ARIZONA COURT OF APPEALS

DIVISION ONE

BRUSH & NIB STUDIO LC, et al.,

Plaintiffs/Appellants/
Cross-Appellees,

v.

CITY OF PHOENIX,

Defendant/Appellee/
Cross-Appellant.

Court of Appeals
Division One
No. 1 CA-CV 16-0602

Maricopa County
Superior Court
No. CV2016-052251

Panel: Winthrop, Campbell, McMurdie
Oral Argument: Apr. 23, 2018, 10:15 a.m.

DEFENDANT/APPELLEE/CROSS-APPELLANT'S RESPONSE TO AMICUS BRIEFS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes and City Code Provisions

Secondary Sources

This brief responds to the four amicus briefs filed by:

- The Center for Constitutional Jurisprudence ("CJ");
- The Center for Religious Expression and the Center for Arizona Policy ("CRE-CAP");
- The Coalition for Jewish Values, Ethics and Religious Liberty Commission, Jews for Religious Liberty, and the Rabbinical Alliance of America, Inc. ("Jewish Values"); and
- Law and Economics Scholars ("Law & Economics").

ARGUMENT

I. Contrary to amici's contentions, the ordinance does not infringe the freedom of speech.

A. Businesses that speak are not immune from regulation.

Like Brush & Nib, amici assume that because Brush & Nib creates some speech, then any government action implicates the freedom of speech. *See* CJ Br. 3-11; CRE-CAP Br. 3-13. But it is well-settled that businesses cannot "claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986). Aside from obvious cases like taxes, fire codes, and zoning, this settled principle also applies to laws that apply in a unique way to traditionally protected entities. For example:

- The First Amendment expressly protects the press, including advertisements, but that does not give newspapers the right to print discriminatory employment advertisements. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 384-88 (1973). Free speech likewise does not give the press *carte blanche* to hire and fire "editorial employees." *Associated Press v. Nat'l Labor Relations Bd.*, 301 U.S. 103, 131 (1937). Nor does it give newspapers the right to band together and exclude competitors. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

- Private schools have a First Amendment right to "promote the belief that racial segregation is desirable," but those schools nevertheless may not refuse to admit students on the basis of race. *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) ("it does not follow that the Practice of excluding racial minorities from such institutions is also protected by the same principle").

- Law firms are places of speech and association, but that does not license them to refuse partnership to women. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984).

The same rules apply to those who claim to be artists:

- Photography warrants constitutional protection, but a high school prom photographer cannot refuse to take pictures of Mexican couples.

- Cartoons and caricatures are protected (the government could not prohibit a newspaper from running a cartoon depicting Muhammad the Prophet). But a portrait artist at the state fair may not refuse to draw portraits of Asians.

- A particularly gifted and creative atheist chef may not refuse to prepare visually appealing dishes for Christians.

Similarly, Brush & Nib cannot refuse to provide custom wedding invitations to a couple because of that couple's sexual orientation.

Prohibiting discrimination does not implicate the freedom of speech, even when applied to businesses that make and sell creative works.

B. Brush & Nib is free to refuse to produce wedding invitations based on their content.

Phoenix City Code § 18-4(B)(2) does one thing: prohibit discrimination based on race, religion, sexual orientation, etc. But amici (like Brush & Nib) suggest the ordinance goes much farther. The CRE-CAP brief (at 3-7, 10-13) suggests that the ordinance requires Brush & Nib to publish "a specific message" that "celebrates and promotes same-sex marriage." The CJ brief (at 8-10) claims that the ordinance seeks to "advance the City's preferred message." Picking up on this theme, the Jewish Values brief suggests (at 8) that it is "the clear aim of the City's position" to force a Muslim grocer to sell pork, a Jewish website designer to develop a website for pornography, or a Christian screen printer to print messages that conflict with his deeply-held beliefs.

The ordinance does not require any of these things. It does not require a public accommodation to offer particular products, let alone to cater to every customer's whim. *See* Phoenix City Code § 18-4(B)(2). Businesses remain free to determine what products they will sell or not sell.

The ordinance simply provides that, once a business has decided what products to sell, it cannot refuse to sell those products to a customer based on race, religion, etc. Thus, the Muslim grocer is free not to stock pork and the Jewish website designer is free not to develop pornographic websites.

The better analogy is that if the Muslim grocer sells bread, he cannot refuse to sell bread to Jews. If the Jewish website developer makes online attorney profiles, he cannot refuse to make a profile for a Christian (assuming the developer is even a place of public accommodation). And if the Christian screen printer makes "God Bless America" t-shirts, he cannot refuse them to make them for Muslims.

Similarly, Brush & Nib can refuse to make certain types of products. It may categorically refuse to make birthday-party invitations or birth announcements. It may also refuse to write in a lettering style it dislikes or paint imagery it finds tacky. And it may refuse to sell invitations with puns or wordplay, just like it may refuse to make motorcycle-themed invitations. But having decided to offer wedding invitations to the public, it cannot refuse to make invitations based on race, religion, sexual orientation, etc. *See* Argument § I.C.1, below.

This analysis demonstrates why amici's reliance on *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) and *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986) is misplaced. *See* CJ Br. 8-9; CRE-CAP Br. 6-7. The laws in those cases required a private forum (a newspaper and a corporate newsletter, respectively) to include messages, thereby depriving the newspaper and the utility of the ability to reject messages based on their content. Phoenix's ordinance does not.

C. The claim that Brush & Nib discriminates based on the message, not the customers, is a shallow mask for illegal conduct.

Amici (like Brush & Nib) also claim that Brush & Nib merely seeks permission to discriminate based on message, and not the identity of its customers. *See* CRE-CAP Br. 9; Jewish Values Br. 1, 5, 18. That's not true. Brush & Nib unquestionably seeks to discriminate on the basis of its customers' sexual orientation apart from any message.

1. The only evidence in the record shows that invitations for same-sex couples and opposite-sex couples are not substantively different.

The only wedding invitations in the record use completely routine celebratory text. Consider the invitation below, which is substantively

identical to an invitation Brush & Nib willingly produced.[1] Redacting the couple's names demonstrates that the identical invitation could be used for either a same-sex couple or an opposite-sex couple:

> *Together with their families*
>
> [redacted]
>
> *- and -*
>
> [redacted]
>
> *Request the pleasure of your company at the celebration of their marriage*
>
> *On Sunday, April 28, 2019*
> *The Four Seasons*
> *Scottsdale, Arizona*
>
> *Dinner and dancing to follow*

Requiring Brush & Nib to sell an essentially identical invitation to a same-sex couple does not require Brush & Nib to write "words that promote causes objectionable to [it]." CRE-CAP Br. 9. It merely requires Brush & Nib to write two names of the same gender (i.e., fill in the redacted portions above).

[1] APP182.

The Supreme Court has held that replacing one name with another in an announcement does not infringe the freedom of speech, even though such announcements "are subject to First Amendment scrutiny." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). If a law school will willingly announce an employer name, location, and time, then the government may compel the law school to make the same announcement for the U.S. Army (effectively swapping the name of a law firm with a branch of the military). *See id.*

If a law school will write:	**Then it must also write:**
The Kirkland & Ellis recruiter will meet interested students in Room 123 at 11 a.m.	*The U.S. Army recruiter will meet interested students in Room 123 at 11 a.m.*[2]

As the Court explained, compelling such a substitution "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" (or here, for other couples). *Id.*

[2] This is a direct quotation from *Rumsfeld*, 547 U.S. at 62.

This reasoning applies equally to wedding invitations:

If an invitation vendor will write:	Then it must also write:
John and Jane request the pleasure of your company to celebrate their marriage. *April 28, 2019 at the Four Seasons, Scottsdale, Arizona*	*Joan and Jane request the pleasure of your company to celebrate their marriage.* *April 28, 2019 at the Four Seasons, Scottsdale, Arizona*

In reality, therefore, and contrary to amici's implicit assumption, a same-sex couple's wedding invitation is not a product distinct from an opposite-sex couple's wedding invitation. In most cases, an invitation for a same-sex couple looks identical to one for an opposite-sex couple other than the names. Amici and Brush & Nib's contention that the requested refusal is based on message rather than sexual orientation is thus a shallow mask for unlawful discrimination.

2. Brush & Nib seeks to refuse to make *any* such invitations, without regard to message.

Every single wedding invitation in the record uses routine celebratory text and would look no different if the names were redacted, as shown above.[3] Yet Brush & Nib requests an injunction and declaratory

[3] APP182; APP185; APP188.

judgment allowing it to refuse to make *any* custom wedding invitations for same-sex couples, *regardless of the words or design*—i.e., *regardless of the message*. In reality, Brush & Nib does not seek to avoid an extreme or unusual invitation—that is merely a convenient excuse. Instead, it wants to refuse even the most conventional invitation, solely because it will be used by a same-sex couple instead of an opposite-sex couple.

Perhaps some hypothetical couple could ask Brush & Nib to sell a wedding invitation with wording that Brush & Nib objects to without regard to whether the wedding involves two men or two women. The record simply contains no such request, and therefore *this record* does not justify enjoining the ordinance.

Moreover, if Brush & Nib were to refuse to sell such a wedding invitation without regard to the sexual orientation of the couple (or race, religion, etc.), then the refusal would not even violate the ordinance because the refusal would not implicate the protected categories. Consequently, in that circumstance, the ordinance would not infringe Brush & Nib's free-speech rights and still should not be enjoined.

This highlights the difficulty of analyzing a pre-enforcement facial challenge. Although amici present several hypothetical requests Brush &

Nib could receive, nothing in the record suggests that anyone (same-sex couples or opposite-sex couples) would ever actually make such requests, nor is there any testimony indicating whether Brush & Nib would fulfill such requests if they came from opposite-sex couples. *See Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 450 (2008) (facial challenges are "disfavored" because they "often rest on speculation" and require courts to "anticipate a question of constitutional law in advance of the necessity of deciding it").

At bottom, Brush & Nib wants to refuse to sell *any* invitations, with any design or wording, to an entire category of consumers. This dispute is not about speech; it is about wanting to refuse service.

3. Amici's proposed limiting principle falls apart.

Amici also argue that Brush & Nib's requested right to refuse is not based on sexual orientation because Brush & Nib willingly sells some products to same-sex couples. Jewish Values Br. 6. In other words, amici and Brush & Nib ask the Court (presumably as a limiting principle) to distinguish between wedding and non-wedding products, or between custom and premade products. Those distinctions fall apart with scrutiny because the government may prohibit discrimination even if a public

accommodation is willing to provide a subset of goods and services to anyone.

For example, a restaurant that gives personal service in the dining room only to white customers but still offers "take-out service for Negroes" nevertheless unlawfully discriminates on the basis of race. *Katzenbach v. McClung*, 379 U.S. 294, 296-97 (1964). A law firm that willingly hires female associate attorneys nevertheless unlawfully discriminates on the basis of gender if it denies partnership to women—even if partnership is a subjective and discretionary promotion. *Hishon*, 467 U.S. at 78. Brush & Nib may not reserve its wedding products or custom products for a preferred set of customers any more than a restaurant may reserve its dining room or a law firm may reserve its partnership.

D. Brush & Nib is free to speak about marriage, art, and religion.

Amici also contend that the ordinance prevents Brush & Nib from speaking freely about same-sex marriage. *See* Jewish Values Br. 6. Not so. As Phoenix has repeatedly explained, Brush & Nib can voice its views on same-sex marriage however it wants, as long as it does not engage in discriminatory conduct or say it will engage in such conduct. *See* Answering Br., Arg. § II.B. Advocacy is one thing; discrimination is

another. The Jewish Values brief (at 15) mentions several entirely permissible religiously motivated business practices, but antidiscrimination laws do not permit the same businesses from converting their advocacy to discrimination. Using some of the Jewish Values brief's examples:

- Marriott is free to place the Book of Mormon in all of its rooms, but it cannot announce a policy of refusing rooms to non-Mormons.
- In-N-Out may proselytize by printing Bible verses, but may not post a sign limiting its cheeseburgers and fries to Christians.
- Hobby Lobby may take out full-page ads to evangelize, but may not advertise that it will refuse to hire non-Christians.

This distinction between advocacy and conduct holds true outside of antidiscrimination law, including where conduct is accomplished through speech.

- You can write all you want about whether prostitution should be illegal.[4] But the government can punish publishing an ad offering sex for money. *Pittsburgh Press*, 413 U.S. at 388.
- You can speak all you want about whether drugs should be legal.[5] But the government can punish making a verbal offer to sell drugs. *Arizona v. Padilla*, 169 Ariz. 70, 72 (App. 1991).

[4] *Cf.* Richard A. Posner, *Sex and Reason* (1992).

- You can publish books about how insider trading promotes efficient markets and should not be illegal.[6] But the government can arrest you for passing written insider information to your brother. *Salman v. United States*, 137 S. Ct. 420, 427-28 (2016).

- You can run a blog about whether antitrust laws should be loosened.[7] But if you speak to your competitor about prices, you can go to jail. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 440-41 (1978).

As these examples illustrate, merely labelling something "speech" does not resolve the inquiry. Otherwise the government could not constitutionally prohibit advertisements for sex, verbal offers to sell drugs, family conversations about publicly traded companies, or secret meetings to agree on prices. And despite these prohibitions, serious people can—and do—publicly debate the wisdom of the underlying laws or whether the prohibited conduct may have societal benefits. Similarly, Brush & Nib may

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[5] *Cf.* Conor Friedersdorf, *Federal Judge Richard Posner: It's "Really Absurd" That Marijuana Is Illegal*, The Atlantic (Sept. 11, 2012, https://www.theatlantic.com/politics/archive/2012/09/federal-judge-richard-posner-its-really-absurd-that-marijuana-is-illegal/262189.

[6] *Cf.* Henry G. Manne, *Insider Trading and the Stock Market* (1966).

[7] *Cf.* Geoffrey Manne, *Manne on the Apple E-Books Case: The Second Circuit's Decision Has No Support in the Law and/or Economics*, Truth on the Market (Feb. 15, 2016), https://truthonthemarket.com/2016/02/15/manne-on-the-apple-e-books-case-the-second-circuits-decision-has-no-support-in-the-law-andor-economics/.

say that it opposes same-sex marriage and may engage in vigorous debate on the topic, but it cannot announce that it will refuse to treat same-sex couples equally.

Courts have recognized this distinction for decades. Following the same principle, "[u]ndoubtedly [a restaurant owner] has a constitutional right to espouse the religious beliefs of his own choosing," but he does not "ha[ve] a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs." *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968). The law on this point is the same now as it was in the 1960s.

E. The only policy expressed by the ordinance is that of equality in the marketplace, and the ordinance extends identical protection to religious communities.

1. Contrary to amici's suggestion, Phoenix does not favor "orthodox" views.

The CJ brief closes by saying that the City "limit[s] creative expression to only those points of view with which the City agrees." Two amici contend that Phoenix favors "orthodox" views over unorthodox

views. CJ Br. 4, 10; CRE-CAP Br. 10. Far from it. Phoenix does not pick winners or losers, orthodox or unorthodox views. Said another way, Phoenix prohibits discrimination in the marketplace of *goods* but does not prohibit any views in the marketplace of *ideas*.

Indeed, Phoenix added sexual orientation in 2013,[8] when same-sex marriage was not even legal in Arizona.[9] Thus, although same-sex couples in 2013 could not marry in Arizona, public accommodations still could not refuse service to them. The ordinance neither prescribes nor endorses any view about marriage. It merely prohibits discrimination on the basis of sexual orientation.

2. The ordinance protects religious individuals just as much as it protects same-sex couples.

The ordinance prohibits discrimination on the basis of religion at least as much as it prohibits discrimination on the basis of sexual orientation. *See* Phoenix City Code § 18-4(B)(2). This means that:

- An atheist cannot refuse to serve Christians.

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[8] Ordinance No. G-5780 (2013) (copy at APP098-APP103).

[9] *Cf. Majors v. Horne*, 14 F. Supp. 3d 1313, 1315 (D. Ariz. 2014) (declaring Arizona's prohibition on same-sex marriage unconstitutional in light of controlling Ninth Circuit precedent); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (requiring all states to recognize same-sex marriage).

- A small theatre troupe cannot refuse Christian patrons entry to a production of *Fiddler on the Roof*, Jewish patrons to *Godspell*, or Mormon patrons to *The Book of Mormon*.
- A gay jeweler who opposes the position taken by the Jewish and Southern Baptist groups in the Jewish Values brief cannot refuse to sell wedding rings to Jews or Southern Baptists.

A member of an unpopular religion should not face the indignity of being turned away when trying to buy gas, groceries, or a hotel room for the night. Nor should a same-sex couple be turned away from a vendor who sells wedding invitations to opposite-sex couples.

3. The government properly protects its citizens from discrimination.

As a society, we decided a half-century ago that public accommodations cannot say "Your kind is not welcome here." Interpreting that set of laws to violate the freedom of speech would require overturning the same half-decade of progress and necessarily would enable lunch counters to turn away customers of unpopular races, religions, or sexual orientations. That is not the law, nor should it be. *See Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (holding "patently frivolous" a restaurant owner's argument that the federal public accommodations statute "was invalid because it 'contravenes the will of God' and

constitutes an interference with the 'free exercise of the Defendant's religion'") (citation omitted).

II. The ordinance does not unduly interfere with Brush & Nib's ability to act based on its religious beliefs.

The Jewish Values brief also argues that the ordinance does not adequately respect Brush & Nib's freedom of religion—although the brief does not mention the Free Exercise of Religion Act, A.R.S. § 41-1493.01 ("FERA"). Amici's primary claim is that religion teaches people how to conduct themselves in their everyday lives, including in their business dealings. Of course that is true. But it does not help decide this case.

Our law has long sought to balance protection for religiously-motivated conduct with the requirements of civil government. *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145, 167 (1878) (rejecting free exercise challenge to polygamy conviction). If courts create religious exemptions for everything, then "every citizen" would become "a law unto himself." *Id.* A pluralistic society cannot accommodate all religious demands for accommodation in the public sphere. That is especially true in the commercial marketplace, which would become unworkable if each business became "a law unto [it]self."

For example, a man may believe that only religious courts are legitimate, but if a supplier sues him for breach of contract, he cannot ignore the judgment. Similarly, a man may believe that a woman's place is in the home, but if he opens up a business, he may not refuse to hire women.[10]

Arizona's framework for resolving this age-old question is FERA. That statute provides that "[g]overnment 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.R.S. § 41-1493.01(c). The ordinance complies with FERA because it does not substantially burden Brush & Nib's exercise of religion, and even if it did, it is the least restrictive means

[10] Amici try to defend Brush & Nib by insisting that Brush & Nib and many religions lack animus toward same-sex couples. Jewish Values Br. 18-20. But that is beside the point. The purpose of antidiscrimination laws is to prohibit discriminatory treatment, regardless of motive. Phoenix prohibits discrimination, not animosity. For example, a man may believe that women should stay at home based on well-intentioned desires to protect and celebrate women's unique role. But if he owns a business, he may not refuse to hire women employees. His good intentions and lack of animosity do not excuse discrimination.

of furthering the compelling government interest of eliminating discrimination in the public marketplace. *See* Answering Br., Arg. § III. None of amici's arguments changes that.

The Jewish Values brief appears to assume that the ordinance substantially burdens Brush & Nib's exercise of religion. But it does not mention the substantial-burden test or any record evidence relevant to that claim.

That omission is telling. Bob's religion, for example, may prohibit something that Jane lawfully does. That does not mean that Bob tangentially facilitating Jane's activities substantially burdens Bob's exercise of religion. For example, a taxi driver whose religion says that women may not drink is not substantially burdened by driving a woman to a bar. His act of driving does not proximately cause, and he is not responsible for, the woman's decision to drink. Similarly, a Crate & Barrel employee whose religion says that same-sex couples may not marry is not substantially burdened by setting up a wedding registry for a same-sex couple, because that act does not cause the marriage. *See Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1145 (11th Cir. 2016) ("[I]t is for the courts to determine

objectively what the [laws] require and whether the government has, in fact, put plaintiffs to the choice of violating their religious beliefs."); *see also* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 Geo. Wash. L. Rev. 94, 132, 137 (2017) (to perform this task, courts should "enlist common law tort principles," including proximate cause).

The same is true of Brush & Nib. Many goods and services go into a wedding: invitations, rings, table settings, janitorial services, perhaps even valet parking. But none of these vendors is responsible for the act of marriage. That responsibility lies with the couple and the officiant. Brush & Nib cannot claim that its religion is substantially burdened by tangentially furthering a marriage for which it is not, in any normal sense of the word, responsible.

In any case, even if the ordinance placed a substantial burden on Brush & Nib's ability to act in accordance with its religious beliefs, that burden would be justified. FERA requires that a law which substantially burdens religion must further "a compelling government interest" and be "the least restrictive means of furthering" that interest. A.R.S. § 41-1493.01(c). The Supreme Court has held that the government has a

"compelling interest in eliminating discrimination," *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987), that "public accommodations laws 'plainly serv[e] compelling state interests of the highest order,'" *id.* (citation omitted), and that such laws "abridge[] no more speech or associational freedom than is necessary to accomplish that purpose," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628-29 (1984).

Without mentioning this authority, the Law & Economics amici argue (at 8-14) that, absent monopoly, market forces will make discrimination unusual and antidiscrimination laws unnecessary. That is a nice theory, but reality has shown it not to be true. Minorities of all sorts historically have been excluded from places of public accommodation without the presence of any monopoly. Moreover, even if efficient markets would have solved that problem in the long run, the government need not wait to protect its citizens against discrimination.[11] It may accelerate the transition by law.

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[11] As one famous economist remarked, "this *long run* is a misleading guide to current affairs. *In the long run* we are all dead. Economists set themselves too easy, too useless a task, if in tempestuous seasons they can only tell us, that when the storm is long past, the ocean is flat again." John Maynard Keynes, *A Tract on Monetary Reform* 80 (1924).

The Law & Economics amici seem to think that as long as a person who suffers discrimination eventually finds a willing seller, no meaningful harm has been done. But as the Supreme Court recognized five decades ago, the "fundamental object" of public accommodation laws is to prevent the "deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (citation omitted). This object is not accomplished by sending customers on a search for non-discriminatory stores. Throughout the twentieth century, disfavored minorities typically had access to a market niche, but that did not justify excluding them equal enjoyment of the entire market.[12] "Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty." *Obergefell*, 135 S. Ct. at 2600.

If amici are suggesting that public accommodation laws could be justified only in those locales where alternatives are unavailable to particular protected classes, this would result in an unworkable standard.

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[12] *See, e.g.*, Nat'l Park Serv., *Civil Rights in America: Racial Desegregation of Public Accommodations* 92–93 (2009); David Montejano, *Anglos and Mexicans in the Making of Texas, 1836–1986* 167 (1987).

Businesses would have to keep tabs on the discriminatory practices of their competitors with respect to each protected class. Minorities of all sorts would have to revive something like *The Negro Motorist Green Book*. And governments and courts would have to determine, for each town and neighborhood, whether insufficient service existed to justify requiring equal treatment. No court has adopted this approach, and for good reason.

III. The constitutional and common law history does not help Brush & Nib.

Amici also include discussions of constitutional and common law history. That history does not help decide this case.

The CJ brief (at 11-16) recapitulates the history of the First Amendment to show its importance (even though this case involves only state-law claims). But the question in this case is not whether free speech is important (it is), but whether the ordinance compels speech under the meaning of the free-speech clause. Thomas Paine's anonymous publication of *Common Sense* sheds no light on this point.

The Law & Economics brief (at 8-11) asserts that the common law guaranteed non-monopoly businesses the right to refuse customers. That is not even true to begin with. At common law, "if an inn-keeper, or other

victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way." 3 William Blackstone, *Commentaries* *166; *see also* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1321 (1996) (the common law provided that "[t]hose who hold themselves out as ready to serve the public thereby make themselves public servants and have a duty to serve"). But regardless, even if such a common-law rule existed, the government may change course and prohibit discrimination by legislation or regulation. There is no constitutional right to pick customers, or else antitrust laws and common-carrier requirements would fall. To top it off, if the right to choose customers were absolute, as amici suggest, then retailers could refuse service to women, a Chinese restaurant could refuse to serve white customers, and atheists could refuse to serve Christians. That is not the law. A business has "no 'right' to select its guests as it sees fit, free from governmental regulation." *Heart of Atlanta*, 379 U.S. at 259.

IV. The amicus briefs show that the attack on public accommodation laws is not as narrow as Brush & Nib claims.

Finally, it is worth noting what is at stake in this case. Brush & Nib has insisted that its challenge to the ordinance is limited to that "small subset of businesses . . . that provide expressive services and that may have message-based objections to certain work." Opening Br. at 60. The amicus briefs bely those claims. The Jewish Values brief insists (at 9) that Brush & Nib must be exempt from the ordinance because "[t]he practice of faith does not end when a religious believer leaves her home or place of worship"—but the brief does not explain why public accommodation laws must yield to religious belief only in the context of wedding vendors. Similarly, the Law & Economics brief (at 6-11) argues that public accommodation laws are an affront to free-market principles, without purporting to limit this critique to the wedding-vendors context.

Meanwhile, Brush & Nib's own lawyers have been busy elsewhere in the country, arguing (unsuccessfully) that a bed and breakfast may refuse lodging to a same-sex couple on freedom of association and privacy grounds, *Cervelli v. Aloha Bed & Breakfast*, --- P.3d ---, 2018 WL 1027804 (Haw. Ct. App. Feb. 23, 2018), and that an employer's religious beliefs

exempt him from federal laws prohibiting discrimination in employment, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, --- F.3d ---, 2018 WL 1177669, at *12-24 (6th Cir. Mar. 7, 2018).

As these arguments demonstrate, there is no limiting principle to Brush & Nib's argument that it should be able to refuse custom wedding invitations to same-sex couples. Brush & Nib's arguments would equally support allowing religiously-motivated discrimination on the basis of race and gender, and in a wide variety of other domains. This Court should reject the invitation to undo a half-century of progress merely because Brush & Nib does not want to write the names of two people of the same gender.

CONCLUSION

Amici ask this Court to give Brush & Nib a blank check to discriminate against any same-sex couple that requests a wedding invitation. But the freedom of speech does not require Phoenix to permit such discriminatory conduct. Nor do the other constitutional and statutory claims raised by Brush & Nib. The judgment of the superior court should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of March, 2018.

OSBORN MALEDON, P.A.

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