Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-052251 10/24/2017

HONORABLE KAREN A. MULLINS

CLERK OF THE COURT
P. Culp
Deputy

BRUSH & NIB STUDIO L C, et al. JEREMY D TEDESCO

v.

CITY OF PHOENIX COLIN F CAMPBELL

KATHLEEN E BRODY

UNDER ADVISEMENT RULING

The Court has considered Plaintiffs' Motion for Summary Judgment and Memorandum in Support, Plaintiffs' Statement of Facts Supporting Summary Judgment, City of Phoenix Motion for Summary Judgment and Opposition to Plaintiffs' Motion, City of Phoenix's Statement of Facts in Support of its Motion for Summary Judgment and Opposition to Plaintiffs' Motion and Response to Plaintiffs' Statement of Facts, Plaintiffs' Reply in Support of their Motion for Summary Judgment and Response to Defendant's Motion for Summary Judgment, Plaintiffs' Response to Defendant's Statement of Facts in Support of its Motion for Summary Judgment, City of Phoenix Reply in Support of its Motion for Summary Judgment and Opposition to Plaintiffs' Motion, Defendant's Notice of Supplemental Authority, Plaintiffs' Response to Defendant's Notice of Supplemental Authority, and the oral argument of counsel.

Plaintiffs' Causes of Action

Plaintiffs Joanna Duka and Breanna Koski own and operate Plaintiff Brush & Nib Studio, LC (collectively "Plaintiffs"). Plaintiffs create and sell custom wedding invitations and other wedding-related and special event products. Plaintiffs do not wish to sell their custom products to same sex couples. The City of Phoenix's ("City") anti-discrimination ordinance prohibits businesses from discriminating against member of the public based on race, religion, sex, sexual

orientation, and other characteristics. Plaintiffs seek a declaratory judgment that the ordinance violates certain constitutional rights as applied to them and other third-parties. Specifically, Plaintiffs allege in their Second Amended Complaint that the City ordinance impermissibly impairs their right to: (1) free speech under Art.2, § 6 of the Arizona Constitution; (2) free exercise of their religion under Arizona's Free Exercise of Religion Act; (3) free exercise of their religion under Art. 20, § 1 of the Arizona Constitution; (4) equal protection under Art. 2, § 13 of the Arizona Constitution; and (5) due process under Art. 2, § 4 of the Arizona Constitution. Plaintiffs also seek an order permanently enjoining the ordinance plus $1 in nominal damages.

The Undisputed Material Facts

The parties agree that there are no facts in dispute that are material to the issues before the Court.

Plaintiffs specialize in hand-painting and hand-lettering for weddings, special occasions, and general home décor. As important here, Plaintiffs sell custom-lettered and painted wedding invitations. Plaintiffs meet with customers, discuss the color schemes and style of the wedding planned, and then create the wedding invitations and any other wedding-related products requested for those customers. Plaintiffs also offer for sale to the general public pre-made products, such as thank you cards, signs, table place cards, and other similar products.

Plaintiffs are Christians and testified that they cannot separate their business from their religious belief that marriage is between one man and one woman. While Plaintiffs are willing to sell any pre-made products to any customer, they intend to refuse to sell or offer for sale any custom-made product for same-sex couples. Plaintiffs also desire to post a statement on their business website stating that they will not sell any custom-made product-- such as wedding invitations--to same-sex couples. Plaintiffs also desire to post on their business website a statement expressing their view that God created marriage as a life-long union exclusively for one man and one woman.

No same-sex couple has yet requested Plaintiffs custom-made products. Plaintiffs bring this lawsuit on their behalf and on behalf of third-parties who fall within the definition of a public accommodation and are thus regulated by the City's anti-discrimination ordinance.

The City's Anti-discrimination Ordinance

Phoenix City Code §18-4(B) prohibits places of public accommodation from discriminating against persons based on race, color, religion, sex, national origin, marital status, sexual orientation, gender identity, or disability. Specifically, Phoenix City Code §18-4(B)(1)-(3) (hereinafter the "Ordinance") states:

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*. Plaintiffs' business is a place of public accommodation as defined by the Ordinance because it offers services and goods to members of the general public.

Arizona's Free Speech Clause

Plaintiffs argue that the Ordinance "forces them to create artwork consisting of written words and/or paintings expressing messages that violate their religious beliefs and bars them from using written or spoken words to decline to create such artwork." [1] Thus the conduct in issue here is: (1) the refusal to sell or offer for sale any custom-made product to same-sex couples; (2) the posting of a statement on their business website stating in essence that same-sex couples are unwelcome as customers; and (3) the posting of a statement expressing Plaintiffs' view that God created marriage as a life-long union exclusively for one man and one woman.

[1] *Plaintiffs' Motion for Summary Judgment and Memorandum in Support* ("*Plaintiffs' Motion*"), 2:20-3:2.

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 disagrees that the ordinance violates Plaintiffs right to free speech under the Arizona Constitution, interferes with their right of expressive association, or is overly broad.[2] The government may permissibly regulate the sale of goods and services by businesses that sell those goods and services to the general public. This is true even if the goods and services at issue involve expression or artistic creativity. Because the Ordinance permissibly prohibits businesses from discriminating against persons having protected characteristics, it may also constitutionally prohibit businesses from publishing or advertising an unlawful discrimination practice. Plaintiffs remain free to publish their religious and personal view that marriage is between one man and one woman so long as they do not state or imply that they will discriminate in the sale of their goods and services.

Legislative enactments are presumed to be constitutional, and the party challenging the validity of a statute has the burden of overcoming that strong presumption. *State ex rel. Napolitano v. Gravano*, 204 Ariz. 106, 110, ¶ 11, 60 P.3d 246, 250 (App. 2002). Because not every interference with speech triggers the same degree of scrutiny under the First Amendment, we must decide at the outset the level of scrutiny is applicable to the Ordinance here. The United Supreme Court has held that the level of scrutiny for speech depends on whether the limitation imposed by the Ordinance is content-based or content-neutral. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 643 (1994). Laws which by their terms distinguish favored speech from disfavored speech based on the ideas or views expressed are content based, whereas laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are content-neutral. *Id*. Stated another way, government regulation of expressive activity is content-neutral so long as it is justified without reference to the content of the regulated speech. And even if the Ordinance imposes an incidental burden on speech, the proper test is still the intermediate level of scrutiny, and not strict scrutiny as claimed by Plaintiffs. *Turner*, 512 U.S. at 662. A regulation may also still be content-neutral even though it incidentally affects some, but not all, speakers or messages. *Id.*

Here, the Ordinance prohibits a place of public accommodation from refusing to sell goods and services to the general public based on certain characteristics, including sexual orientation. The Ordinance also prohibits places of public accommodations from publishing or communicating that persons falling within the listed characteristics would be unwelcome as customers. The plain terms of the Ordinance are content-neutral because they make no reference

[2] While Plaintiffs argue that the Free Speech Clause in the Arizona Constitution is broader than that in the U.S. Constitution, they neither argue nor offer case law that distinguishes these two clauses under the facts of this case. This argument is therefore not further considered.

to any ideas or views expressed by a place of public accommodation. The obvious and stated purpose of the Ordinance is to prohibit discrimination in the sale of goods and services rather than to restrict speech. While the Ordinance likewise prohibits places of public accommodation from publishing or communicating that persons falling within the listed characteristics would be unwelcome as customers, this term is incidental to the focal point of the Ordinance and is there to ensure that discrimination does not occur by communicating in advance that sales would not be made. The focal point of the Ordinance remains the prohibition of discrimination and thus the Ordinance remains content-neutral.

The fact that the Ordinance incidentally affects the purported free speech of Plaintiffs in this case still renders it content-neutral. Indeed, of all the businesses regulated by the Ordinance, most would not involve any type of expressive or artistic creativity. To the extent that there are other places of public accommodation that sell goods or services which involve expressive or artistic creativity, the limitations imposed by the Ordinance remain incidental to the focal point of the Ordinance and thus the Ordinance remains content-neutral.[3]

Finally, even as to these Plaintiffs, only one aspect of their business is affected by the Ordinance--the hand-lettering and art on wedding invitations meant for same-sex couples. The remainder of their business is wholly unaffected. So even the impact of the Ordinance on these Plaintiffs is itself incidental; while they may not refuse to sell to same-sex couples or publish that intent, the remainder of their sales are not at all impacted.

The standard or review applicable to content-neutral restrictions that impose an incidental burden on speech is the intermediate level of scrutiny. This level of scrutiny is appropriate in cases such as ours because the Ordinance does not pose inherent dangers to free expression or present the potential for censorship or manipulation, as to justify the application of strict scrutiny, which is the most exacting level of First Amendment scrutiny.

[3] Plaintiffs argue that this Court's prior conclusion that the Ordinance prohibited conduct and not speech is erroneous. However the Ordinance by its terms prohibits only the refusal to sell without addressing the content of any speech, whether expressive or artistic. Likewise, the only thing "compelled" by the ordinance is the sale of goods and services to all persons without regard to their sexual orientation; no particular form of art is compelled. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 68 (New Mexico 2013)([T]he [antidiscrimination public accommodation state law] applies not to Elane Photography's photographs but to its business operation, and in particular, its business decision not to offer its services to protected classes of people. While photography may be expressive, the operation of a photography business is not.) Plaintiffs remain free to use any style or form of hand-painting, hand-lettering, or other art they please in their business, as there is no term in the Ordinance that addresses the content of their art or expression.

To satisfy the intermediate level of scrutiny, the Court must consider if the Ordinance "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."*United States v. O'Brien*, 391 U.S. 367, 377 (1968). Under this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. Rather, the standard is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. *Turner*, 512 U.S. at 662. In other words, the means chosen does not burden substantially more speech than is necessary to further the government's legitimate interests. *Id*.

Applying this standard, the Court first finds that the Ordinance clearly furthers the government's substantial interest in eliminating discrimination by businesses against members of the public based on characteristics such as race, color, religion, sex, national origin, or sexual orientation. In *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984), the United States Supreme Court held that a Minnesota statute prohibiting places of public accommodation from discrimination based on sex and other characteristics reflected the state's "strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services… plainly serves the compelling state interest of the highest order." The same is true here.

Second, the Court finds that the governmental interest in eliminating discrimination by businesses is unrelated to the suppression of free expression. Indeed, the government's interest is rooting out discrimination is wholly unrelated to the first amendment and the antidiscrimination terms of the Ordinance apply to all places of public accommodation regardless of what particular goods or services are sold.

Third, the Court finds that the restriction is no greater than necessary to further the government's interest in eliminating discrimination. The Ordinance is directed solely to those who open their doors to the general public. Its provisions are then limited to the sale or goods and services, without any attempt to preclude free expression of views otherwise. ***See e.g. United States v. Albertini,*** 472 U.S. 675, 689 (1985)("[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.").

Thus, the Ordinance at hand satisfies the intermediate level of scrutiny and does not violate the Free Speech clause in the Arizona Constitution.

The Court's ruling here is consistent with sister-states that have upheld anti-discrimination laws applicable to public accommodations in situations involving expressive or artistic wedding-related services. While not binding, the Court finds these sister-state opinions compelling and instructive. In *Elane Photography, LLC v. Willock*, 309 P.3d 53 (2013), a wedding photographer argued that the New Mexico statute prohibiting public accommodations from discriminating against persons based on their sexual orientation violated his right to free speech by requiring him to photograph a same-sex commitment ceremony contrary to his religious beliefs. The photographer further argued that photography was an expressive art form, requiring First Amendment protection. The New Mexico Supreme Court rejected the photographer's free speech claims:

> [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.
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> The United States Supreme Court has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation. In fact, it has suggested that public accommodation laws are generally constitutional. See *Hurley*, 515 U.S. at 572, 115S.CT.2338 ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.... [T]he focal point of [such statutes is] rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds."). …
>
> The NMHRA does not, nor could it, regulate the content of the photographs that Elane Photography produces. It does not, for example, mandate that Elane Photography take posed photographs rather than candid shots, nor does it require every wedding album to

> contain a picture of the bride's bouquet. Indeed, the NMHRA does not mandate that Elane Photography choose to take wedding pictures; that is the exclusive choice of Elane Photography. Like all public accommodation laws, the NMHRA regulates "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." [Citation omitted.] Elane Photography argues that because the service it provides is photography, and because photography is expressive, "some of [the] images will inevitably express the messages inherent in [the] event." In essence, then, Elane Photography argues that by limiting its ability to choose its clients, the NMHRA forces it to produce photographs expressing its clients' messages even when the messages are contrary to Elane Photography's beliefs.
>
> Elane Photography has misunderstood this issue. It believes that because it is a photography business, it cannot be subject to public accommodation laws. The reality is that because it is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work.

Id., 309 P.3d at 59, 65-66. Likewise in *Craig v. Masterpiece Cakeshop, Inc*., 370 P.3d 272 (Colo. App. 2015)[4], the plaintiffs owned a bakery and refused to sell its custom made wedding cakes to same-sex couples. 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. *See also Telescope Media Group v. Lindsey,* 2017 WL 4179899 (Dist. Minn.); *Washington v. Arlene's Flowers, Inc*., 389 P.3d 543 (Wash 2017); *State v. Arlene's Flowers, Inc*., 389 P.3d 543 (Wash. 2017).

Plaintiffs next argue that the Ordinance violates their right of freedom of association. The right to freedom of association under the First Amendment protects "certain intimate human relationships," such as those that "attend the creation and sustenance of a family," and one's "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 U.S. 609, 617–19 (1984); see also, *City of Tucson v. Grezaffi*, 200 Ariz. 130, 136, ¶¶ 13-14, 23 P.3d 675, 681 (App. 2001); *Kahn v. Thompson,* 185 Ariz. 408, 414, 916 P.2d 1124, 1130 (App.1995). "As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty." *Roberts,* 468 U.S. at 620. Although "a considerable amount of private or intimate association" may occur "in many restaurants and other places of public accommodation, ... that fact alone does not afford the entity as a whole any constitutional immunity" from government regulation. *New York State*

[4] While the opinions of other state appellate courts are not precedent, this Court finds these cases instructive.

Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 12 (1988). Thus, the freedom of association does not apply to Plaintiffs' business relationship with its customers.

Finally, Plaintiffs argue that the Ordinance is overly broad. The Ordinance is plainly not overly broad because it does not prohibit a substantial amount of protected speech either in an absolute sense or relative to its plainly legitimate sweep. *See United States v. Williams*, 553 U.S. 285, 292 (2008).

For all of the foregoing reasons, and for the other reasons set forth in the City's Motion and Reply, Phoenix City Code §18-4(B)(1)-(3) does not violate Plaintiffs right to free speech under Art.2, § 6 of the Arizona Constitution, does not violate any right of free association, and is not overly broad. Therefore, under the ordinance, Plaintiffs may not refuse to sell or offer for sale any custom-made product to same-sex couples, nor may they post a statement on their business website stating in essence that same-sex couples are unwelcome as customers. Plaintiffs may, however, post a statement expressing their views that God created marriage as a life-long union exclusively for one man and one woman, so long as that statement does not state or imply that same-sex couples are unwelcome as customers.

Arizona's Free Exercise of Religion Act

Plaintiffs generally argue that the Ordinance imposes a substantial burden or religion because creating art promoting same-sex marriage violates their religious beliefs and punishes their religiously motivated decisions with criminal penalties.[5] Plaintiffs rely on both Arizona's free exercise of religion clause and A.R.S. 41-1493.01.

Article XX, Section 1 of the Arizona Constitution states:

> First. Perfect toleration of religious sentiment shall be secured to every inhabitant of this state, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship, or lack of the same.

Plaintiffs do not explain in either their Motion or Reply how their refusal to sell custom wedding invitations to members of the same-sex violates the above clause. The facts here do not involve any kind of religious worship as contemplated by the Free Exercise Clause. Proselytizing, preaching, and prayer *are* protected by the Free Exercise Clause. *See, e.g., Texas Monthly v. Bullock*, 489 U.S. 1, 22–33, (1989). Nothing about the ordinance has prevented the Plaintiffs from participating in the customs of their religious beliefs or has burdened the practice of their

[5] *Plaintiffs' Reply in Support of their Motion for Summary Judgment and Response to Defendant's Motion for Summary Judgment ("Plaintiffs' Reply")*, 16:4-10.

religion in any way. The printing of same-sex persons names on wedding invitations 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. Indeed, as this Court has already ruled, Plaintiffs are free to publish their religious beliefs so long as they do not state or imply that same-sex couples are unwelcome as customers. Plaintiffs likewise offer no legal authority that would render Arizona's free exercise of religion clause applicable under the facts of this case and thus it is not further considered.

Plaintiffs next argue that the Ordinance violates A.R.S. 41-1493.01 ("FERA"). That statute reads, 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 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 a party 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.*

Plaintiffs have failed to assert even an incidental burden on the exercise of their religion, and certainly cannot establish a substantial burden. Thus, the Ordinance simply does not violate any of Plaintiffs' rights under FERA.

For the foregoing reasons, the Ordinance does not impose a substantial burden on Plaintiffs' free exercise of their religion under Art. 20, § 1 of the Arizona Constitution or under Arizona's Free Exercise of Religion Act.

Equal Protection

Plaintiffs equal protection argument is elusive at best. Plaintiffs seem to argue that art studios that create art for same-sex marriages are treated differently from art studios that create art for only opposite sex marriage.[6] This argument is rejected out of hand as no rational court would conclude that two such classes were created by the Ordinance or in any way protected by the equal protection clause of the Arizona Constitution.

Due Process

Lastly, it appears that Plaintiffs have abandoned their substantive due process argument. In their Reply, that argue that if the Constitution protects a citizen's right to have dignity in their own distinct identity related to sexual preference, they it should also protect identity ground in sincerely-held religious beliefs.[7] Absent legal authority for this new novel claim, and none is provided, it is not further considered.

For the above stated reasons, and the additional reasons stated in the City's Motion for Summary Judgment and Reply in Support of its Motion for Summary Judgment,

IT IS ORDERED granting City of Phoenix Motion for Summary Judgment on all of Plaintiffs' claims, and denying Plaintiffs' Motion for Summary Judgment.

DATED this 24 day of October, 2017.

/s/ HONORABLE KAREN A. MULLINS
JUDICIAL OFFICER OF THE SUPERIOR COURT
KAREN A. MULLINS

[6] *Plaintiffs' Reply, 18:10-12*
[7] *Plaintiffs' Reply*, 19:5-11.