ARIZONA COURT OF APPEALS

DIVISION ONE

Brush & NIB STUDIO, LC, a limited liability company; BREANNA KOSKI; and JOANNA DUKA, *Plaintiffs/Appellants*, v. CITY OF PHOENIX, *Defendant/Appellee*.	Court of Appeals Division One No. 1 CA-CV 16-0602 Maricopa County Superior Court No. CV2016-052251

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ARIZONA, ARIZONA TRANS YOUTH & PARENT ORGANIZATION, EQUALITY ARIZONA, GLSEN PHOENIX, HUMAN RIGHTS CAMPAIGN, ONE N TEN, PHOENIX PRIDE, SOUTHERN ARIZONA AIDS FOUNDATION, SOUTHERN ARIZONA GENDER ALLIANCE, SOUTHERN ARIZONA SENIOR PRIDE, TRANS QUEER PUEBLO, AND TRANS SPECTRUM OF ARIZONA IN SUPPORT OF APPELLEE[1]

[1] All parties have consented to the filing of this *amici curiae* brief.

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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 support of Appellee City of Phoenix. 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 LGBT people in places of public accommodation.

The Arizona Trans Youth & Parent Organization ("AZTYPO") provides support to the parents and families of transgender, gender non-conforming, and gender neutral children. AZTYPO fosters a safe space for families to come together and work toward a bright future for their children. Discrimination against individuals based on gender identity or gender expression is a fear of many AZTYPO families.

Equality Arizona's mission is to achieve and maintain equal, legal rights and protections for the lesbian, gay, bisexual, transgender, and queer people in Arizona. The organization's vision is to make Arizona a state where LGBTQ people are valued as full and equal members of society. Equality Arizona believes

that all people, no matter their gender identity or sexual orientation, should have equal access to public accommodations and supports policies protecting people from discrimination.

GLSEN Phoenix is a chapter of GLSEN, a national education organization that has championed LGBT issues in K-12 education since 1990. GLSEN works to ensure that all students— regardless of sexual orientation or gender identity or expression—have access to a safe and healthy learning environment, free of bias-based behavior. Because discrimination out-of-school negatively affects student life in school, in terms of educational performance and aspirations as well personal well-being, GLSEN Phoenix opposes discrimination against lesbian, gay, bisexual, and transgender people in places of public accommodation.

Human Rights Campaign ("HRC"), the largest national lesbian, gay, bisexual, transgender, and queer advocacy organization, envisions an America where lesbian, gay, bisexual, transgender, and queer people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. Equal treatment in public spaces and places including in the context of services is among these basic rights.

One n Ten serves lesbian, gay, bisexual, transgender, and queer youth ages 14 to 24 and enhances their lives by providing empowering social and service programs that promote self-expression, self-acceptance, leadership development

and healthy life choices. The organization opposes sexual orientation and gender identity discrimination in public accommodations, which is often encountered by the individuals the group serves.

Phoenix Pride promotes unity, visibility, and self-esteem among lesbian, gay, bisexual, transgender and queer people in the Valley of the Sun and across Arizona. Phoenix Pride aims to educate the public at large about the challenges faced by LGBTQ people in Arizona and the reasons why unfairness and discrimination are a detriment to the community, and state, as a whole.

The Southern Arizona AIDS Foundation ("SAAF") works to cultivate a healthy and stigma-free society through transformative action by promoting education on HIV prevention and testing, providing care services for people living with HIV/AIDS, and spearheading LGBTQ initiatives designed to empower the LGBTQ community. Discrimination against people living with HIV/AIDS and discrimination against gay, lesbian, bisexual, and transgender people are deeply connected, both in history and in contemporary society. Further, discrimination against LGBTQ community members is a direct form of stigma that SAAF works to eliminate. SAAF's work both to destigmatize those living with HIV/AIDS and for the entire LGBTQ community naturally aligns with efforts to combat sexual orientation and gender identity discrimination and is a prime focus of the agency's mission and work.

The Southern Arizona Gender Alliance ("SAGA") has advocated for the rights of transgender and other gender nonconforming people in Arizona since 1998. In 1999, SAGA played a key role in the amendment of Tucson's nondiscrimination ordinance, Tucson City Code, Chapter 17, to include protections for transgender people, making Tucson among the first cities in the nation to provide such protections. SAGA has a profound interest in the outcome of this case, since any ruling in favor of the plaintiffs is likely to limit the scope of protections in Tucson and the other Arizona cities with similar ordinances, resulting in harm to transgender people throughout the state.

Southern Arizona Senior Pride celebrates, supports and unites lesbian, gay, bisexual, and transgender seniors in Southern Arizona. Southern Arizona Senior Pride recognizes and responds to the unique concerns of LGBT seniors by creating volunteer, social, and educational opportunities for senior LGBT people, increasing awareness of LGBT aging issues, and developing age-appropriate, LGBT-friendly information and referral services. Southern Arizona Senior Pride recognizes that LGBT elders are regularly mistreated because of their sexual orientation or gender identity and believes places of public accommodation should be free from discrimination on those grounds.

Trans Queer Pueblo serves as a refuge for lesbian, gay, bisexual, transgender and queer migrants of color living in Arizona. The organization creates

community-based solutions for the injustices faced by LGBTQ migrants of color and cultivates leaders who will advance equality for the LGBTQ migrant of color community. Trans Queer Pueblo opposes discrimination based on sexual orientation, gender identity, and gender expression and believes all places of public accommodation should serve people without regard to these, and other, personal characteristics.

Trans Spectrum of Arizona provides support and social outlets to transgender and gender non-conforming individuals and their allies by organizing a variety of peer-to-peer groups. Transgender individuals are often unfairly denied access to public accommodations, which negatively impacts their wellbeing. Trans Spectrum believes no person should face public accommodations discrimination based on their sexual orientation or gender identity.

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 appeal.

INTRODUCTION

This appeal 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. As the Superior Court rightly concluded, 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.[2] Brush & Nib's claims fare no better.

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

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[2] *See 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. granted*, No. 16-111, 2017 WL 2722428 (2017); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017) (rejecting a flower business's challenge to Washington's anti-discrimination law), *cert. pending*; *Matter of 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); *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).

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. Regardless whether Section 18.4(B)substantially burdens Brush & Nib's religious exercise, it passes 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 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.

Appellees Joanna Duka ("Duka") and Breanna Koski ("Koski") own and operate Brush & Nib Studio, LC (collectively, "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. IR-30. In its Motion for Preliminary Injunction and Memorandum in Support, Brush & Nib argued 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). IR-5. The Superior Court denied the preliminary injunction. App. 116–125. Brush & Nib filed this appeal. IR-66.[3]

STANDARD OF REVIEW

This Court reviews the denial of a preliminary injunction for abuse of discretion. *McNally v. Sun Lakes Homeowners Ass'n #1, Inc.*, 241 Ariz. 1, ¶ 11

[3] The Superior Court also denied the City of Phoenix's motion to dismiss the case on standing and ripeness grounds. App. 114–16. *Amici* do not address those issues.

(App. 2016). This Court "defer[s] to the [superior] court's factual findings unless clearly erroneous, but review[s] its legal decision de novo." *Id.* (citation and internal quotation marks omitted). "A court abuses its discretion when, in exercising its discretion, it commits an error of law." *Id.* (citation omitted).

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 and to announce its policy of discriminating against same-sex couples on its website. Not so. Laws prohibiting invidious discrimination by businesses open to the general public regulate commercial operations, not speech. Such laws do not violate free speech rights, even if they require public accommodations to provide goods or services involving speech to customers on a nondiscriminatory basis. By the same token, public accommodations do not have a free speech right to publish or advertise their intention to engage in unlawful conduct by discriminating against their customers.[4]

[4] 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

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 Acad. & 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 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

follow "federal interpretations of the United States Constitution," *State v. Stummer*, 219 Ariz. 137, 142 (2008).

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.[5]

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.*, *N.Y. 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

[5] The Supreme Court recently reaffirmed that the same principles apply to a business's claims of compelled speech. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150–51 (2017) (stating that, in order to comply with "a law requiring all New York delis to charge $10 for their sandwiches . . . a store would likely have to put '$10' on its menus or have its employees tell customers that price. Those written or oral communications would be speech, and the law—by determining the amount charged—would indirectly dictate the content of that speech. But the law's effect on speech would be only incidental to its primary effect on 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.'" (quoting *Rumsfeld*, 547 U.S. at 62)).

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. § 12181(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"). 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.[6]

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[6] Brush & Nib argues that it does not object to the "status" of same-sex couples, but that it simply refuses to provide weddings cards to those couples because of the

Countless businesses provide goods or services that involve expression or artistry. The fact that these businesses—be they hair salons, tailors, restaurants, architecture firms, florists, jewelers, theaters, or dance schools, among others—use artistic skills 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] beliefs," Opening Br. at 1, may preserve their autonomy by declining to solicit business from the general public. *See id.* ("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

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messages such cards would convey about marriage equality. Reply Br. at 18. The Supreme Court has rejected such distinctions. *See Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. Of the Law v. Martinez*, 561 U.S. 661, 689 (2010) ("CLS contends that it does not exclude individuals because of sexual orientation, but rather 'on the basis of a conjunction of conduct and the belief that the conduct is not wrong.' Our decision have declined to distinguish between status and conduct in this context." (citing *Lawrence v. Texas*, 539 U.S. 558, 575 (2003)).

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 *Pac. Gas & Elec. Co. v. Public Utilities Comm'n of California*, 475 U.S. 1 (1986), and *Miami Herald Pub. 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 Pub. 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 cannot deny those same goods or services based on the customer's membership in a

protected class. 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.

Brush & Nib also cites *Hands on Originals, Inc. v. Human Rights Commission*.[7] But the disposition of that case undermines, rather than supports, Brush & Nib's argument. There, the Kentucky Court of Appeals ultimately held that a printing business could not be compelled to print a t-shirt expressing support for the Gay and Lesbian Services Organization's 2012 Lexington Pride Festival. No. 2015-CA-745-MR (Ky. Ct. App. 2017) (unpublished).[8] The court found that the print shop did not engage in unlawful discrimination based on sexual orientation, but rather chose not to print promotional t-shirts for an LGBT

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[7] Opinion and Order, *Hands on Originals, Inc. v. Human Rights Commission*, No. 14-CI-04474 (Fayette Cir. Ct. 2015), *available at* http://perma.cc/75FY-Z77D (last visited July 14, 2017).

[8] Opinion Affirming, *Hands on Originals, Inc. v. Human Rights Commission*, No. 14-CI-04474 (Ky. Ct. App. 2017) (No. 2015-CA-000745-MR), *available at* http://162.114.92.72/COA/2015-CA-000745.pdf (last visited July 14, 2017).

advocacy organization. The court further stated, however, that "[a] shopkeeper's refusal to serve a homosexual, not because the person is homosexual, but because the shopkeeper disapproves of homosexual intercourse or same-sex marriage, would be the legal equivalent of sexual orientation discrimination" because "[t]he acts of homosexual intercourse and same-sex marriage are conduct engaged in exclusively or predominantly by persons who are homosexual." Slip Op. at 14, 17 (citing *Craig v. Masterpiece Cakeshop, Inc.,* 370 P.2d at 282); *see also Elane Photography*, 309 P.3d at 61.[9]

Finally, Phoenix's interest in eradicating discrimination justifies any incidental burden that Section 18.4(B) may impose on Brush & Nib's speech. Free speech challenges to content- and viewpoint-neutral laws that do not facially target speech receive intermediate scrutiny. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same

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[9] *Hands on Originals* thus demonstrates the fallacy underlying Brush & Nib's argument that Section 18.4(B) could be used to force "a gay web designer to create a website for a Mormon who wishes to provide online resources explaining the religious underpinnings of Mormon opposition to same-sex marriage." Opening Br. at 34. In Brush & Nib's hypothetical, as in *Hands on Originals*, the refusal of service would be based on the underlying message—i.e., the website's message of opposition to marriage equality—rather than the customer's status as a Mormon. As the Kentucky Court of Appeals recognized, a refusal to provide wedding-related goods and services on equal terms to same-sex couples *is* based on their protected status.

course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”).[10] Courts apply a more stringent standard to evaluate laws that infringe upon rights of expression association. *See Roberts*, 468 U.S. at 623 (holding that laws burdening rights of expressive association are constitutional if justified by “[a] compelling state interests, [b] unrelated to the suppression of ideas, that [c] cannot be achieved through means significantly less restrictive of associational freedoms”); *accord Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987).

Section 18.4(B) survives scrutiny under either standard. 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

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[10] *See also Turner Broad. Sys., Inc. v. F.C.C*, 512 U.S. 622, 629 (1994) (applying *O’Brien* to content-neutral “compelled speech” claim); *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y. Inc.*, 968 F.2d 286, 295–96 (2d Cir. 1992) (applying *O’Brien* to First Amendment defense to liability under public accommodations law); *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1060 (N.D. Cal. 2007) (applying *O’Brien* to First Amendment defense to public accommodations law based on “compelled speech.”).

compelling interest to prevent—wholly apart from the point of view such conduct may transmit." *Id*. As explained in Sections II, *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.[11] The Supreme Court has made clear that businesses do not have a First Amendment right to advertise their intent to engage in unlawful discrimination. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 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

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[11] 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. Reply Br. at 20–21. The City of Phoenix has stated that such statements would not violate Section 18.4(B). Answering Br. at 14, 63, 79. *Amici* therefore do 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.

columns) ("Any 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."); *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). Opening Br. at 53–61. 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, regardless whether Section 18.4(B) substantially burdens Brush & Nib's religious exercise, it is the least restrictive means for furthering Phoenix's compelling interest in preventing invidious discrimination in places of public accommodation.

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.*, *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 14 n.5 (1988) (the Court has "recognized the State's 'compelling interest' in combating invidious discrimination"); *Rotary Club*, 481 U.S. at 549 ("[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. Grp., Inc. v. San Diego Cty. 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." *SmithKline*, 740 F.3d 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*, 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.

Section 18.4(B) is 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 v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 282 (Alaska 1994).

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 ordinance 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 affirm the denial of Plaintiffs' Motion for Preliminary Injunction.

RESPECTFULLY SUBMITTED this 17th day of July, 2017.

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