ARIZONA COURT OF APPEALS
DIVISION ONE

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

BRIEF OF CENTER FOR RELIGIOUS EXPRESSION AND CENTER FOR ARIZONA POLICY AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amicus Curiae Center for Religious Expression ("CRE") is a national nonprofit legal organization based in Memphis, Tennessee that defends the freedom of people of faith to speak, or not speak, consistent with their sincerely-held religious beliefs. CRE represents earnest individuals all over the country, including Arizona, in securing these fundamental liberties. The *Amicus* is particularly interested in this important case because of its firm conviction that people should never be forced to write, speak, or otherwise express messages they cannot support in good conscience.

Amicus Curiae Center for Arizona Policy ("CAP") promotes and defends the foundational principles of life, marriage and family, and religious freedom. As an advocate for religious freedom in Arizona for the past twenty-two years, CAP has an interest in protecting the First Amendment rights of creative professionals in Arizona to live and work according to their sincerely held religious beliefs.

INTRODUCTION

Freedom of expression necessarily "includes…the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The City of Phoenix ("Phoenix") intrudes on this fundamental guarantee, commanding artistic entrepreneurs Joanna Duka and Breanna Koski

(hereinafter "Joanna and Breanna")[1] to write, draw, and paint messages they cannot, in good conscience, promote. (Def./Appellee Combined Answering Br. & App. ["Answering Br."], pp. 36-37, 52-53). According to Phoenix, the sacrifice of this freedom is the going price of doing business. (Answering Br., p. 53).

This appeal proceeds in the shadow of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a matter pending before the U.S. Supreme Court concerning a cake artist named Jack Phillips and his desire to not create custom wedding cakes designed to celebrate same-sex marriages. (U.S. No. 16-111). Akin to Joanna and Breanna, Mr. Phillips gladly sells his pastry creations to anyone regardless of status, but he is unwilling to promote and celebrate through his art events that conflict with his religious beliefs, a position that runs afoul of the state's application of its nondiscrimination law. Brief for Petitioners at 8-9, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (U.S. No. 16-111), available at http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/. Having heard oral arguments, the Supreme Court is poised to rule on the burden imposed on Mr. Phillips' artistic freedom, but the ruling in *Masterpiece Cakeshop* might not ultimately

[1] Because briefs identify Appellants by their first names, *Amici* uses the same reference to avoid any confusion.

dictate the outcome in this case – in light of an important distinction between the two cases.

There, the Supreme Court must wrestle with the expressive nature of a bakery item, while here, the expressive nature of the product – employing words – is beyond question. Engaging in a collaborative process with patrons to craft and publish words, Joanna and Breanna engage in pure speech in supplying their services. And since the existence of – and protection afforded to – this form of expression is well-settled, so is the right to avoid communication of it. Phoenix cannot rightly compel Joanna and Breanna to create artwork conveying words they do not wish to say.[2] Antidiscrimination laws are no exception to this constitutional principle. A nearly-universal consensus – including the *amici* opposing Mr. Phillips in the *Masterpiece Cakeshop* case – recognizes antidiscrimination laws cannot compel written messaging without violating the First Amendment.

ARGUMENT

I. Collaborative Process to Create Artwork Containing and Expressing Words Constitutes Pure Speech and Can Not be Compelled

It is self-evident that the selection and writing of words is pure speech, entitled to the highest level of constitutional shielding. *See Bigelow*

[2] This case does not implicate the disclosure of accurate consumer product information.

v. Virginia, 421 U.S. 809, 817 (1975) (holding statute criminalizing production of written words encouraging abortion or miscarriage implicated "pure speech" and not conduct). And, where "[t]he only 'conduct' which the State [seeks] to punish is the fact of communication [or refusal to do so]," the restriction necessarily targets pure speech. *Cohen v. California*, 403 U.S. 15, 18 (1971). *See Bartnicki v. Vopper*, 532 U.S. 514, 526-27 & n. 11 (2001) (holding that statute restricted "pure speech" where "what gave rise to statutory liability in this suit was the information communicated").

That the resulting expression is for sale does not diminish its character as speech. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943). Neither does a speaker lose his status and rights to the speech because it is created for another. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010) (holding tattooist engaged in speech in tattooing even though customer had ultimate control of design because tattooist "applies his creative talents as well.").

Phoenix wants to control pure speech by applying its ordinance to the creative, expressive activity of Joanna and Breanna. As Phoenix all but

confirms in its briefing, Joanna and Breanna are obliged to author and design a specific message, namely, one that celebrates and promotes same-sex marriage in the same way they author and design messages celebrating and promoting opposite-sex marriage. (Answering Br., pp. 36-37). If requested, Joanna and Breanna must write that God has joined together and blessed same-sex couples in marital union simply because they have previously written the same about opposite-sex couples – regardless of whether they agree with this sentiment or are willing to promote it. (Answering Br., pp. 52-53).

The Supreme Court has resoundingly and repeatedly rejected comparable attempts to compel pure speech. In *West Virginia State Bd. of Educ. v. Barnette*, the Supreme Court held unconstitutional an attempt to compel schoolchildren to recite words of the Pledge of Allegiance with their own voices. 319 U.S. 624, 628-29, 642 (1943). That the law punished this nonconformity as "insubordination" in no way transformed the pure speech involved into "conduct" of a child that could validly be compelled. *Id.* at 631 ("Here, however, we are dealing with a compulsion of students to declare a belief."). Correspondingly, in *Wooley v. Maynard*, New Hampshire's attempt to force an individual to bear the words "Live Free or Die" on his vehicle unconstitutionally compelled pure speech, not the

"conduct" of displaying a license plate without obstruction. 430 U.S. 705, 707, 714-17 (1977). And likewise, in *Miami Herald Pub. Co. v. Tornillo,* a law forcing newspapers to print words they would not otherwise print (a political candidate's reply to criticism) compelled pure speech, not the "conduct" of supplying equal access. 418 U.S. 241, 257-58 (1974) ("Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'").

Participating in a collaborative creative process with clients to select and design messages they can support, Joanna and Breanna rightly claim the full protection of the First Amendment. (Appellant Opening Br. ["Opening Br."], pp. 7-10, 13). Although their clients provide input in framing the commission and receive the finished product for disbursement, Joanna and Breana exercise editorial discretion in selecting which messages to promote, a decision that remains their prerogative throughout the progression of the design. (Opening Br., pp. 9-10, 13-14). The First Amendment places such decisions beyond government oversight and control. *See Tornillo*, 418 U.S. at 258 (holding decisions about which messages to include in a newspaper "constitute the exercise of editorial control and judgment" which encroach on First Amendment speech). *See also Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 675 (1998) (acknowledging that exercise of

editorial discretion itself constitutes "speech activity"). Since Joanna and Breanna retain legal ownership of the artistic message, they necessarily retain artistic discretion on how to best convey that message. (Opening Br., pp. 13-14). *See Anderson*, 621 F.3d at 1062. This process entails "esthetic and moral judgments about art," which judgments are "for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011). Joanna's and Breanna's hands are not "a passive receptacle or conduit" for reproducing the messages on behalf of the State or anyone else. *Tornillo*, 418 U.S. at 258.[3] They utilize intimately personal resources to write, draw, and paint messages that fit their own esthetic and moral judgments.

II. Antidiscrimination Law Cannot Justify Compulsion of Pure Speech

Antidiscrimination laws do not necessarily transgress into the free speech realm, particularly, where they truly target "the act of discriminating against individuals," rather than speech. *Hurley, v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995). But when the government applies antidiscrimination laws to punish private citizens for refusing to promote messages they find objectionable, First Amendment

[3] Joanna and Breana are not selling blank cardstock for others to put messages on them. (*See* Opening Br., p. 50).

rights are plainly invoked.

Hurley is instructive on this point. In that case, a parade organizer excluded the Irish-American Gay, Lesbian, and Bisexual Group of Boston ("GLIB"), a group seeking to "express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals," from marching as a distinct unit in its parade. *Id.* The parade organizer did not exclude by virtue of sexual orientation, allowing anyone to participate as part of other units. *Id.* Still, the State of Massachusetts equated refusal to include and promote GLIB's *message* with illegal discrimination based on GLIB's members' *status*. *Id.* at 562 (state court holding GLIB was "excluded because of its values and its message, *i.e.*, its members' sexual orientation"). Recognizing that this "peculiar" interpretation "essentially require[ed] petitioners to alter the expressive content of their parade," the Supreme Court unanimously held that "this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 572-73. The Supreme Court recognized that the parade organizer's decision "to exclude a message it did not like from the communication it chose to make…is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." *Id.* at 574.

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

(Mis)casting Joanna's and Breanna's pure speech as a violation of its antidiscrimination ordinance, Phoenix adopts the same rationale as the State of Massachusetts in *Hurley*: equating and confusing refusal to promote a particular message with refusal to provide services to certain people based on their status. (Answering Br., pp. 33-38). The analysis involves a

semantic sleight of hand, stripping Joanna's and Breanna's speech of First Amendment protection by liberally describing their pure speech as conduct, calling it a "refusal to provide same-sex wedding services." (*See* Answering Br., p. 75). But the critical facts are obstinate: Joanna and Breanna decline to write messages promoting same-sex marriage for anyone regardless of status, will write messages promoting marriage between one man and one woman for anyone regardless of status, and will sell generic products to anyone regardless of status, even if they are used in a same-sex wedding. (Opening Br. 7-8, 55).

Insisting that this creative control over one's product constitutes invalid discrimination, Phoenix does not focus on the recipient of the service, but the content of what Joanna and Breanna wish to write. Bottom line for Phoenix: Joanna and Breanna must handwrite and paint artwork featuring words promoting same-sex marriage or forego wedding invitations altogether. But no matter how beneficial the City might consider this objective, the compulsion is "a decidedly fatal" one, proposing to compel "orthodox expression." *Hurley*, 515 U.S. at 579.

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

A wide consensus recognizes that antidiscrimination laws cannot, consistent with the First Amendment, compel pure speech such as written

words.

For example, a group of free speech scholars who opposed Mr. Philip's position in *Masterpiece Cakeshop* acknowledged that "serious constitutional questions would be raised if [an antidiscrimination] statute compelled a baker to affix an offensive message to a cake he or she was asked to bake." Brief for Freedom of Speech Scholars as *Amici Curiae* supporting Respondents at 8, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (U.S. No. 16-111), *available at* http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/. Similarly, the National League of Cities, "a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans," distinguished *Masterpiece Cakeshop* from a case where a printer was punished for declining to print a message promoting a gay pride festival because in *Masterpiece Cakeshop* "[n]o actual images, words, or design celebrating same-sex marriage or the rights of LGBT individuals were ever at issue." *Amici Curiae* Brief of the National League of Cities in support of Respondents at 1, 27, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (U.S. No. 16-111), *available at* http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/. *See also* Brief of Floyd

Abrams et al. as *Amici Curiae* in support of Respondents at 6, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (U.S. No. 16-111) (antidiscrimination law cannot "compel a baker to inscribe a cake with a unique message he has not produced and would not produce for any other customer – say, 'God Bless This Gay Wedding.'"), *available at* http://www.scotusblog.com/case-files/cases /masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/. Even opposing *amicus* in this case recognizes the distinction (though it curiously declines to recognize its applicability). (Brief of Amici Curiae American Civil Liberties Union, *et al.*, p. 18 n. 10).

State courts entertaining similar issues have also recognized the constitutional danger of stretching antidiscrimination rationale to engulf words. The Colorado appellate court that ultimately ruled against Mr. Phillips suggested the inclusion of "written inscriptions" on a cake could trigger a different result. *See Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. App. 2015). Analogously, in *State v. Arlene's Flowers, Inc.*, a case where a florist declined to arrange flowers for a same-sex wedding, the Washington Supreme Court reasoned that "words, realistic or abstract images, symbols, or a combination of these" – which the court found absent in that case – "are forms of pure expression," and that stricter constitutional scrutiny would be required to compel such expression. 389

P.3d 543, 559 n.13 (Wash. 2017) (quoting *Anderson*, 621 F.3d at 1061). In *Lexington Fayette Urban Cnty. Human Rights Comm'n v. Hands on Originals, Inc.*, the Kentucky Court of Appeals held that a human rights commission could not apply an antidiscrimination ordinance to make a printer print t-shirts containing words and messages promoting a gay pride festival because such expressions qualify as "pure speech." No. 2015-CA-000745-MR, 2017 WL 2211381, at *7 (Ky. Ct. App. May 12, 2017), *review granted* (Oct. 25, 2017). And, in *Klein v. Oregon Bureau of Labor and Industry*, – P.3d –, 289 Or. App. 507, 2017 WL 6613356, *16 (2017), the Oregon state court, holding against bakers that refused to bake same-sex wedding cakes, opined the case would have turned out differently had the bakers been punished "for refusing to decorate a cake with a specific message…that they found offensive or contrary to their beliefs."

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

CONCLUSION

For the reasons set out herein and in Appellants' Brief, this Court should reverse the Superior Court's decision in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This certificate of compliance concerns an *amicus curiae* brief, and is submitted under Rule 16(b)(4). The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 2,708 words. The document to which this Certificate is attached does not exceed the word limit that is set by Rule 14.

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