained in Sections II.B and II.C,

[4] Brush & Nib also cites *Hands on Originals, Inc. v. Human Rights Commission*, an unpublished trial court decision from Kentucky holding that a printing business in Kentucky could not be compelled to print a t-shirt expressing support for the Gay and Lesbian Services Organization's 2012 Lexington Pride Festival. No. 14-CI-04474 (Fayette Cir. Ct. Apr. 27, 2015), http://perma.cc/75FY-Z77D, *appeal pending*. There, the court found that the print shop did not engage in unlawful discrimination based on sexual orientation, but rather made a protected decision not to promote the Pride Festival. Slip Op. at 10. By contrast, as the New Mexico Supreme Court has made clear, refusal to provide wedding-related services to same-sex couples is undoubtedly discrimination based on sexual orientation. *Elane Photography*, 309 P.3d at 61; *cf. Christian Legal Society v. Martinez*, 561 U.S. 661, 689 (2010) ("Our decisions have declined to distinguish between status and conduct in this context [of discrimination based on sexual orientation]."). The decision is therefore inapposite.

infra, Phoenix has the same compelling interest in preventing invidious discrimination based on sexual orientation, and Section 18.4(B) is narrowly drawn to further that compelling interest.

B. The Free Speech Clause does not protect a public accommodation's right to publish its unlawful policy of discrimination.

Brush & Nib also lacks a free speech right to publish its policy of discrimination against same-sex couples. "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562–63 (1980). The informational content of advertising merits constitutional protection under the commercial speech doctrine, but "commercial messages that do not accurately inform the public about lawful activity" are unprotected. *See id.* Thus, the government may ban both deceptive advertising and, crucially, "commercial speech related to illegal activity." *Id.* at 563–64. As the Supreme Court explained in *Pittsburgh Press Co. v. Human Relations Comm'n*, "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal and which might . . . arguably outweigh the governmental interest [in] supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." 413 U.S. 376, 389 (1973) (holding that the City of Pittsburgh could constitutionally enforce its antidiscrimination ordinance to prevent a newspaper from publishing help wanted advertisements in separate, sex-designated columns); *see also, e.g.*, *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1003 (2d Cir. 1991) (holding that a newspaper's "publication of real estate advertisements that indicate a racial preference is . . . not protected commercial speech," and stating that Congress's power to prohibit speech that "directly furthers discriminatory sales or rentals of housing" is "unquestioned").

This case is even more straightforward than *Pittsburgh Press* and *Ragin*. In those cases, the question was whether a newspaper could be held liable for publishing a third

party's discriminatory advertisements. Here, the question is simply whether a business has a free speech right to publish its own policy of unlawful discrimination. No such right exists. Federal, state, and local governments undoubtedly have the power to prevent invidious discrimination, regardless of whether it comes in the form of individual discriminatory acts or a publicized discriminatory policy. *See Rumsfeld*, 547 U.S. at 62 (stating that Congress could constitutionally prohibit employers from engaging in employment discrimination based on race, and the "fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct"). Were it otherwise, longstanding bans on discriminatory advertisements in employment, housing, and public accommodations throughout the country would have to be struck down on free speech grounds. *See, e.g.*, 42 U.S.C. 3604(c) (prohibiting real estate advertisements that indicate "any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin"). No court has countenanced such an absurd result.

II. Section 18.4(B) Does Not Violate Arizona's Free Exercise of Religion Act.

Brush & Nib also argues Arizona's Free Exercise of Religion Act entitles it to an exemption from Section 18.4(B). Motion for PI at 11–15. Not so. The Act provides that the government shall not substantially burden a person's exercise of religion, unless it demonstrates that application of the burden to the person is the least restrictive means for furthering a compelling government interest. A.R.S. § 41-1493.01. Here, requiring Brush & Nib's owners to abide by the same anti-discrimination requirements that regulate other businesses open to the general public does not substantially burden religious exercise. Even if it did, Section 18.4(B) is nonetheless the least restrictive means for furthering the government's compelling interest in preventing invidious discrimination in places of public accommodation.

A. Section 18.4(B) does not impermissibly burden Brush & Nib's religious exercise.

First, Section 18.4(B) does not impermissibly burden Brush & Nib's religious exercise rights. Plaintiffs Koski and Duka voluntarily own and operate a place of public accommodation for profit. They must therefore comply with neutral and generally applicable anti-discrimination laws that apply to all business owners in their position. *E.g.*, *United States v. Lee*, 455 U.S. 252, 261 (1982) (rejecting federal religious exercise challenge to law requiring employers to pay social security taxes for their employees) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith, are not to be superimposed on the statutory schemes which are binding on others in that activity."); *see also Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (rejecting state religious exercise challenge to housing anti-discrimination laws) ("Voluntary commercial activity does not receive the same status accorded to directly religious activity."). As the Minnesota Supreme Court explained in *McClure v. Sports & Health Club, Inc.*, when Koski and Duka "entered into the economic arena and began trafficking in the market place, they . . . subjected themselves to the standards the legislature has prescribed . . . for the benefit of the citizens of the state as a whole in an effort to eliminate pernicious discrimination." 370 N.W.2d 844, 853 (Minn. 1985). If those obligations conflict with Koski's and Duka's religious exercise, they may choose to cease operating Brush & Nib as a public accommodation. But they may not solicit business from the general public while refusing to play by the same anti-discrimination rules that bind every other business open to the general public.

B. Phoenix has a compelling government interest in preventing discrimination, including discrimination based on sexual orientation.

Even if Section 18.4(B) did substantially burden Brush & Nib's religious exercise, it still would pass muster under the Free Exercise of Religion Act because it is the least restrictive means for furthering Phoenix's compelling interest in preventing

discrimination. Public accommodations laws reflect the "importance, both to the individual and to society, of removing the barriers to economic and political and social integration that have historically plagued certain disadvantaged groups." *Roberts*, 468 U.S. at 626. Discrimination in public accommodations harms both the individual and society at large because it "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Id.* at 625. Without these protections, discrete groups could be excluded from the "almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Accordingly, the Supreme Court has repeatedly affirmed that public accommodations laws serve compelling government interests. *See Roberts*, 468 U.S. at 624; *see also e.g.*, *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 n.5 (1988) (the Court has "recognized the State's 'compelling interest' in combating invidious discrimination"); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) ("[P]ublic accommodations laws plainly serv[e] compelling state interests of the highest order." (internal quotation marks omitted)).

Courts do not reach different conclusions when the law at issue prohibits discrimination based on sexual orientation. *E.g.*, *Butler*, 486 F. Supp. 2d at 1060 (holding that "California's interest in combating discrimination on the basis of sexual orientation is compelling"); *N. Coast Women's Care Med. Gr., Inc. v. San Diego Cnty. Superior Court*, 189 P.3d 959, 968 (Cal. 2008) (holding that California's law prohibiting discrimination in places of public accommodation "furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation"); *Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1, 38 (D.C. 1987) (government has compelling interest in "eradicating sexual orientation discrimination"); *cf. SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014) (holding that heightened scrutiny applies to government

classifications based on sexual orientation, for purposes of equal protection). Indeed, the government's compelling interest in preventing discrimination based on sexual orientation is amply justified. "[F]or most of the history of this country, being openly gay resulted in significant discrimination." *Id.* at 485; *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015). And "[e]mpirical research . . . show[s] that discriminatory attitudes toward gays and lesbians persist." *SmithKline Beecham Corp.*, 740 F.3d at 486. As the Seventh Circuit Court of Appeals explained, "homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world." *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014) (Posner, J.). The spate of litigation over same-sex couples' access to marriage-related goods and services underscores the need for anti-discrimination measures to realize the Constitution's promise of marriage equality.

C. Section 18.4(B) is the least restrictive means for furthering Phoenix's interest in preventing discrimination.

Section 18.4(B) is also the least restrictive means for furthering Phoenix's compelling interest in preventing invidious discrimination. Every single instance of discrimination "causes grave harm to its victims." *United States v. Burke*, 504 U.S. 229, 238 (1992); *see also Daniel v. Paul*, 395 U.S. 298, 307–08 (1969) (describing "the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public" (internal quotation marks omitted)). Such discrimination also denies society the benefit of their "participation in political, economic, and cultural life," *Roberts*, 468 U.S. at 625. Because of the harms associated with each instance of invidious discrimination, there is simply no "numerical cutoff below which the harm is insignificant." *Swanner*, 874 P.2d at 282.

Moreover, as discussed above, Section 18.4(B) applies only to the extent that a business offers goods and services to the general public. The statute thus focuses on activities that affect the broader commercial marketplace and carry with them an implicit invitation to the public at large. At the same time, Section 18.4(B) is not so broad that it

covers conduct unrelated to its compelling goals. For example, Section 18.4(B) does not prevent Brush & Nib's owners from holding the personal belief that marriage is an institution reserved for a man and a woman. Nor does it prevent them from participating in organizations that share their views. The ordinance forbids them only from acting on their personal beliefs by discriminating against same-sex couples in the operation of their public accommodation. That prohibition "responds precisely to the substantive problem which legitimately concerns" the City of Phoenix. *Roberts*, 468 U.S. at 628–29 (citation and internal quotation marks omitted). Thus, even if Section 18.4(B) substantially burdened Brush & Nib's religious exercise, it would survive scrutiny under the Free Exercise of Religion Act.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion for Preliminary Injunction.

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By:/s/*Kathleen E. Brody*
Kathleen E. Brody, 026331
American Civil Liberties Union Foundation of Arizona
3707 North 7th Street, Suite 235
Phoenix, AZ 85014
(602) 650-1854
kbrody@acluaz.org

/s/ *Brian Hauss*
Brian Hauss (*pro hac vice application forthcoming*)
American Civil Liberties Union Foundation
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2500
bhauss@aclu.org

Attorneys for Proposed Amici Curiae

THE FOREGOING has been electronically filed this 15th day of August, 2016.

COPY of the foregoing emailed, by agreement of the parties, this 15th day of August, 2016 to:

Colin F. Campbell
David B. Rosenbaum
Eric M. Fraser
Hayleigh S. Crawford
OSBORN MALEDON, P.A.
2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793
ccampbell@omlaw.com
drosenbaum@omlaw.com
efraser@omlaw.com
hcrawford@omlaw.com

Attorneys for Defendant City of Phoenix

Jeremy D. Tedesco
Jonathan A. Scruggs
Samuel D. Green
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, Arizona 85260
jtedesco@adflegal.org
sgreen@adflegal.org
jscruggs@adflegal.org

Roberta S. Livesay
HELM, LIVESAY &WORTHINGTON, LTD
1619 E. Guadalupe, Suite One
Tempe, Arizona 85283
Livesay.roberta@hlwaz.com

Attorneys for Plaintiffs

/s/ Gloria Torres