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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-052251 09/16/2016

HONORABLE KAREN A. MULLINS

CLERK OF THE COURT
P. Roe/A. Quintana
Deputy

BRUSH & NIB STUDIO L C, et al.

JEREMY D TEDESCO

v.

CITY OF PHOENIX

HAYLEIGH S CRAWFORD

KATHLEEN E BRODY

UNDER ADVISEMENT RULING

The Court has also considered Defendant's Motion to Dismiss Under Rule 12(b)(1), Plaintiffs' Response to Defendant's Rule 12(b)(1) Motion to Dismiss, and Defendant's Reply in Support of its Motion to Dismiss Under Rule 12(b)(1). This Motion was not fully briefed until after the evidentiary hearing regarding Plaintiffs' Motion for Preliminary Injunction, and the Court took Plaintiffs' injunctive relief request under advisement pending completion of the briefing on Defendant's Motion to Dismiss. Thus, in considering Defendant's Motion to Dismiss, the Court has also considered Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support, Defendant's Bench Brief Re Preliminary Injunction, Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Preliminary Injunction and in Response to Defendant's Bench Brief, and the evidence and argument presented at the Preliminary Injunction evidentiary hearing on July 28, 2016. Although a Motion to Dismiss generally relies upon the facts as pled, to ignore the evidence presented at the July 28, 2016 hearing that bears on the issues presented in the Motion does not best serve a full resolution of the merits of the Motion to Dismiss nor does it achieve judicial economy.

The Facts Alleged in the Second Amended Complaint and Presented at the Evidentiary Hearing

Plaintiffs Joanna Duka and Breanna Koski own and operate Plaintiff Brush & Nib Studio, LC (hereinafter collectively "Plaintiffs"). *Exhs. 1, 15*. Plaintiffs offer the following services and goods to the general public:

> Brush & Nib Studio specializes in hand-painting, hand-lettering, calligraphy for weddings, events, special occasions, business, home décor, and everyday moments. We offer custom and pre-made save-the-dates, wedding invitations, wedding invitation suites, wedding programs, vows, marriage certificates, place cards, escort cards, table numbers, menus, wood signs, glass signs, chalkboard signs, reception décor, party invitations, dinner invitations, birth announcements, graduation announcements, prints, custom cards, stationary, business cards, logos, letterheads, and more. Design feature watercolor and acrylic art, leaves, florals, color washes, landscapes, classic calligraphy, modern calligraphy, brush lettering. Fine papers, flat printing, letterpress, foiling, and thermography available.

Exhs. 2-6, 9-12. In regard to wedding invitations, Plaintiffs meet with individual clients, discuss the color schemes and style of the wedding planned, and then create the invitations and other wedding-related products for those individual clients. Plaintiffs also offer for sale pre-made products, such as signs, thank you cards, and other similar goods.

Plaintiffs describe themselves as Christians, and testified that they cannot separate their religious beliefs from their business. Thus, if same-sex couple were ever to request their custom wedding invitation services, Plaintiffs would deny to sell them these services, although they would sell premade products to any customer. Plaintiffs desire to post on their business website their intent in this regard:

> For example, Brush & Nib Studio won't create any custom artwork that demeans others, endorses racism, incites violence, contradicts our Christian faith, or promotes any marriage except a marriage between one man and one woman. That means Brush & Nib Studio won't create any custom art, such as wedding invitations, for same-sex wedding ceremonies.

Exh. 22.

Plaintiffs also desire to post their religious views on their website, but have not yet done so due to their fear that such posting would violate the Phoenix City ordinance in issue here. An example of such a desired post is:

> We understand if you disagree with some of our beliefs. We support your right to disagree! Some may, for instance, disagree with our beliefs about marriage. We believe that God created marriage as a life-long union exclusively for one man and one woman. Only this marriage reflects Jesus' love for His bride, the Church. No other type of marriage reflects this, same-sex marriage included. We can't promote a marriage that God says isn't really marriage. Or take gender equality. We believe that God created both men and women equally in His image. So we can't promote businesses that exploit women or sexually objectify the female body to sell goods. Or take the environment. We believe that God created the world and entrusted humans to care for it. So we can't create art that promotes businesses that exploit the environment. But even if our beliefs are a bit different or unpopular, we have to stick to them – to be true to ourselves, to be true to our art, to be true to our God.

Exh. 22.

At this time, Plaintiffs have not yet refused to sell any services or products to same-sex couples as no such couple has yet made a definite offer to purchase. Plaintiffs allege they have received two form inquiries[1] purportedly from two persons of the same sex through an on-line form. *Exhs. 18, 51.* These form inquiries, however, merely reflect the names of the persons getting married, their wedding date, and their email addresses. Plaintiffs never contacted the potential customers for fear they would be prosecuted if their refused to sell their services/products. It is unknown whether the couples who completed the forms are interested in purchasing custom wedding products (which Plaintiffs allege they would refuse to sell), or pre-made products (which Plaintiffs would sell). These potential customers never further contacted Plaintiffs.

Plaintiffs allege that because Phoenix City Code §18-4(B) prohibits public accommodations from discriminating against persons based on sexual orientation, they could be prosecuted and charged with a misdemeanor if: (1) they refused to sell their custom wedding products or other custom work that promotes sexual activity to same-sex couples, (2) they communicated or posted on their website their intent to refuse to sell custom wedding products or other custom work that promotes sexual activity to same-sex couples, and/or (3) they posted on their business website their religious beliefs concerning same-sex marriage and same-sex sexual activity.

The only claims made by Plaintiffs in their Second Amended Complaint are for Declaratory Judgment. Specifically, Plaintiffs seek "[a] declaration that §18-4(B)(1-3) violates the Arizona Constitution's Free Speech Clause, Religious Toleration Clause, Equal Protection

[1] It is obvious from the few other purported "inquiries" that they were simply submitted to chastise Plaintiffs for their views on same-sex marriage, not for the purpose of seeking goods and services. Plaintiffs agreed with this assessment of those other inquiries at the evidentiary hearing.

Clause, Due Process Clause, and the Arizona Free Exercise of Religion Act facially and as applied to the constitutionally protected activities of third-parties and Plaintiffs." *Second Amended Complaint*, p. 23, paragraph 2.

The Phoenix City Ordinance

Phoenix City Code §18-4(B) prohibits public accommodations from discriminating against persons based on sexual orientation. Specifically, §18-4(B) provides in pertinent part:

> 1. Discrimination in places of public accommodation against any person because of race, color, religion, sex, national origin, marital status, sexual orientation, gender identity or expression, or disability is contrary to the policy of the City of Phoenix and shall be deemed unlawful.
>
> 2. No person shall, directly or indirectly, refuse, withhold from, or deny to any person, or aid in or incite such refusal, denial or withholding of, accommodations, advantages, facilities or privileges thereof because of race, color, religion, sex, national origin, marital status, sexual orientation, gender identity or expression, or disability nor shall distinction be made with respect to any person based on race, color, religion, sex, national origin, marital status, sexual orientation, gender identity or expression, or disability in connection with the price or quality of any item, goods or services offered by or at any place of public accommodation.
>
> 3. It is unlawful for any owner, operator, lessee, manager, agent or employee of any place of public accommodation to directly or indirectly display, circulate, publicize or mail any advertisement, notice or communication which states or implies that any facility or service shall be refused or restricted because of race, color, religion, sex, national origin, marital status, sexual orientation, gender identity or expression, or disability or that any person, because of race, color, religion, sex, national origin, marital status, sexual orientation, gender identity or expression, or disability would be unwelcome, objectionable, unacceptable, undesirable or not solicited.

A "place of public accommodation" is defined as including "all establishments offering their services, facilities or goods to or soliciting patronage from the members of the general public." *Phoenix City Code §18-3*. Plaintiff Brush & Nib Studio, LC is a place of public accommodation as defined by this ordinance because it offers services and goods for sale to members of the general public. An exemption exists under the ordinance for bona fide religious organizations, *Phoenix City Code §18-4(B)(4)*, however the parties and the Court agree that this exemption does not apply to Plaintiffs' business. A violation of the foregoing ordinance constitutes a Class 1 Misdemeanor. *Phoenix City Code §18-7(A).*

Justiciable Controversy and Ripeness

Defendant seeks dismissal of the Second Amended Complaint pursuant to Ariz.R.Civ.P. 12(b)(1) for lack of a justiciable claim, lack of standing, and lack of ripeness. The declaratory judgment act is remedial and is to be liberally construed. *Citizens' Comm. for Recall of Jack Williams v. Marston*, 109 Ariz. 188, 192–93, 507 P.2d 113, 117–18 (1973);*Planned Parenthood Center of Tucson, Inc. v. Marks*, 17 Ariz.App. 308, 497 P.2d 534 (1972); *Connolly v. Great Basin Insurance Co*., 6 Ariz.App. 280, 431 P.2d 921 (1967). However, the declaratory judgment act was not intended to constitute a fountain of legal advice for the court, *Iman v. Southern Pacific Co*., 7 Ariz.App. 16, 435 P.2d 851 (1968). Thus,

> [E]ven though the act is remedial and is to be liberally construed, it is well settled that a declaratory judgment must be based on an actual controversy which must be real and not theoretical. To vest the court with jurisdiction to render a judgment in a declaratory judgment action, the complaint must set forth sufficient facts to establish that there is a justiciable controversy. A "justiciable controversy" arises where adverse claims are asserted upon present existing facts, which have ripened for judicial determination. [Internal citations omitted.]

Citizens' Comm. for Recall of Jack Williams v. Marston, 109 Ariz. 188, 193, 507 P.2d 113, 118 (1973). Stated another way, in order to serve as a basis for declaratory relief, "a controversy involving a statute or ordinance must be justiciable, i.e., there must be specific adverse claims, based upon present rather than future or speculative facts, which are ripe for judicial determination." *Manning v. Reilly*, 2 Ariz. App. 310, 314, 408 P.2d 414, 418 (1965).

Defendant relies on *Thomas v. Anchorage Equal Rights Com'n*, 220 F.3d 1134 (9th Cir. 1999). In *Thomas*, several landlords who refused to rent to unmarried couples brought action against state human rights official, city, and city's equal rights commission, seeking declaratory and injunctive relief and alleging that enforcement of antidiscrimination laws against them would violate their rights to free speech and free exercise of religion. The Ninth Circuit Court of Appeals set forth the standard for a pre-enforcement action:

> We have held that neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the "case or controversy" requirement. *See, e.g., San Diego County Gun Rights Comm. v. Reno,* 98 F.3d 1121, 1126–27 (9th Cir.1996). In a somewhat circular argument, the landlords contend that they are presently injured because they must violate the housing laws to remain true to their religious beliefs, even though their beliefs counsel against violating secular law. This argument is essentially another way of saying that the mere existence of a statute can create a constitutionally

> sufficient direct injury, a position that we have rejected before and decline to adopt now. *See id.* (" '[t]he mere existence of a statute ... is not sufficient to create a case or controversy within the meaning of Article III.' " (quoting *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir.1983))). Rather, there must be a "genuine threat of imminent prosecution." *Id.* at 1126.
>
> In evaluating the genuineness of a claimed threat of prosecution, we look to whether the plaintiffs have articulated a "concrete plan" to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute. *Id.* at 1126–27.

Thomas, 220 F.3d at 1139. The Court then found:

> This is a case in search of a controversy. Several landlords mount a First Amendment free exercise of religion and free speech challenge to the Alaska housing laws prohibiting discrimination on the basis of marital status. We do not address this constitutional question, however, because this pre-enforcement challenge presents a threshold issue of justiciability. No prospective tenant has ever complained to the landlords, let alone filed a complaint against them. Neither the Alaska State Commission for Human Rights nor the Anchorage Equal Rights Commission has ever initiated an investigation into the landlords' rental practices or commenced a civil enforcement action or criminal prosecution under the challenged laws. No violation of the laws is on the horizon and no enforcement action or prosecution is either threatened or imminent. Indeed, the principal enforcement agencies had never even heard of these landlords before they filed this action. Simply put, at this stage the dispute is purely hypothetical and the injury is speculative. Whether viewed through the lens of standing or ripeness, resolution of the First Amendment issues is premature. Thus, dismissal of this action is required.

Id., 220 F.3d at 1137.

Defendant argues that like *Thomas*, there is no justiciable controversy here because Plaintiffs have no concrete plan to violate the law, no enforcement proceedings have been threatened, and there is no history of past enforcement. The Court disagrees. First, Plaintiffs do have a concrete plan to violate the law in that they have drafted and stand ready to post on the Brush & Nib website their intent not to sell custom wedding invitations to same-sex couples. Additionally, Plaintiffs have received two written inquiries by what appear to be persons of the same sex that concern wedding services, the very type of custom services that Plaintiffs desire to refuse to sell. So as to not violate the law, Plaintiffs did not communicate back with these potential customers after inquiry was made. Second, Defendant City has already stated in

interrogatory answers that assuming Plaintiffs fall within Phoenix City Code §18-4(B) governing public accommodations, and further assuming that no exemptions apply[2], Plaintiffs' intended post would violate §18-4(B)(3). Third, while Defendant City has only received two complaints under the subject ordinance to date, and no complaints against Plaintiffs, the City has already investigated a complaint which alleged that a business refused to provide a wedding venue and ceremony services for a same-sex couple. *Exh. 34*. No prosecution was initiated because the facts as investigated did not support that a violation occurred. *Id*.

Plaintiffs cite *Planned Parenthood Center of Tucson, Inc. v. Marks*, 17 Ariz.App. 308, 497 P.2d 534 (1972) as support for their claim that a justiciable controversy exists. In *Planned Parenthood*, the Arizona Court of Appeals stated:

> To require statutory violation and exposure to grave legal sanctions; to force parties down the prosecution path, in effect compelling them to pull the trigger to discover if the gun is loaded, divests them of the forewarning which the law, through the Uniform Declaratory Judgments Act, has promised. Begrudging availability of the declaratory vehicle is inconsistent with the Act's expressed remedial tenor directed to the elimination of uncertainty and insecurity and the settlement of controversy. Whenever facts are present justifying prosecution, prosecution will serve to test the statute and tell the whole story. A declaratory judgment in such case is ordinarily as superfluous as medicine administered to a corpse. Violation of a criminal statute as a prerequisite to testing its validity invites disorder and chaos and subverts the very ends of law. The court will not indulge in the fomentation of lawlessness.

Planned Parenthood, 17 Ariz. App. at 312-13, 497 P.2d at 538–39. The same is true here. Plaintiffs would have to actually violate the law by posting their intent not to provide services and sales and then respond to the pending inquiries by refusing services and sales to those potential customers if the Court did not grant they access to declaratory relief now.

For all the foregoing reasons,

IT IS ORDERED denying Defendant's Motion to Dismiss.

The Court thus now considers Plaintiffs Motion for Preliminary Injunction and Memorandum in Support, Defendant's Bench Brief Re Preliminary Injunction, Plaintiffs' Reply

[2] The only exemption under the ordinance is for bona fide religious organizations, which clearly is not applicable to these Plaintiffs. *See Phoenix City Code, §18-4(B)(4).*

Brief in Support of Plaintiffs' Motion for Preliminary Injunction and in Response to Defendant's Bench Brief, and the evidence and argument presented at the Preliminary Injunction evidentiary hearing on July 28, 2016.

A party seeking a preliminary injunction traditionally must establish four criteria: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury if the requested relief is not granted, (3) a balance of hardships favoring that party, and (4) public policy favoring a grant of the injunction. *Arizona Ass'n of Providers for Persons with Disabilities v. State,* 223 Ariz. 6, 12, ¶ 12, 219 P.3d 216, 222 (App. 2009); *Shoen v. Shoen,* 167 Ariz. 58, 63, 804 P.2d 787, 792 (App.1990). A court applying this standard may apply a "sliding scale." *Smith v. Ariz. Citizens Clean Elections Comm'n,* 212 Ariz. 407, 410, ¶ 10, 132 P.3d 1187, 1190 (2006). In other words, "the moving party may establish either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and [that] 'the balance of hardships tip[s] sharply' in favor of the moving party." *Id.* at 411, ¶ 10, 132 P.3d at 1191 (citing *Shoen,* 167 Ariz. at 63, 804 P.2d at 792). In determining whether "serious questions" exist to support a preliminary injunction, however, the relevant inquiry is whether there are serious questions *going to the merits. Id. Thu*s, whether there are "serious questions" depends more on the strength of the legal claim than on the gravity of the issue.

Plaintiffs contend that the foregoing ordinance requires Plaintiffs to provide any service and sell any product to same-sex couples that they would also provide or sell to opposite-sex couples, regardless of whether those services are "expressive" in nature or not. Plaintiffs further contend that because the creation of their custom paper products for weddings is "expressive" in nature, the ordinance violates their rights under the Free Speech Clause of the Arizona Constitution and the Arizona Free Exercise of Religion Act. Lastly, Plaintiffs contend that because the ordinance further prohibits them from publishing any statement wherein they express their intent not to sell custom wedding products to same-sex couples, it further violates their rights under the Free Speech Clause of the Arizona Constitution and the Arizona Free Exercise of Religion Act.[3]

The Free Speech Clause

The Arizona Constitution provides, "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Ariz.Const. Art. II, §6. The Court

[3] Because Plaintiffs make no other legal arguments in support of their request for a preliminary injunction, the other legal claims made in Plaintiff's Second Amended Complaint are not considered or purposes of their request for injunctive relief.

disagrees that the ordinance violates Plaintiffs right to free speech under the Arizona Constitution.[4]

Fundamentally, Plaintiffs misconstrue what the ordinance prohibits or, in their view, compels. The ordinance first pronounces that discrimination in places of public accommodation against any person because of sexual orientation is prohibited. The ordinance then prohibits the denial or withholding of services and sales of goods, or any distinction in price or quality of those services and sales of goods, because of sexual orientation. The ordinance further prohibits advertising or communicating that a service would be refused or restricted because of sexual orientation, or advertising or communicating that persons would be unwelcome because of sexual orientation. Thus, the plain language of the ordinance prohibits only the conduct of refusing to sell and the conduct of publishing that refusal to sell. Conversely, the only thing compelled by the ordinance is the sale of goods and services to persons regardless of their sexual orientation. There is nothing about the ordinance that prohibits free speech or compels undesired speech.

Freedom of speech includes the "right to refrain from speaking" and prohibits the government from telling people what they must say. *Wooley v. Maynard,* 430 U.S. 705, 714, 97 S.Ct. 1428 (1977); *Rumsfield v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 61, 126 S.Ct. 1297 (2006). The compelled speech doctrine was first articulated by the Supreme Court in *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178 (1943), and has been applied in two lines of cases.

The first line of cases prohibits the government from requiring that an individual "speak the government's message." *Rumsfield*, 547 U.S. at 63, 126 S.Ct. 1297;*Wooley,* 430 U.S. at 715–17 (holding that New Hampshire could not require individuals to have its slogan "Live Free or Die" on their license plates); *Barnette*, 319 U.S. at 642, 63 S.Ct. 1178 (holding that West Virginia could not require students to salute the American flag and recite the Pledge of Allegiance). These cases establish that the government cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" by forcing individuals to publicly disseminate its own ideological message. *Barnette,* 319 U.S. at 642, 63 S.Ct. 1178. The government also cannot require "the dissemination of an ideological message by displaying it on [an individual's] private property in a manner and for the express purpose that it be observed and read by the public." *Wooley,* 430 U.S. at 713, 97 S.Ct. 1428; *Barnette,* 319 U.S. at 642, 63 S.Ct. 1178. This line of cases clearly does not apply here as the Phoenix ordinance does not require that Plaintiffs speak any message. Moreover the ordinance does not prohibit Plaintiffs from stating their religious view concerning same-sex marriage and same-sex sexual activity.

[4] While Plaintiffs argue that the Free Speech Clause in the Arizona Constitution is broader than that in the U.S. Constitution, they do not describe or offer case law that would distinguish the two given the issues in this case.

The second line of compelled speech cases establishes that the government may not require an individual "to host or accommodate another speaker's message." *Rumsfield*, 547 U.S. at 63, 126 S.Ct. 1297. For example, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244, 94 S.Ct. 2831 (1974), the Supreme Court invalidated a Florida law which provided that if a local newspaper criticized a candidate for public office, the candidate could demand that the newspaper publish his or her reply to the criticism free of charge. Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 4, 106 S.Ct. 903 (1986), the Supreme Court struck down a California Public Utilities Commission regulation that permitted third-party intervenors in ratemaking proceedings to include messages in the utility's billing envelopes, which it distributed to customers. These cases establish that the government may not commandeer a private speaker's means of accessing its audience by requiring that the speaker disseminate a third-party's message. This line of cases also does not apply here as the Phoenix ordinance does not require that another's message be disseminated by Plaintiffs. In other words, the City does not require that Plaintiffs carry their anti-discriminatory message to the public.

Lastly, the Supreme Court has also recognized that some forms of conduct are symbolic speech and deserve First Amendment protections. *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (holding that the public burning of draft cards during anti-war protest is a form of expressive conduct). However, because "[i]t is possible to find some kernel of expression in almost every activity a person undertakes," *City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989), the Supreme Court has rejected the view that conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea, *Rumsfield*, 547 U.S. at 65–66, 126 S.Ct. 1297. Rather, First Amendment protections extend only to conduct that is "inherently expressive." *Id.*

In deciding whether conduct is "inherently expressive," the question is whether " '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.' " *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11, 94 S.Ct. 2727 (1974)). The message need not be "narrow," or "succinctly articulable." *Hurley v. Irish–American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569, 115 S.Ct. 2338 (1995). The Supreme Court has recognized expressive conduct in several cases. *See, e.g., id.* (marching in a parade in support of gay and lesbian rights); *United States v. Eichman*, 496 U.S. 310, 312–19, 110 S.Ct. 2404 (1990) (burning of the American flag in protest of government policies); *Johnson*, 491 U.S. at 399, 109 S.Ct. 2533 (burning of the American flag in protest of Reagan administration and various corporate policies); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43, 97 S.Ct. 2205 (1977) (wearing of a swastika in a parade); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06, 89 S.Ct. 733 (1969)(wearing an armband in protest of war). Other decisions have declined to recognize certain conduct as expressive.

See Carrigan, 564 U.S. at 126, 131 S.Ct. at 2350 (legislators' act of voting not expressive because it "symbolizes nothing" about their reasoning); *Jacobs v. Clark Cnty. Sch. Dist.*,526 F.3d 419, 437–38 (9th Cir.2008) (wearing of nondescript school uniform did not convey particularized message of uniformity).

Plaintiffs rely on this line of cases in arguing that their custom lettering and artwork is "expressive". The threshold question is whether the compelled conduct is sufficiently expressive to trigger First Amendment protections, and it is Plaintiffs that have the burden of demonstrating that the First Amendment applies. *See Jacobs*, 526 F.3d at 437–38; *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293 n. 5, 104 S.Ct. 3065 (1984).

In this case, Plaintiffs confuse conduct with expressive speech. In *Rumsfeld*, the United States Supreme Court clarified the difference between regulating conduct and regulating free speech. In that case, a statute required colleges to allow military recruiters on their campuses to the same extent other recruiters were allowed, or risk a loss of federal funding. The plaintiff law school alleged that by forcing it to allow the military recruiters on campus, it was being compelled to express the views of the military recruiters even though it disagreed with those views. The Supreme Court disagreed that the act of allowing the military recruiters on campus was "expressive":

> The [statute] neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds… As a general matter, the [statute] regulates conduct, not speech. It affects what law schools must do—afford equal access to military recruiters—not what they may or may not say.

Id., 547 U.S. at 61-62, 126 S.Ct. at 1308.

The same is true in our case. The City ordinance does not require Plaintiffs to say anything, and Plaintiffs remain free under the ordinance to express their views of same-sex marriage and same-sex sexual activity. The ordinance only precludes Plaintiffs from refusing to sell products or provide services to same-sex couples and from stating that same-sex couples are unwelcome as customers. The selling of wedding invitations here is the equivalent of allowing the military access to a college campus in *Rumsfeld*; it is an act devoid of expression.

Plaintiffs next argue that the actual creation of artwork and lettering on the invitations for same-sex couples is expressive. *Rumsfield* is instructive on this issue as well:

> Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say.…
>
> The Solomon Amendment does not require any similar expression by law schools. Nonetheless, recruiting assistance provided by the schools often includes elements of speech. For example, schools may send e-mails or post notices on bulletin boards on an employer's behalf. See, *e.g.*, App. 169–170; Brief for NALP (National Association for Law Placement) et al. as *Amici Curiae* 11. Law schools offering such services to other recruiters must also send e-mails and post notices on behalf of the military to comply with the Solomon Amendment. …
>
> This sort of recruiting assistance, however, is a far cry from the compelled speech in *Barnette* and *Wooley*. The Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only "compelled" if, and to the extent, the school provides such speech for other recruiters. There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.
>
> The compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct, and "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1949). Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. 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. See *R.A.V. v. St. Paul*, 505 U.S. 377, 389, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct"). Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto "Live Free or Die," and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.

Id., 547 U.S. at 61-62, 126 S.Ct. at 1308.

Here, there is nothing about custom wedding invitations made for same-sex couples that is expressive. The purpose of a wedding invitation is simply to convey the details of the date, time, and place of the wedding and to identify the persons getting married. The printing of the names of a same-sex couple on an invitation or thank you note does not compel Plaintiffs to

convey a government mandated message, such as an endorsement or pledge in favor of same-sex marriages, nor does it convey any message concerning same-sex marriage. Indeed any conceivable endorsement of same-sex marriage that might be conveyed would be conveyed by the act of the marriage itself, and not by the creator or printer of the physical invitation itself. It is absurd to think that the fabricator of a wedding invitation for a same-sex couple has endorsed same-sex marriage merely by creating or printing that invitation. Moreover, there is nothing about the creative process itself, such as a flower or vine or the choice of a particular font or color, that conveys any pledge, endorsement, celebration, or other substantive mandated message by Plaintiffs in regard to same-sex marriage. Thus, the creation of custom lettering or artwork displayed on Plaintiffs wedding invitations and related wedding products does not constitute expressive speech.

Arguments similar to those made by Plaintiffs here have been made in other states having anti-discrimination laws for public accommodations. For example, in *Craig v. Masterpiece Cakeshop, Inc*., 370 P.3d 272 (Colo. App. 2015)[5], the plaintiffs owned a bakery and refused to sell its custom made wedding cakes to same-sex couples. Yet the Colorado Court of Appeals held that Colorado's public accommodations law, which prohibits discrimination based on sexual orientation, did not force the bakery to engage in compelled expressive conduct in violation of the First Amendment. In *Elane Photography, LLC v. Willock*, 309 P.3d 53 (2013), the New Mexico Supreme Court considered a case involving a photography business that refused to photograph a commitment ceremony between a same-sex couple. The New Mexico Supreme Court held:

> [W]e conclude that the NMHRA [public accommodation anti-discrimination statute] does not violate free speech guarantees because the NMHRA does not compel Elane Photography to either speak a government-mandated message or to publish the speech of another. The purpose of the NMHRA is to ensure that businesses offering services to the general public do not discriminate against protected classes of people, and the United States Supreme Court has made it clear that the First Amendment permits such regulation by states. Businesses that choose to be public accommodations must comply with the NMHRA, although such businesses retain their First Amendment rights to express their religious or political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws. We also hold that the NMHRA is a neutral law of general applicability, and as such, it does not violate the Free Exercise Clause of the First Amendment.

Id., 309 P.3d at 59.

[5] While the opinions of other state appellate courts are not precedent, the logic and reasoning of their decisions conforms to the U.S. Supreme Court case law defining expressive speech.

For all of the foregoing reasons, the ordinance in issue does not violate the Free Speech Clause of the Arizona Constitution.

The Free Exercise of Religion Act

A.R.S. 41-1493.01 provides, in pertinent part:

> A. Free exercise of religion is a fundamental right that applies in this state even if laws, rules or other government actions are facially neutral.
> B. Except as provided in subsection C, government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.
> C. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is both:
> 1. In furtherance of a compelling governmental interest.
> 2. The least restrictive means of furthering that compelling governmental interest.

A party who raises a religious exercise claim or defense under FERA must establish three elements: (1) that an action or refusal to act is motivated by a religious belief, (2) that the religious belief is sincerely held, and (3) that the governmental action substantially burdens the exercise of religious beliefs. *State v. Hardesty*, 222 Ariz. 363, 366, ¶¶ 10-11, 214 P.3d 1004, 1007 (2009). Once the claimant establishes a religious belief that is sincerely held and substantially burdened, the burden shifts to the state to demonstrate that its action furthers a "compelling governmental interest" and is "[t]he least restrictive means of furthering that compelling governmental interest." A.R.S. § 41–1493.01(C). *Id.*

The Free Exercise Clause recognizes the right of every person to choose among types of religious observance free of government compulsion. *Seidman v. Paradise Valley Unified Sch. Dist. No. 69*, 327 F. Supp. 2d 1098, 1118 (D. Ariz. 2004); *Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1533 (9th Cir.1985). To establish a violation of the clause, a litigant must show that the challenged government action has a coercive effect that operates against the litigant's practice of his or her religion. *Id.*

The case here, however, does not involve religious activity as contemplated by the Free Exercise Clause. Thus the Court need not examine whether the asserted state interest justifies the "burden" imposed, because the Plaintiffs in this case have failed to assert even an incidental burden on the exercise of their religion.

The requirement under the ordinance that Plaintiffs transact business without regard to sexual orientation is not sufficient to create a Free Exercise Clause violation, even if this Court were to assume that strict scrutiny applies. Proselytizing, preaching, and prayer *are* protected by the Free Exercise Clause. *See, e.g., Texas Monthly v. Bullock*, 489 U.S. 1, 22–33, 109 S.Ct. 890, 903, 103 L.Ed.2d 1 (1989). However, the sale of wedding invitations free of the names of same-sex couples clearly is not the exercise of religion, and certainly is not a burden on the free exercise of their religion. Nothing about the ordinance has prevented the Plaintiffs from participating in the customs of their religious beliefs or has burdened the practice of their religion in any way.

This conclusion is supported by the testimony of Plaintiff Kuka who stated that Plaintiff Brush & Nib would sell any premade non-custom product to anyone, including same-sex couples, but will not sell custom products to same-sex couples. The only difference between the foregoing is the printing of two male names or the printing of two female names, rather than the printing of one male and one female name, on the product before it is sold. The printing of names does not hinder in any way Plaintiffs independent exercise of its religious belief by attending the church of their choice, engaging in religious activities or functions, and expressing their beliefs on their business website and literature or in their personal lives.

For all of the foregoing reasons, the ordinance in issue does not impose a substantial burden on Plaintiffs' exercise of religion.

Balancing

Plaintiffs are not likely to succeed on the merits given that the Phoenix ordinance does not violate Plaintiffs' right to free speech and does not impose a substantial burden on their exercise of religion. The possibility of irreparable injury is quite small, at best, given that Plaintiffs are free to express their beliefs on their business website and may practice their religious beliefs without substantial burden. The balance of hardships favors Defendant City, given the government's interest in allowing its citizens to enjoy public accommodations free of discrimination based on sexual orientation. Finally, the public policy underlying anti-discrimination laws for sexual orientation runs contrary to the requested injunction. Thus, the Court declines to grant Plaintiffs the preliminary injunction requested in this case.

IT IS ORDERED denying Plaintiffs Motion for Preliminary Injunction.