SUPREME COURT OF ARIZONA

BRUSH & NIB STUDIO LC, et al., Plaintiffs/Appellants/ Cross-Appellees, v. CITY OF PHOENIX, Defendant/Appellee/ Cross-Appellant.	Arizona Supreme Court No. CV-18-0176-PR Court of Appeals Division One No. 1 CA-CV 16-0602 Maricopa County Superior Court No. CV2016-052251

CITY OF PHOENIX'S SUPPLEMENTAL BRIEF

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INTRODUCTION

In its Response to the Petition, Phoenix explained that:

1. Brush & Nib seeks the right to refuse to make *any* custom wedding product for *any* same-sex couple; no court in this country has granted that right. Response to Petition § I.A.

2. Brush & Nib has no valid speech claim because the ordinance regulates only the discriminatory conduct of refusing to serve. Response to Petition § I.B.

3. Because Phoenix can prohibit public accommodations from discriminating, *see* Phoenix City Code § 18-4(B)(2), it can also prohibit public accommodations from announcing that they will discriminate, *see id.* § 18-4(B)(3). Response to Petition § I.C.

4. The ordinance does not substantially burden Brush & Nib's religion. Response to Petition § II.A.

5. Even if the ordinance substantially burdens Brush & Nib's religion, it survives the resulting scrutiny because it is the least restrictive means to eliminate discrimination in the private marketplace. Response to Petition § II.B.

This supplemental brief elaborates on the first, second, and fourth points.

ARGUMENT

I. Brush & Nib must show that Phoenix can never constitutionally apply § 18-4(B)(2) to Brush & Nib's intended refusals to same-sex couples.

A challenge to a law made "not in the context of an actual" dispute is "a facial challenge." *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 449 (2008). Here, Brush & Nib's challenge does not arise from an actual

request for services from a same-sex couple. Instead, Brush & Nib launched a preemptive strike, seeking the right to refuse *any* request for custom services for *any* same-sex wedding. That is a facial challenge.

In a facial challenge, the plaintiff must demonstrate "that the law is unconstitutional in all of its applications." *Id.*[1] Challenging a subset of applications of the law rather than the law's full scope does not transform a case into an as-applied challenge. The plaintiff must show "that the law is unconstitutional in all its applications," *id.*, *within the scope of the challenge*. For example, in *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010), the plaintiffs challenged a public records law as applied only to "referendum petitions." The Court construed the case as a facial challenge "to the extent of that reach." *Id.*

Thus, even though Brush & Nib does not challenge all possible applications of the ordinance (e.g., applied to racial discrimination or discrimination at restaurants), Brush & Nib still must meet the facial challenge standard for the scope of its challenge (i.e., refusals to make

[1] The Panel also referenced a lighter burden. Op. at 11 n.8. That lighter burden applies only to overbreadth challenges, *Grange*, 552 U.S. at 459 n.6; neither side petitioned this Court on an overbreadth claim.

custom wedding stationery products for same-sex couples' weddings). Brush & Nib insists that its challenge is as-applied, but it has never specified as-applied *to what*.

Brush & Nib carries this heavy burden because ruling for Phoenix would not require Brush & Nib (or anyone else) to fulfill any particular request for services. It would simply affirm the "general rule" that, although "religious and philosophical objections are protected," they "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). Any disputes about particular wedding items should wait until a same-sex couple requests such an item (if that ever happens).

In addition to these formal burdens, facial challenges are "disfavored." *Grange*, 552 U.S. at 450. Because they lack particulars, "[c]laims of facial invalidity often rest on speculation," risking "premature interpretation of statutes on the basis of factually barebones records." *Id.* at 450 (citation omitted). "Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught

by the particular, to which common law method normally looks." *Sabri v. United States*, 541 U.S. 600, 608-09 (2004). These issues create significant problems in wedding-vendor challenges like this one because, as the U.S. Supreme Court explained, "details might make a difference" when deciding whether a wedding vendor has a valid claim. *Masterpiece*, 138 S. Ct. at 1723.

Here, Brush & Nib's claims fail the facial-challenge test. Phoenix can constitutionally apply the ordinance in all sorts of ways within the scope of Brush & Nib's challenge. As the Response to the Petition demonstrated (at 15, 19), Brush & Nib has no constitutional right to refuse a same-sex couple's request for an "Anne / Table Three" place card or an invitation identical to one Brush & Nib would willingly make for an opposite-sex couple. The Court should affirm on this basis.

II. The Panel correctly held that the ordinance does not regulate speech.

Businesses may not "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). For example, tattooing is protected speech, but "generally

applicable laws . . . may apply to tattooing businesses." *Coleman v. City of Mesa*, 230 Ariz. 352, 360, ¶ 31 (2012).[2]

Even though Brush & Nib engages in speech in some aspects of its business, Phoenix City Code § 18-4(B)(2) does not regulate that speech. Conversely, none of Brush & Nib's expression or creative decisions implicate the ordinance.

Consider each of the creative aspects that go into wedding stationery, based on every piece of Brush & Nib's work product in the record. Brush & Nib has complete control over the range of products it offers—it may choose to make invitations, place cards, and menus, but decline to make thank-you notes. It has complete control over what designs it will paint—it may choose to paint lily- and seascape-themed invitations but refuse to paint cat-themed invitations. It has complete control over what style of calligraphy to offer. And it has complete control over what types of words and celebratory messages it will write—it may choose to write that the couple and their

[2] Although Brush & Nib asserted Arizona constitutional claims, it did "not explain how, in this case, [the] analysis under Arizona's free speech clause would differ from federal precedent." Op. ¶ 23. "Merely referring to the Arizona Constitution without developing an argument is insufficient . . . ." *State v. Jean*, 243 Ariz. 331, 342, ¶ 39 (2018).

parents "request the pleasure of your company at the marriage" but refuse to write "Join us in celebrating marriage equality."

Brush & Nib's products also contain logistical information—the wedding's place and date, the courses on a menu, etc. Brush & Nib presumably does not care whether a wedding takes place at the Four Seasons versus the Arizona Biltmore, or whether the menu features sea bass and carpaccio versus salmon and chicken. But in any event, Brush & Nib has broad latitude there, too.

Essentially the only thing left is the couple's names. When it comes to writing names, however, Brush & Nib functions as a scribe. Consequently, and as Phoenix demonstrated in the Response to the Petition (at 18-19), the law does not recognize fill-in-the-blank names as constitutionally protected speech. That's the core takeaway of *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). Brush & Nib simply has no legitimate interest in whether a bride's name is Ali, Amy, or Anne. Thus, declining a request based on the names (or the couple's races or genders) is the same as choosing customers. But "[t]he Constitution does not guarantee a right to choose . . . customers. . . ." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring).

Brush & Nib nevertheless insists that its objection is to the *message*, not the couple. Phoenix, however, has never questioned Brush & Nib's right to refuse requests to write bona fide messages with which it disagrees (e.g., an invitation with "marriage equality" messages). If the refusal is actually based on *message*, the refusal does not trigger the ordinance.[3] But as shown in the Response to the Petition (at 18-19), one change—flipping the gender of one of the individuals—is the difference between whether Brush & Nib will accept or refuse a couple's request. That substitution does not change the *message* in any way the law recognizes.

That is not to trivialize Brush & Nib's belief that a same-sex couple's wedding is something different from an opposite-sex couple's wedding. Brush and Nib may sincerely and strongly believe that a wedding for "one man and one woman" is what "God ordained," whereas a wedding for two men or two women is not. Petition at 5. It can do so "based on decent and

[3] As the Supreme Court of the United Kingdom recently held, refusing to bake a cake iced with "Support Gay Marriage" is message-based discrimination, but refusing to bake a cake for a same-sex couple that the baker would willingly bake for an opposite-sex couple is not. *Lee v. Ashers Baking Co.* [2018] UKSC 49 (appeal taken from N. Ir.), ¶¶ 12, 22, 62, https://www.supremecourt.uk/cases/docs/uksc-2017-0020-judgment.pdf.

honorable religious or philosophical premises." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

But objections to the wedding do not create a free-speech right to refuse to write something announcing the event. In *Rumsfeld*, law school administrators objected to the military and its policies, and therefore did not want military recruiting to occur on their campuses. They argued that having to swap "Kirkland & Ellis" with "The U.S. Army" violated their free-speech rights because of their underlying objections to on-campus military recruiting. *Rumsfeld*, 547 U.S. at 62. But as *Rumsfeld* explained, "[t]o the extent that the Solomon Amendment incidentally affects expression, the law schools' effort to cast themselves as just like the schoolchildren in *Barnette*, the parade organizers in *Hurley*, and the Boy Scouts in *Dale* plainly overstates the expressive nature of their activity and the impact of the Solomon Amendment on it, while exaggerating the reach of our First Amendment precedents." *Id.* at 70.

At its core, Brush & Nib's argument relies on the same logic that *Rumsfeld* rejected. Brush & Nib asserts that having to write two names of the same gender violates its free-speech rights because of its objection to the underlying marriage. *Rumsfeld*, however, teaches that even if changing a

name incidentally affects expression, that incidental affect does not regulate speech in a manner that raises any constitutional concern.

To say otherwise, Brush & Nib, like in *Rumsfeld,* simply overstates the expressive nature of its stationery business and the impact of City Code § 18-4(B)(2). Although Brush & Nib repeatedly refers to having to write words celebrating or endorsing same-sex marriage, none of Brush & Nib's portfolio items in the record—routine invitations, place cards, menus, etc.—celebrate or endorse same-sex marriage and altering the names that might appear on these items does not change that fact. In the parlance of *Rumsfeld*, "[n]othing about [wedding invitations] suggests that [the stationery vendor] agree[s] with" the wedding or the underlying union. *Rumsfeld*, 547 U.S. at 65.

In reality, Brush & Nib objects because it does not want to make a product it knows will be used in an event with which it disagrees. The law does not recognize that objection under free-speech doctrine because an artist has no constitutional right to control how the art will be used. For all the rights the Constitution guarantees to artists and speakers, it simply does not give control over downstream uses by customers.

Tellingly, Brush & Nib recognizes this concept for premade products—"they 'will happily sell their pre-made works to anyone…for any

event.'" Petition at 4. Brush & Nib then assumes that the law treats custom works differently in this respect. But it does not. Otherwise a painter willing to paint a custom panda mural for a white baby's nursery could refuse to paint the same panda mural for a black baby's nursery. Brush & Nib's theory, therefore, rests on a demonstrably false legal premise.

In sum, if Brush & Nib objects to *any part* of a customer's request other than the couple's sexual orientation, then it may refuse the request without violating the ordinance (and thus without triggering any constitutional scrutiny). Changing the couples' sexual orientation does not change the message of wedding invitations, menus, maps, or other products in a constitutionally meaningful way. Artists—particularly those who have chosen to serve the public at large—have no constitutional right to choose their customers or dictate how and where their products will be used. The lower courts properly rejected Brush & Nib's free-speech challenge, and this Court should affirm.[4]

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[4] For all of the above reasons, *Rumsfeld* did not apply strict or even intermediate scrutiny. Nevertheless, even if some constitutional scrutiny applied, at most the ordinance would be subject to intermediate scrutiny. "[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (internal citation omitted). "If a regulation serves purposes

III. The Panel correctly held that the ordinance does not substantially burden Brush & Nib's religion under FERA.

As explained above and in the prior briefing, Brush & Nib cannot credibly object to the actual message conveyed by a place card that says "Anne / Table Three" or the routine invitation text on the invitations it has already made. Instead, an amicus supporting Brush & Nib distilled the true basis for Brush & Nib's objection: "moral complicity." *See* Brief of Amicus Curiae Jewish Coalition for Religion Liberty in Support of Appellants (the "Coalition") at 15. Because Brush & Nib's religion prohibits the *underlying marriage*, Brush & Nib wants no part in anything touching the marriage—regardless of whether the product mentions the marriage (e.g., invitations) or not (e.g., place cards or menus).

Complicity claims are "about how to live in community with others who do not share the claimant's beliefs, and whose *lawful conduct* the person of faith believes to be sinful." Douglas Nejaime & Reva B. Siegel, *Conscience*

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unrelated to the content of the expression, it is neutral, even if it incidentally affects some speakers or messages but not others." *State ex rel. Napolitano v. Gravano*, 204 Ariz. 106, 112, ¶ 19 (App. 2002). Here, the Panel explained in the alternative why the ordinance survives intermediate scrutiny. (Op at 18 n.11.) Brush & Nib has never disputed that the ordinance survives intermediate scrutiny, but instead placed all its eggs in the strict-scrutiny basket.

Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 Yale L.J. 2516, 2519 (2015) (emphasis added). Traditional free-exercise cases, by contrast, involve claims "by religious minorities who sought exemptions based on unconventional beliefs generally not considered by lawmakers when they adopted the challenged laws; the costs of accommodating their claims were minimal and widely shared." *Id.* at 2520.

Consider some typical traditional free-exercise claims. Allowing someone to wear a yarmulke or hijab in a driver's license photograph poses few, if any, externalities on any other citizen. Allowing a prisoner to keep a short beard for religious reasons likewise harms no one else. Those traditional FERA disputes are merely between private parties and *the government*.

By contrast, complicity-based FERA claims would allow individuals to project and impose their beliefs onto innocent third parties with different religious beliefs even in places of public accommodation. Complicity-based claims thus "present special concerns about third-party harm." *Id.* at 2519. Consider a religious cab driver whose religion forbids unaccompanied women from traveling. If he asserts a FERA-based refusal to provide his services to unaccompanied women, that projects his beliefs onto innocent

third parties who are merely trying to flag down a cab that purportedly offers its services to the public. Unlike a traditional FERA claim, therefore, this dispute involves more than just the government and one citizen.

The third-party effects of complicity-based claims create tension with the principle, first articulated by Judge Learned Hand, that, because of the Establishment Clause, constitutional free-exercise claims "give[] no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (citation marks and quotations omitted).

In light of this principle, FERA does not give anyone an unqualified right to insist that others conform to his or her own religious beliefs. FERA applies only to "substantial[] burden[s]." A.R.S. § 41-1493.01(B)-(C). Thus, when a business brings a FERA claim, it must identify more than a tenuous connection between its actions and the third-party's alleged sin. It must show that the connection between the two is sufficiently close to result in a substantial burden if an exemption is not granted. *See* 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)

(courts should "enlist common law tort principles as secular sources for measuring the substantiality of burdens on religion").

Brush & Nib has not established a sufficient connection between its actions (providing place cards and invitations) and its moral objection (to the act of marriage) to qualify for a FERA-based objection. Only the couple (and perhaps the officiant) are meaningfully responsible for the marriage. The various vendors who provide services that make the ceremony and celebration possible, or more delicious or beautiful, do not cause the couple to marry in legally relevant way. A wedding stationer/calligrapher, after all, typically is not commissioned until after the couple has already decided to marry, does not attend the ceremony, and plays a relatively insignificant role in the couple's union.

The Coalition (at 16) provides examples of when Orthodox Jewish law prohibits specific types of complicity: e.g., "encouraging *other Jews* to violate the Sabbath for one's own convenience." (Emphasis added.) And the Coalition's examples themselves have boundaries, such as expressly limiting the scope of complicity to "other Jews." It may be no problem for an Orthodox travel agent to book a Sabbath-violating excursion for a *non-Jewish customer*.

Brush & Nib offers no similar concrete rules or limits. It instead essentially asks the court to hold, as a matter of law, that a vendor with a complicity-based objection is always justified in refusing to provide goods and services that non-believers (or disciples of a different denomination) may use in a way that the vendor's religion prohibits.

This legal theory knows no bounds. Brush & Nib's owners happen to be artists. Although their free-speech claim requires that kind of artistry, their FERA claim does not. Non-artists such as the cutlery supplier or the linen vendor would have no free-speech defense for refusing service, but they would all have the same type of complicity-based FERA claim as Brush & Nib.

And the potential refusals go far beyond same-sex weddings. A Catholic who believed in Transubstantiation could refuse valet parking services for a Lutheran wedding that offered Consubstantiation-based Holy Communion. A religious party-rental agency could refuse to rent tables and chairs to an interfaith wedding. A store owner who believes in Jewish or Islamic principles of modesty could refuse entry to women who were not appropriately covered.

At bottom, Brush & Nib is free to infuse its faith into its business. The Ordinance simply prohibits refusing service based on a person's sexual orientation or other protected characteristics. Brush & Nib has not shown that this basic requirement imposes a substantial burden on its ability to exercise its religion. Brush & Nib has full control over what goods and services it offers; FERA does not give it the right to refuse service because of who its customers are or how its customers will use the goods and services.

IV. Reversing on this record would set dangerous precedent.

This record does not justify reversal, particularly in light of the significant consequences that would flow from such a ruling. Wedding products span a broad spectrum in terms of detail, creativity, religiousness, etc. At one end, a place card Brush & Nib willingly made with the *guest's* name and table number ("Anne / Table Three") does not even list the couple's names, and merely conveys logistical information. Brush & Nib has never explained how it has a constitutional right to refuse to make that product for a same-sex couple. At the other end of the spectrum, perhaps a hypothetical request could someday present tougher questions than anything in this record. But a pre-enforcement facial challenge is not the place to resolve such questions because any request and any refusal will

have many potentially relevant details, and "these details might make a difference." *Masterpiece*, 138 S. Ct. at 1723.

Moreover, Brush & Nib has never explained how adopting its legal theory would avoid creating a new constitutional right for wedding vendors to refuse to serve interracial couples, or even interfaith couples, on sincere religious grounds. To its credit, Brush & Nib does not defend that consequence, but it has never explained how to avoid it.

Indeed, when Phoenix first passed this law in 1964, many Americans believed that the Bible prohibited interracial marriage. *See Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting trial judge who wrote in 1959, "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."). Nevertheless, the law on race-based refusals has been settled for fifty years: "Undoubtedly [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) (per curiam). There is no principled reason to reach a different result for sexual orientation.

CONCLUSION

Over the past few years, wedding vendors have litigated cases similar to this one at literally every level in state and federal courts. Regardless of whether the wedding vendor won or lost, no court has ever adopted the legal theory Brush & Nib urges here. The Court should affirm the judgment.

RESPECTFULLY SUBMITTED this 10th day of December, 2018.

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