ARIZONA COURT OF APPEALS

DIVISION ONE

BRUSH & NIB STUDIO, LC, a limited liability company; BREANNA KOSKI; and JOANNA DUKA,	)	No. 1 CA-CV 16-0602
Plaintiffs/Appellants,	)	Maricopa County Superior Court No. CV 2016-052251
v.	)	
CITY OF PHOENIX,	)	
Defendant/Appellee.	)	

APPELLANTS' BRIEF IN RESPONSE TO *AMICI CURIAE*

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INTRODUCTION

The test of a free society is whether it protects "the right to differ as to things that touch the heart of the existing order." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). In our time, the threat to this right comes not from suppression of un-American views but attempts to "coerce uniformity" about views on marriage. *Id*. at 640. Not surprisingly, as the social, commercial, and "governmental pressure toward unity" has increased, so has the cost of dissent. *Id*. at 641.

Artists Joanna Duka and Breanna Koski wish to dissent.[1] Like Jehovah Witness students years ago, they want to avoid promoting a ritual that violates their faith. They cannot pledge allegiance to a particular conception of marriage, through the words they write or the paintings they sketch. But dissent has never been popular at board meetings or prudent for bottom lines. So blue-chip businesses and well-funded organizations now seek to keep Joanna and Breanna in line, demanding full control over their artwork. Buss. Br. 1; ACLU Br. 6-7; Lambda Br. 2.[2]

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[1] This brief refers to Appellants as Joanna and Breanna unless context indicates otherwise.

[2] "Buss. Br." refers to the Brief of Arizona Businesses as *Amici Curiae*; "ACLU Br." refers to the Brief of *Amici Curiae* American Civil Liberties Union, *et al*.;

These organizations' reason for doing so is simple: they want to exclude Joanna and Breanna's view from the cultural marketplace. No other alternative explains what these organizations say and do. For these organizations strongly support the right to speak and operate consistent with particular views. *Amici* have publicly supported same-sex marriage[3] and threatened boycotts when states considered protecting different views.[4] *Amici* have adopted policies supporting "diversity and inclusion" and joined 2,200 other businesses in signing a public pledge endorsing "LGBT nondiscrimination policies."[5] *Amici* promote "progressive candidates and causes all over the country,"[6] create signs promoting pro-LBGT views,[7] and demand "authentic storytelling" in the expression they

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"Lambda Br." refers to the Brief of *Amicus Curiae* Lambda Legal Defense and Education Fund, Inc.

[3] *See* Zach Wener-Fligner, *Every US Company Arguing for the Supreme Court to Legalize Same-Sex Marriage,* QUARTZ (Mar. 10, 2015), https://qz.com/359424/every-us-company-arguing-for-the-supreme-court-to-legalize-same-sex-marriage/.

[4] *See Businesses Threaten to Pull Out of Georgia Over Anti-Gay Bill*, CBS NEWS (Mar. 24, 2016), https://www.cbsnews.com/news/georgia-religious-liberty-bill-proposal-companies-warn-of-boycott-for-lgbt-discrimination/.

[5] Buss. Br. 3, 13 & 13 n.11.

[6] http://www.saguarostrategies.com/careers.html (last visited Aug. 30, 2017).

[7] http://www.openaz.co/about (last visited Aug. 30, 2017).

create and sell.[8] Every day *Amici* exercise *their* right to speak and *their* right to operate consistent with *their* view on marriage. Yet now, they wish to withhold the same right from two young artists with different views. There is a word for that. Hypocrisy.

Standing against this hypocrisy comes at a heavy cost: up to six months in jail and $2,500 in fines for each day Joanna and Breanna dissent. ROA-30 ¶¶ 104-111. According to *Amici*, this is the new "price of citizenship." Buss. Br. 9. But our free-speech tradition allocates the price of dissent much differently: "We can have intellectual individualism and the rich cultural diversities…only at the price of occasional eccentricity…." *Barnette*, 319 U.S. at 641-42. That "price is not too great." *Id*. at 642.

The same calculus holds now just as it did 70 years ago. To be sure, *Amici* paint their view as "essential to their time and country" just like those in power did before them. *Id*. at 640. They do so now by mislabeling Joanna and Breanna as discriminators. But that label "so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning." *Id*. at 636. On more precise scrutiny, Joanna and Breanna do not discriminate based on status at all; they make content-based choices about what art to create. *Amici* can therefore combat

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[8] https://www.feliceagency.com/single-post/2017/02/17/Why-authentic-storytelling-matters (last visited Sept. 6, 2017).

discrimination without crushing the artistic freedom of two dissenting artists. Joanna and Breanna offer a better solution that lacks hypocrisy. They support the right of *Amici* to use their multi-million dollar budgets to celebrate views on marriage they favor and to avoid celebrating views they disfavor. Joanna and Breanna merely ask for the same freedom.

ARGUMENT

I. Joanna and Breanna have standing to challenge § 18-4(B)(2) notwithstanding one footnote from *Amici*.

In their briefing, Joanna and Breanna cite numerous cases, including *State v. B Bar Enterprises., Inc.*, 133 Ariz. 99, 101 n.2 (1982), to establish standing to challenge § 18-4(B)(2)[9] since this law inflicts a "threatened or actual injury." *See* Appellants' Reply Br. ("Reply Br.") 1-8. But in a footnote, one *Amicus* tries to diminish *B Bar* because it found no standing for one claim. Lambda Br. 1 n.2. But that simply proves the point that Arizona courts can waive standing in cases that raise important issues like Joanna and Breanna's case.

More significantly, the lack of standing in *B Bar* means little for Joanna and Breanna's standing because the relevant claim involved a due process challenge to a statute allowing *ex parte* temporary restraining orders. 133 Ariz. at 101-02 n.4. And when that challenge was brought, the government had already filed a

[9] Phoenix only challenged standing regarding § 18-4(B)(2). Answering Br. 21.

complaint and the challenging party had responded. *Id*. at 100-01. On those facts, there was virtually no risk of an *ex parte* restraining order because the parties were engaged in ongoing litigation. In contrast, Joanna and Breanna actually risk complaints, investigations, and jail time if they publish their desired website statement or decline to create artwork inconsistent with their beliefs. Under these circumstances, a plaintiff need not "expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). This Court should make no exception now.

II. Phoenix City Code § 18-4(B)(1)-(2) compels Joanna and Breanna's pure speech as applied.

Turning to the merits, *Amici* misconstrue both the nature and the scope of Joanna and Breanna's challenge to § 18-4(B)(1)-(2). Joanna and Breanna only challenge § 18-4(B)(1)-(2) as-applied. *See* Appellants' Opening Br. ("Opening Br.") 3. So Joanna and Breanna do not dispute that nondiscrimination laws "do not, as a general matter, violate" a person's constitutional rights or "target speech" on their face. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995). But that is not the question. As *Hurley* illustrates, nondiscrimination laws can be valid generally and regulate conduct on their face yet still regulate speech as applied. *Id.* at 574.

Like the parade organizers in *Hurley*, Joanna and Breanna are not asking to dismantle public accommodation laws wholesale. They simply request relief from a law's "peculiar" application that has "the effect of declaring" their "speech itself" — their paintings and words — "to be the public accommodation." *Id.* at 558. Phoenix's application of § 18-4(B)(1)-(2) does precisely this. It forces Joanna and Breanna to create words and paintings with certain content (content promoting same-sex marriage) if they create words and paintings with different content (content promoting opposite-sex marriage). Phoenix concedes as much. *See* Opening Br. App. 017-018, 029-032. Section 18-4(B)(1)-(2) therefore dictates the content of Joanna and Breanna's speech and deserves strict scrutiny.

Yet *Amici* ask this Court to disregard these principles and create a commissioned-speech exception to compelled-speech jurisprudence, an exception that would require business owners to forfeit their constitutional rights anytime they open their business to the public. *See, e.g.*, ACLU Br. 9 ("[Nondiscrimination] laws do not violate free speech rights, even if they require public accommodations to provide goods or services involving speech to customers…."); Lambda Br. 12 ("[T]he 'person' whose autonomy is protected is the [customer] — not those engaging in commercial" activity.). But no Arizona or federal court has ever accepted such an exception.

And for good reason. No one wants to live in a world where sign-makers like *Amicus* FASTSIGNS on Central can be compelled to create signs that promote anti-LGBT messages for the Westboro Baptist Church. Yet *Amici* urge this Court to take that Orwellian leap. There is a better way. That way is to protect the autonomy and dignity of all speakers to choose their own message, regardless of what message they espouse. This principle reflects our strong free-speech tradition, enables speakers to make speech-based decisions, and still allows the government to restrict status-based discrimination in the marketplace. This principle protects the diversity of viewpoints that we value. And this principle is the one Joanna and Breanna urge this Court to reaffirm.

A. *Amici* cannot transform Joanna and Breanna's words and paintings from pure speech into conduct.

In *Coleman v. City of Mesa*, the Arizona Supreme Court found that "words" and "paintings," as well as "the process" and "business" of creating them, are pure speech. *See Coleman,* 230 Ariz. 352, 358 ¶¶ 18-19, 359 ¶ 26, 360 ¶ 31 (2012). This finding is far from unusual. *See, e.g.*, *Turner v. Lieutenant Driver*, 848 F.3d 678, 688-89 (5th Cir. 2017) (citing cases for this point). Thus, Joanna and Breanna's custom wedding artwork (i.e. their words and paintings), as well as their business and process of creating artwork, are pure speech. *See* Opening Br. 19-24 (explaining this point).

Amici skirt this precedent though and discuss the general validity of public accommodation laws, a point Joanna and Breanna do not challenge. *See* ACLU Br. 9-22. But just as Joanna and Breanna do not get a free pass to ignore all generally applicable laws simply "because [their] business involves artistic expression," Phoenix does not get a free pass to compel speech simply because § 18-4(B)(1)-(2) on its face and in many applications "regulate[s] conduct." ACLU Br. 10, 11; *see Hurley*, 515 U.S. at 572 (finding that a generally applicable law that targeted conduct on its face impermissibly compelled speech as applied).

Missing this point, *Amici* lump Joanna and Breanna's words and paintings in with the non-expressive services of "hair salons, tailors, restaurants," and other businesses. ACLU Br. 14. But not all businesses create expression. Courts regularly distinguish speech from conduct and can continue to do so. Just because *Amici* fail to do so should not worry this Court, especially when the Arizona Supreme Court has already found Joanna and Breanna's expression to be protected speech. *See Coleman*, 230 Ariz. at 358 ¶¶ 18-19 (explaining that written words and paintings are pure speech entitled to full constitutional protection).

B. *Amici* cannot transform message-based objections into status-based objections.

Besides skating over precedent and labeling Joanna and Breanna's speech as conduct, *Amici* repeatedly mischaracterize Joanna and Breanna as seeking to commit status discrimination. *See, e.g.*, ACLU Br. 7 (stating that Joanna and

Breanna argue "that public accommodations may not be compelled to provide goods or services involving speech to *customers they deem objectionable*" (emphasis added)); Lambda Br. 9 (claiming there are "pervasive and fervent religious objections on the part of some to interacting with LGBT people in commercial contexts"). But this case has nothing to do with discriminating against classes of people. *Amici*'s "alarm bells" thus ring hollow. Lambda Br. 23.

This case is about Joanna and Breanna's right to "choose the content of [their] own message." *Hurley*, 515 U.S. at 573. Joanna and Breanna will create custom artwork for anyone. ROA-68 at 61:2-4; ROA-30 ¶¶ 76-78. But, like all creative professionals, Joanna and Breanna cannot convey messages they find objectionable. ROA-68 at 60:19-61:1; ROA-30 ¶¶ 60-66, 78. Thus, whenever Joanna and Breanna receive a request for custom artwork, they consider whether the requested *speech* is objectionable, not whether the *person* requesting the speech is objectionable.[10]

And courts have long made this status-based versus speech-based distinction. The U.S. Supreme Court, for example, found that parade organizers did not object to "homosexuals as such" just because they declined to promote a

[10] In light of this distinction, Arizona Businesses need not worry that "cab drivers in Phoenix could refuse to transport women, restauranteurs could refuse to serve interracial couples, and shop owners could refuse to provide goods and services to same-sex couples." Buss. Br. 2. None of those businesses are making speech-based objections.

message of LGBT "social acceptance." *Hurley*, 515 U.S. at 572-74. The Utah Supreme Court found that a newspaper did not object to religious "proponents" just because it "rejected [their] particular advertisement on the basis of content," especially since the religious proponents, "like any other person or entity, [were] free to purchase advertising from [the newspaper] subject to [the newspaper's] editorial judgment." *World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 258 (Utah 1994). And the Kentucky Court of Appeals acknowledged that a print shop could decline to print t-shirts with a pro-LGBT message because "public accommodation laws…[may not] treat *speech* as [the] type of activity or conduct" to which an objection can be classified as a veiled way of discriminating against an entire class of people. *Lexington Fayette Urban Cty. Human Rights Comm'n v. Hands On Originals, Inc.,* No. 2015-CA-000745-MR, 2017 WL 2211381, at *6 (Ky. Ct. App. 2017). Far from undermining Joanna and Breanna's argument (ACLU Br. 17), this Kentucky case adopts the same message/status distinction Joanna and Breanna advance.

In contrast, *Amici* urge this Court to re-make free-speech jurisprudence to equate any decision not to celebrate same-sex marriage with sexual-orientation discrimination. *See* ACLU Br. 13 n.6 (citing *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689 (2010)). But *Martinez* does not stand for this principle. There, the Supreme Court declined

to distinguish homosexual persons' status and their conduct. 561 U.S. at 689. But here, Joanna and Breanna ask the Court to recognize a distinction between *their own speech* (i.e. their custom artwork) and *another person's status* — the same distinction the U.S. Supreme Court accepted in *Hurley*, 515 U.S. at 572-74, the Utah Supreme Court accepted in *World Peace*, 879 P.2d at 258, and the Kentucky Court of Appeals accepted in *Hands On Originals*, 2017 WL 2211381, at *6.

Even the ACLU recognizes this distinction when it furthers the ACLU's views. For the ACLU admits that § 18-4(B) could not force "a gay web designer to create a website for a Mormon who wishes to" publish content "explaining the religious underpinnings of Mormon opposition to same-sex marriage" because the web designer objects to "the underlying message," not to "the customer's status as a Mormon." ACLU Br. 18 n.9. Joanna and Breanna agree and ask this Court to apply the same message/status distinction to them. Meanwhile, the ACLU cannot explain why it will distinguish status from message to protect speakers from objectionable requests from religious clients, yet the ACLU will not make the same distinction to protect religious speakers from objectionable speech. The only consistent aspect of the ACLU's theory is that religious viewpoints always lose. But free-speech protections are not so slanted: they protect *all* speakers from conveying objectionable messages — even messages *Amici* favor.

C. *Amici* cannot transform regulations on speech as-applied to regulations on conduct.

On *Amici*'s theory, generally applicable laws can never compel speech. *See, e.g.*, ACLU Br. 10 ("The Supreme Court has repeatedly explained that anti-discrimination laws permissibly regulate conduct, not speech."); Buss. Br. 9 ("[T]he owners of Brush & Nib Studio are free to think, to say, and to believe as they wish. But they have chosen to engage in public commerce, a commercial act. Having done so, they must abide by the Phoenix ordinance…."). But *Hurley* says otherwise. It enjoined a generally applicable law that targeted conduct on its face for compelling speech as applied. 515 U.S. at 572.

Other cases agree. Cases have repeatedly enjoined laws that regulate conduct on their face for restricting or compelling speech as-applied, including laws like:

- The 1866 Civil Rights Act. *See Claybrooks v Am. Broadcasting Cos.*, 898 F. Supp. 2d 986 (M.D. Tenn. 2012) (enjoining anti-discrimination law for compelling a for-profit television studio to cast actors of a particular race).
- The National Labor Relations Act. *See McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 959-63 (9th Cir. 2010) (refusing to apply NLRA to force newspaper to hire journalists when doing so would affect newspaper's editorial judgment).

- The Americans with Disabilities Act. *See Treanor v. Washington Post Co.*, 826 F. Supp. 568, 569 (D.D.C. 1993) (refusing to consider newspaper to be public accommodation because contrary interpretation "requiring newspaper editors to publish certain articles or reviews would likely be inconsistent with the First Amendment").
- Title VII. *See Booth v. Pasco Cty.*, 757 F.3d 1198, 1211 n.19 (11th Cir. 2014) ("It is generally believed that laws against status-based discrimination…at least sometimes burden speech on the basis of its content.").
- Breach of peace statutes. *See Cohen v. California*, 403 U.S. 15 (1971) (enjoining application of breach of peace statute for restricting jacket with words).

As these cases show, "the enforcement of a generally applicable law may…be subject to heightened scrutiny under the First Amendment…." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 640 (1994). Whether a law is generally applicable (i.e. regulates conduct on its face) does not answer the question whether the law regulates speech as applied. The test is whether "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). *See* Reply Br. 11-13 (explaining this test). Thus, Joanna and Breanna must comply with laws

like those requiring them to pay taxes and comply with "sanitation standards" because those laws are not triggered by their speech activities and do not change the content of their speech. ACLU Br. 12.

But § 18-4(B)(1)-(2) operates differently. Because Joanna and Breanna create artwork promoting opposite-sex weddings, § 18-4(B)(1)-(2) requires them to create artwork promoting same-sex weddings. *See* Opening Br. App. 17-18, 29-32. In so doing, the law (1) is triggered by Joanna and Breanna's expressive decision to create speech promoting opposite-sex weddings; (2) dictates (i.e. changes) the content of their desired speech; and (3) mandates speech that Joanna and Breanna would not otherwise convey. Any of those traits reveals that § 18-4(B)(1)-(2) applies a content-based regulation of Joanna and Breanna's speech. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech."); *Hurley*, 515 U.S. at 572-73 ("[T]he state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade."); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 13 (1986) (noting that a law was content based because "it was triggered by a particular category of…speech").

The ACLU agrees with this principle in theory but stumbles over its application. For the ACLU admits that "the government cannot dictate which

designs a tattoo parlor may offer," yet the ACLU allows the government to dictate which tattoos (i.e. content) a business owner must create whenever a person from a protected class makes the request. ACLU Br. 12; *see id.* at 9 (arguing that nondiscrimination laws "do not violate free speech rights, even if they require public accommodations to provide…speech to customers on a nondiscriminatory basis").

But a commissioned speaker can object to the message requested without objecting to the status of the requestor. A tattoo artist can object to the message "White Lives Matter" without objecting to the Caucasian status of the person making the request. *See World Peace*, 879 P.2d at 258 (holding that "a publisher may discriminate on the basis of content even when content overlaps with a suspect classification like religion"). This illustration debunks the ACLU's notion that § 18-4(B)(1)-(2) "applies not" to Joanna and Breanna's custom artwork "but to [their] business operations, and, in particular, [their] business decision not to offer its services to protected classes of people." ACLU Br. 16 (citing *Elane Photography, LLC v. Willock,* 309 P.3d 53, 68 (N.M. 2013)). Joanna and Breanna will create custom artwork for anyone; they just can't convey certain messages. ROA-68 at 61:2-4; ROA-30 ¶¶ 76-78.

For this reason, Joanna and Breanna are not like a tattoo parlor "claim[ing] a constitutional right to deny service to a person of color." ACLU Br. 13. That tattoo

parlor engages in status-based discrimination — denying all services to African Americans — and can be restricted accordingly. Joanna and Breanna, on the other hand, serve homosexual clients but cannot create artwork conveying messages objectionable to them — no matter who asks them. The only "business decision" at issue then is whether they will use their inherently expressive artwork to express *messages they object to*. "[T]hat choice is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575.

D. *Amici* cannot transform commissioned speech into conduct even though it is sold.

The ACLU admits that "speech does not lose constitutional protection whenever it is created or sold for profit." ACLU Br. 11. This makes the ACLU's request for a commissioned-speech exception all the more remarkable. *See id.* at 14 ("Those who wish to create art consistent with [their] beliefs may preserve their autonomy by declining to solicit business from the general public." (quotation marks and citation omitted)). The Arizona Businesses, however, are less equivocal: they demand Joanna and Breanna forfeit their free-speech rights because they "have chosen to engage in public commerce." Buss. Br. 9. Or, as the ACLU concludes, "[t]he critical factor is whether the business chooses to open its doors to the public, not whether the services provider creates art…." ACLU Br. 14.

But *Amici* never explain why receiving money changes the analysis. Speakers do not lose their speech rights when they go into business. "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley*, 487 U.S. at 801. For these reasons, courts have protected the right of newspapers, painters, and tattoo artists to sell their speech and to engage in the business of creating speech. *See Coleman*, 230 Ariz. at 360 ¶ 31 ("[T]he business of tattooing is constitutionally protected.").[11]

Ignoring this, *Amici* suggest Joanna and Breanna lose their freedoms by entering the marketplace. ACLU Br. 14; Buss. Br. 9. But that is not true, historically, logically, or legally. Historically, the common law placed a duty to serve only on innkeepers and common callings. *Hurley*, 515 U.S. at 571 (detailing this history). While statutes expanded this scope over time, laws like the 1964 Civil Rights Act apply only to businesses that offer essential and non-expressive services. 42 U.S.C. § 2000a. Until recently, governments have not drafted or applied these laws so as to include expressive businesses.

[11] *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n. 5 (1988) ("[T]he degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away."); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1063 (9th Cir. 2010) ("Thus, we conclude that the business of tattooing qualifies as purely expressive activity…."); *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (protecting sale of painting).

This historical point highlights the logical problem with *Amici*'s "give up your rights" argument. It begs the question. While Joanna and Breanna have chosen to serve everyone, they have not chosen to speak objectionable messages. Meanwhile, under *Amici*'s boot-strapping logic, Phoenix could compel any entity — from newspapers to private clubs to churches — to speak messages because that entity "willingly" gave up its rights by inviting the general public in or by accepting requests from the general public. *See* ACLU Br. 17 ("Requiring businesses open to the general public to treat their customers equally…simply does not amount to compelled speech.").

Free-speech protections, however, are not so easily lost. Almost a half-century ago, equal access laws advanced a similar theory to put newspapers in the crosshairs — i.e. that newspapers accepted the obligation to print diverse viewpoints by accepting money for advertisements from the general public. *See, e.g., Chicago Joint Bd., Amalgamated Clothing Workers of Am., AFL-CIO v. Chicago Tribune Co.*, 435 F.2d 470, 478 (7th Cir. 1970) (rejecting argument that "the privilege of First Amendment protection afforded a newspaper carries with it a reciprocal obligation to serve as a public forum, and if a newspaper accepts any editorial advertising it must publish all lawful editorial advertisements tendered to it for publication at its established rates").

But the Supreme Court rejected that theory in *Miami Herald Publishing Co. v. Tornillo* when it stopped an equal access law from compelling a newspaper to disseminate objectionable messages from someone else. *Tornillo*, 418 U.S. 241, 259 (1974). Like a newspaper editor choosing which advertisements to accept, Joanna and Breanna's content-based choices about what artwork to create "constitute the exercise of editorial control and judgment." *Pac. Gas & Elec.*, 475 U.S. at 10. An equal access law cannot infringe this judgment by compelling access to a speaker's inherently expressive medium, whether "a parade, a newsletter, or the editorial page of a newspaper." *Rumsfeld v. Forum for Acad. & Institutional Rights*, Inc., 547 U.S. 47, 64 (2006); *see also Groswirt v. Columbus Dispatch*, 238 F.3d 421, *1 (6th Cir. 2000) (unpublished) (holding that newspaper had First Amendment right to not publish author's article because of author's "'racial; heritage; political; religious;' status").

In other words, just because Joanna and Breanna open their doors to the public does not give the government "the right to make use of" Joanna and Breanna's creativity, paint brushes, and pens to promote an objectionable message "without [their] consent." *Chi. Joint Bd.,* 435 F.2d at 478. While *Amici* claim otherwise and try to condition Joanna and Breanna's rights upon not entering the commercial marketplace, "[w]e do not understand this to be the concept of freedom of the press recognized in the First Amendment. The First Amendment

guarantees of free expression, oral or printed, exist for all — they need not be purchased at the price amici would exact." *Id*.

E. *Amici* cannot transform commissioned speech into conduct even though it is made for someone else.

Moving from motives to messages, Joanna and Breanna explain that they speak their messages through their words and paintings. ROA-30 ¶¶ 45, 55; ROA-36 ¶¶ 268-270; ROA-68 at 32:8-12. That should be uncontroversial. Authors speak through their books. Painters speak through their paintings. Yet *Amici* claim that commissioned speakers never speak through their creations; they merely speak their client's message. Lambda Br. 2 ("Although wedding invitations certainly contain a message, that message is the couple's.").

But that claim is irrelevant. The government cannot force citizens to speak "another speaker's message." *Rumsfeld v. Forum for Acad. & Inst. Rights*, 547 U.S. 47, 63 (2006). That claim is also incorrect. As the Arizona Supreme Court notes, "the process of [creating artwork] is protected speech" even though artwork may reflect "the work of the…artist" as well as the "self-expression of the [customer]." *Coleman,* 230 Ariz. at 359-60 ¶¶ 25, 30. *See also Baker v. Peddlers Task Force*, No. 96 CIV. 9472 (LMM), 1996 WL 741616, at *1 (S.D.N.Y. Dec. 30, 1996) ("The City cites no authority for the proposition that commissioned works are excluded from the protection of the First Amendment, and common

sense and even a casual acquaintance with the history of the visual arts strongly suggest that a commissioned work is expression.").

Thus, the fact that Joanna and Breanna's clients may speak through Joanna and Breanna's artwork does not silence Joanna and Breanna's voice. Free-speech protection is not "a mantle, worn by one party to the exclusion of another and passed between them depending on the artistic technique employed, the canvas used, and each party's degree of creative or expressive input…Protected artistic expression frequently encompasses a sequence of acts by different parties, often in relation to the same piece of work." *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015). Even *Amicus* Keith & Melissa Photographers acknowledge this point: "a great portrait is a work of art, with both the photographer and the subjects as the artists."[12] Joanna and Breanna rest on that same logic.

F. *Amici* cannot limit *Hurley* to the non-profit context.

As *Hurley* established, the government may not compel someone to open their inherently expressive medium to create and disseminate objectionable speech. 515 U.S. at 574. The same principle protects Joanna and Breanna. But *Amici* misread *Hurley* and therefore misinterpret its controlling principle

[12] http://www.kmplifestyle.com/558343a9e4b04419097987ec/ (last visited Aug. 25, 2017).

While the ACLU views Joanna and Breanna's speech as "significantly different from the speech at issue in *Hurley*" because former is "offered for hire," ACLU Br. 15, commissioned speech deserves just as much protection as non-commissioned speech. *See supra* § II.D.

Hurley itself acknowledges this point, for it concluded that "business corporations generally" and "professional publishers" in particular enjoy the right to not speak. 515 U.S. at 573-74. But professional publishers deal in speech for hire. Thus, the "peculiar" application of the public accommodation law in *Hurley* was not the fact that it applied to a non-profit speaker. *Id*. at 572. Public accommodation laws routinely do that. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629-30 (1984) (examining application of public accommodation law to non-profit organization); *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 8, 17-18 (1988) (same). Rather, the "peculiar" application of the public accommodation law in *Hurley* was the fact that it declared the parade organizers' "speech itself to be the public accommodation." 515 U.S. at 573. And § 18-4(B)(1)-(2) operates the same way here by forcibly opening access to Joanna and Breanna's artwork (i.e. their speech).

Understanding *Hurley*'s logic also helps distinguish *Rumsfeld*. Although the ACLU cites *Rumsfeld* to argue equal access laws never compel speech, ACLU Br. 10-11, *Rumsfeld* involved a law requiring law schools to open their rooms to

military recruiters. 547 U.S. at 52. There, the law schools objected to two things: (1) being compelled to provide access to empty rooms and (2) facilitating that access by sending a scheduling email. *Rumsfeld* said the first was not speech — empty rooms are not inherently expressive — and the second was speech "incidental" (or integral) to regulable conduct. 547 U.S. at 62-65. But Joanna and Breanna's art is speech — art is an inherently expressive medium — not conduct.

And their case does not involve disseminating speech to inform people about some event they must legally host (like military recruiters at a law school). Rather, Joanna and Breanna object to creating certain art because their art *itself* celebrates a view they oppose. This is a far cry from the scheduling e-mail at issue in *Rumsfeld*.

By attempting to hitch this case to *Rumsfeld*, the ACLU overlooks the critical fact that the scheduling e-mail there commenced (i.e. was integral to) *conduct* (providing access to empty rooms) that the government could legally compel. In such situations, the government has greater leeway. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150 (2017) (explaining that a law requiring delis to charge $10 for sandwiches could force deli employees to tell customers that price).[13] But Joanna and Breanna's creation of custom artwork

[13] The speech integral to illegal conduct doctrine explains why restaurant workers can be required to say "May I help you" or "What would you like to order?" without constitutional offense. *See* ACLU Br. 17 (citing *Brooks v. Collis Foods,*

does not commence some other regulable conduct. And while Phoenix claims that Joanna and Breanna's choice of what to put in its art is itself the proscribable "conduct," that same argument was rejected by *Hurley* and stretches the speech-incidental-to-conduct doctrine beyond its proper bounds. *See* Reply Br. 16-17.

In addition, the ACLU cannot blunt Phoenix's peculiar application of § 18-4(B)(1)-(2) by saying the law does not require Joanna and Breanna "to sell goods and services for weddings, but simply requires [them] to offer [their] goods and services to all customers." ACLU Br. 11. The same could be said of any equal access law. In *Hurley*, for example, the nondiscrimination law did not require the parade organizers to host a parade. And in *Tornillo*, the law did not force the business to publish a newspaper. But that did not stop the Supreme Court from invalidating the application of those laws. And for good reason. If the ACLU's theory were correct, the government could dictate the content of someone's expression, as long as it did not prohibit the person from speaking in the first place. That principle is both unnerving and unprecedented.

With no help from federal cases, *Amici* divert the Court's attention from precedent to non-Arizona cases that have mistaken speech for conduct. *See* ACLU Br. 6; Lambda Br. 5; Buss. Br. 2-3. But many of these cases support Joanna and

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Inc., 365 F. Supp. 2d 1342, 1347 (N.D. Ga. 2005)). In those situations, the words used are necessary to accomplish some other legally required conduct (the service of food).

Breanna because they admit that governments cannot compel businesses to create words — the very thing Phoenix tries here.[14]

The cases *Amici* cite are also distinguishable. One involved a wedding venue and did not confront speech at all.[15] The others involved wedding cakes, flowers, and photographers. And whatever one thinks about those, no one can doubt that words and paintings convey messages, especially when the Arizona Supreme Court has already held that words and paintings are pure speech. *See Coleman*, 230 Ariz. at 358 ¶ 18. Moreover, the cases *Amici* cite invoked concerns about third-party perceptions, which do not apply here because Joanna and Breanna place a self-identifying mark on all their custom artwork. [16] *See* ROA-30

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[14] *See Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. Ct. App. 2015) (explaining that a wedding cake with "written inscriptions" could implicate First Amendment), *cert. granted sub nom. Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (U.S. June 26, 2017) (No. 16-111); *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543, 559 n.13 (Wash. 2017) (distinguishing floral arrangements from tattoos, which involve words and other "forms of pure expression").

[15] *See Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016) (finding a wedding venue non-expressive).

[16] *See, e.g.*, *Arlene's Flowers,* 389 P.3d at 832 (stating that "floral arrangements" did not "communicate[] something to the public at large"); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 69 (N.M. 2013) ("Reasonable observers are unlikely to interpret [business's] photographs as an endorsement of the photographed events."); *Masterpiece*, 370 P.3d at 287 ("[I]t is unlikely that the public would understand [bakery's] sale of wedding cakes to same-sex couples as" supporting same-sex marriage.).

¶¶ 50-52. And these cases incorrectly separated expressive products from the process and business of creating them.[17] But the Arizona and U.S. Supreme Courts reject that separation. *See Coleman*, 230 Ariz. at 359 ¶ 26; *Brown*, 564 U.S. at 792 n.1 ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference."). It is no surprise then that the U. S. Supreme Court recently granted certiorari to review *Masterpiece Cakeshop*, one of the cases *Amici* relies on. Simply put, the cases *Amici* cite are tenuous, distinguishable, and incorrect. They give this Court no reason to disregard precedent like *Coleman* or persuasive authority like *Hurley*.

G. *Amici*'s legal theory contains no limit.

Setting aside all the case law, public accommodation laws as a matter of policy should not be allowed to compel commissioned speakers like Joanna and Breanna to speak. If Phoenix can compel Joanna and Breanna to speak, they could compel any objectionable message by any for-profit writer, newspaper, web designer, printer, publisher, photographer, sign maker, and advertising firm by

[17] *See, e.g.*, *Arlene's Flowers,* 389 P.3d at 559 (stating that creating and selling floral arrangements are not "inherently expressive" but "unprotected conduct"); *Elane Photography*, 309 P.3d at 68 ("While photography may be expressive, the operation of a photography business is not"); *Masterpiece*, 370 P.3d at 285 (holding that case involved "compelled conduct" that did not "trigger First Amendment protections").

regulating their "business decisions" about what to say and when. That power imperils too much speech to go unchecked.

For example, if § 18-4(B)(1)-(2) can compel Joanna and Breanna to create custom wedding artwork promoting same-sex marriage, then it can also compel:

- *Amicus* HMA Public Relations, which markets itself as "great storytellers," to create a church's advertising campaign about the biblical story that God created marriage as an exclusive union between one man and one woman and write content to "move the reader to action" to promote that understanding of marriage in society;[18]
- *Amicus* Raising Arizona Kids, Inc., whose magazine targets "caring, open-minded and intellectually curious Arizona parents,"[19] to publish a submission by a Muslim person that describes the drawbacks of same-sex adoptions if it publishes a submission describing the benefits of same-sex adoptions;
- *Amicus* Felice + Whitney PR LLC, which is a member of a pro-LGBT advocacy group and limits its marketing services to "only focus on

[18] http://hmapr.com/expertise/ (last visited Aug. 30, 2017).

[19] http://www.raisingarizonakids.com/writer-guidelines/ (last visited Aug. 30, 2017).

positive communication,"[20] to create a website and marketing campaign for a Mormon organization that seeks to promote opposite-sex marriage and explain Mormon opposition to same-sex marriage;

- *Amicus* FASTSIGNS on Central, who made pro-LGBT signs to oppose the passage of a religious freedom bill,[21] to create signs for the Westboro Baptist Church containing Bible verses indicating that homosexuality is a sin;
- *Amicus* Keith & Melissa Photographers, who "bring [their] heart to every wedding"[22] and state that the images they "capture on film speak to [their] soul[s]"[23] and see themselves as "real life story tellers" with a "passion for creating images that are both purposeful and beautiful,"[24] to bring their heart to capture film for a Jewish organization that does *not*

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[20] https://www.feliceagency.com/single-post/2017/02/17/Why-authentic-storytelling-matters (last visited Aug. 30, 2017).

[21] http://www.openaz.co/about (last visited Aug. 30, 2017).

[22] http://www.keithmelissa.com/aboutus/ (last visited Aug. 30, 2017).

[23] http://www.keithmelissa.com/journal/love-film-personal (last visited Aug. 30, 2017).

[24] http://www.kmplifestyle.com/558343a9e4b04419097987ec/ (last visited Aug. 30, 2017).

speak to their souls and to tell stories that they do *not* find purposeful or beautiful; or

- *Amicus* Saguaro Strategies, who "is a full-service digital firm and direct mail" outfit "working to promote *progressive candidates and causes* all over the country" and touts itself as a company that will be a "key player" in "roughly a dozen races Democrats need to take back the House majority,"[25] to create advertisements stating, "Say Yes to Trumpcare," "Preserve Citizens United," and "Arizona Republican Party: Moving Arizona Forward," if Phoenix were to add "political beliefs" alongside "sexual orientation" as a protected class, like other localities have done. *See, e.g.*, Madison General Ordinances § 39.03(2) (defining protected class membership to include political beliefs); Code of the District of Columbia § 2-1402.31(a) (same).

As these examples show, the power to compel speech cannot be limited to compelling messages we agree with or those we do not care about. While *Amici*'s preferred messages find favor today, the tides may change if different bureaucrats gain power. When governments have the power to compel speech, everyone eventually loses, both the speakers who no longer have the freedom to control

[25] http://www.saguarostrategies.com/careers.html (last visited Aug. 30, 2017) (emphasis added).

their message and the public who no longer receives diverse, authentic viewpoints.

In contrast to the unlimited power *Amici* request for Phoenix, Joanna and Breanna propose a narrow and administrable principle: governments cannot compel commissioned speakers to create and disseminate objectionable speech. This principle is narrow because it only protects businesses that create speech. Very few do that. Likewise, the right to not speak only protects expressive businesses when they speak. Because artists speak when they create artwork, but not when they pay taxes or dispose of hazardous waste, the government cannot control the former but can regulate the latter. In this respect, Joanna and Breanna merely ask this Court to apply traditional free-speech principles to commissioned speakers as courts have always done.

III. Phoenix City Code § 18-4(B)(3) bans too much protected speech, Joanna and Breanna's included.

While § 18-4(B)(1)-(2) compels Joanna and Breanna to speak objectionable messages, § 18-4(B)(3) bans them from speaking their desired messages. And § 18-4(B)(3) does so because of what their speech says (i.e., its content and viewpoint). *See* Opening Br. 25-27. Indeed, Phoenix admits § 18-4(B)(3) forbids Joanna and Breanna from posting their desired website statement because of that statement's message. See ROA-30 ¶¶ 102, 111; Opening Br. App. 30, 35-36.

Amici do not dispute these points. They instead try to rebrand Joanna and Breanna's website statement as an illegal denial of service and try to narrow § 18-4(B)(3) to forbid only such denials. But Joanna and Breanna's website statement cannot be misconstrued that way, and *Amici*'s own concessions show that § 18-4(B)(3) reaches more broadly.

A. Section 18-4(B)(3) bans Joanna and Breanna's protected speech, not speech incidental to illegal conduct.

To defend government censorship of Joanna and Breanna's website statement, *Amici* compare that statement to a "White Applicants Only" sign that governments can validly restrict as speech incidental to illegal conduct. ACLU Br. 20-21. But any comparison to that sign falls apart because Joanna and Breanna's website statement does not commence any illegal activity. Unlike an employer who discriminates based on race, Joanna and Breanna have the constitutional right to decline to create objectionable wedding artwork. *See supra* § II. Since Phoenix cannot legally (i.e. constitutionally) force Joanna and Breanna to create artwork, Phoenix cannot ban them from describing their intent to exercise their constitutional right.

Moreover, Joanna and Breanna's statement does much more than say what they will and will not create. Their statement describes their beliefs about marriage and art more generally. *See* Opening Br. App. 35-36. Thus, regardless of *Amici*'s labeling, Joanna and Breanna's statement does not even describe, much

less commence, illegal activities. *See* ACLU Br. 20 (branding Joanna and Breanna's desired website statement a "policy of discrimination"). With this distinction in mind, Joanna and Breanna's desired statement comes nowhere close to a "White Applicants Only" sign. Phoenix's ability to ban that sign does not permit it to ban Joanna and Breanna's website statement.

B. *Amici* admit that § 18-4(B)(3) bans a large amount of protected speech, not just denials of service.

Section 18-4(B)(3) bans much more speech than "statements of intent to engage in unlawful discrimination." ACLU Br. 20. Even *Amici* admit that § 18-4(B)(3) applies more broadly. For example, *Amici* admit that § 18-4(B)(3) may ban a person's "opposition to a protected class's rights…in some circumstances." ACLU Br. 20 n.11. This is exactly the interpretation Joanna and Breanna fear. If § 18-4(B)(3) bans mere opposition to a protected class's rights, it also bans Joanna and Breanna's website statement which discusses their opposition to same-sex marriage and that supports opposite-sex marriage exclusively.

But *Amici*'s understanding of § 18-4(B)(3) did not come from nowhere. Other jurisdictions have already interpreted similar laws the same way. In Oregon, for example, administrative officials punished a business unwilling to celebrate same-sex weddings for posting a sign saying "This fight is not over. We will continue to stand strong." *In re Melissa & Aaron Klein dba Sweetcakes by*

Melissa, Case Nos. 44-14 and 45-14, 2015 WL 4868796, at *11 (Or. BOLI July 2, 2015). But that sign did not advertise an intent to decline to serve anyone. And § 18-4(B)(3) is much broader than the law upheld in *Klein* which does not contain the unwelcome, objectionable, unacceptable, or undesired language from § 18-4(B)(3).

History and common sense, then, confirm that § 18-4(B)(3) bans a broad array of protected speech including any criticism of the beliefs, actions, or affiliations of protected classes. Even those who do not share Joanna and Breanna's viewpoint agree. *See* Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 Nw. U. L. Rev. 1125, 1126-27 (2016) (explaining how a similar law could reasonably be applied to ban dissenting religious speech).[26] As these examples show, laws with broad language like § 18-4(B)(3) can be used to censor unpopular viewpoints. Joanna and Breanna need protection from this overbroad restriction.

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[26] Activists use these overbroad statutes to file complaints against those with unpopular views. In 2012, for example, a Chicago-based Chick-fil-A store faced a complaint for violating a law similar to § 18-4(B)(3) simply because its corporate officials reportedly "made statements against gay marriage" which caused some customers to feel "unacceptable," "objectionable," and "unwelcome." Kate Sosin, *TCRA Hits Chick-fil-A with Complaints*, WINDY CITY TIMES (Aug. 2, 2012), http://www.windycitymediagroup.com/lgbt/TCRA-hits-Chick-fil-A-with-complaints/38907.html.

IV. Section 18-4(B) substantially burdens Joanna and Breanna's religious exercise and *Amici* do not challenge that burden.

Joanna and Breanna's prior briefing explained how § 18-4(B) substantially burdens their religious beliefs as defined by Arizona's Free Exercise of Religion Act (FERA). *See, e.g.*, Opening Br. 43-53; Reply Br. 21-27. But *Amici* do not challenge this truth. The Arizona Businesses never raise this issue. The ACLU meanwhile explicitly declines to address the question. ACLU Br. 22. And though Lambda "agrees" with Phoenix that § 18-4(B) does not substantially burden Joanna and Breanna's religious exercise, Lambda offers no arguments on the topic. Lambda 2. *Amici* do not take on this challenge for good reason. *Amici* can offer no reason to doubt the substantial burden placed on Joanna and Breanna's religious beliefs.

V. Section 18-4(B) does not satisfy strict scrutiny and *Amici*'s arguments undermine Phoenix's attempts to satisfy strict scrutiny.

Section 18-4(B) must overcome strict scrutiny because it compels Joanna and Breanna's speech, forbids their speech based on content and viewpoint, and substantially burdens their religious exercise. *See* Opening Br. 53-54. Under this standard, Phoenix bears the burden to show § 18-4(B) serves a compelling interest in a narrowly tailored way. *See State v. Hardesty*, 222 Ariz. 363, 365-66 ¶¶ 9-10 (2009); *Ruiz v. Hull*, 191 Ariz. 441, 457 ¶ 62 (1998). Phoenix cannot satisfy this heavy burden.

Although Phoenix proposes an interest in "preventing *everyone* from discriminating" as the basis for restricting Joanna and Breanna, Def./Appellee Combined Answering Br. & App. ("Answering Br.") 76, that framing is way too broad. *See Attorney Gen. v. Desilets*, 636 N.E.2d 233, 238 (Mass. 1994) ("The general objective of eliminating discrimination of all kinds...cannot alone provide a compelling State interest...."). Strict scrutiny requires a particularized inquiry that "look[s] beyond broadly formulated interests justifying the general applicability of government mandates" and examines whether the strict scrutiny standard "is satisfied through application of the challenged law" to "the particular" party. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006). *See also Hurley*, 515 U.S. at 578 (focusing on public accommodation law's "apparent object" when "applied to expressive activity in the way it was done here" rather than its general purpose of preventing "denial[s] of access to (or discriminatory treatment in) public accommodations.").

Upon taking the proper particularized analysis, Phoenix's interest falls apart. Because Joanna and Breanna *do not discriminate* against anyone based on status, applying § 18-4(B) against them does not stop status discrimination; it merely controls their speech. *See* Opening Br. 54-59. But *Hurley* held that was not a legitimate — much less a compelling — interest. 515 U.S. at 578-79.

Amici try to ride to Phoenix's rescue though, asserting four interests to justify restricting Joanna and Breanna's speech: (1) stopping discrimination, (2) increasing their own profit, (3) ensuring access to goods and services, and (4) protecting the dignity of same-sex clients. *Amici*'s arguments not only fail to justify squelching constitutional rights, they actually weaken Phoenix's position with a volley of friendly fire.

A. Stopping unsubstantiated sexual-orientation discrimination does not justify restricting Joanna and Breanna who serve everyone.

While *Amici* harp on the need to stop sexual-orientation discrimination (Buss. Br. 2), the obvious response is the one already made: Joanna and Breanna do not discriminate based on status. They believe "God made everyone in His image," they "will happily create custom artwork for lesbian, gay, bisexual, or transgender clients," and they do not even *consider* a patron's sexual orientation when deciding what artwork to create. ROA-36 ¶¶ 264-267; ROA-39 ¶¶ 94-97. So this interest in stopping discrimination cannot possibly justify restricting Joanna and Breanna's speech-based decisions. *Amici* never engage this point even though Joanna and Breanna repeatedly made it in prior briefing. *See* Opening Br. 55-56. The silence is telling.

Setting that problem aside, *Amici* do not carry Phoenix's burden to show "an 'actual problem' in need of solving." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). To be sure, *Amici* try to fill the gap because Phoenix cannot

muster any evidence of Phoenix public accommodations engaging in unlawful sexual-orientation discrimination. Phoenix's shortcoming is unsurprising since, as one scholar recently noted, "there is no evidence of widespread denials of service to gay customers." *See* Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 IND. L.J. 693, 721 (Spring 2017).

Without any evidence to speak of, *Amici* primarily point to a handful of cases acknowledging a government interest in stopping sexual-orientation discrimination. *See, e.g.*, ACLU Br. 22-24. But many of those cases occurred outside the public accommodation context, and none addressed the particular situation in Arizona, much less Phoenix. *See* Oman, *supra*, at 721 (highlighting the difference between the housing and employment context and the public accommodation context). Indeed, *Amici* point to no case from Arizona, the U.S. Supreme Court, or the U.S. Court of Appeals finding a compelling interest in eliminating sexual-orientation discrimination by places of public accommodation. That is not surprising given that the federal government, Arizona, and the majority of states have not found a need to make sexual orientation a protected class in their public accommodation laws.[27]

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[27] *See* Answering Br. App.167 (admitting that only a minority of state public accommodation laws include sexual orientation as a protected category); Ariz. Rev. Stat. § 41-1442 (Arizona public accommodation law); 42 U.S.C. § 2000a(a) (federal public accommodation law).

This is not to say egregious forms of sexual orientation discrimination never occur. But strict scrutiny places a heavy burden on *Amici* to show a widespread problem exists to justify restricting constitutional rights. Speculation does not cut it.

Without any actual evidence, *Amici* turn to irrelevant and anecdotal illustrations. For example, Lambda discusses alleged employment discrimination and hate crimes in Arizona. Lambda Br. 14-16. But this case concerns public accommodations. The best way to stop hate crimes and employment discrimination is to do just that, not restrict the artistic judgment of an art studio in choosing what art to create. In fact, Lambda even concedes that the public accommodation and employment contexts differ, thereby highlighting the lack of evidence in the public accommodation context relevant here. Lambda Br. 15 n.7. Next, Lambda points to government restrictions imposed years ago on marriage and sodomy. Lambda Br. 16-18. But that fails to reveal anything about the recent behavior or attitudes of private actors who run public accommodations.

In a particularly desperate act, Lambda points to 626 help desk calls it received from Arizona residents in the last five years. Lambda Br. 22. But Lambda never specifies how many of these calls involved substantiated accusations, how many involved sexual orientation, or how many involved public accommodations as opposed to irrelevant topics such as "family law disputes." *Id.*

Some of the "evidence" Lambda cites actually supports Joanna and Breanna. For example, Lambda highlights legislation that Governor Brewer vetoed after it was "strongly opposed by business and civic leaders" as "anti-LGBT." Lambda Br. 19-21. But this shows that businesses already oppose and do not commit sexual-orientation discrimination.

The Arizona Businesses brief confirms this point. When Arizona businesses that "employ almost 65,000 people" have (1) adopted "policies and practices that promote diversity and inclusion," (2) joined over 2,200 other Arizona businesses in signing "the UNITY pledge, which calls for LGBT nondiscrimination policies," and (3) gone out of their way to condemn sexual-orientation discrimination in an *amicus* brief, any likelihood of widespread sexual-orientation discrimination evaporates. Buss. Br. 3, 13 & 13 n.11. That will not change by protecting the rights of two young artists — the ones truly at risk of mistreatment — to create expression consistent with their unpopular religious views.

B. Improving profit margins does not justify revoking Joanna and Breanna's fundamental freedoms.

Throughout their brief, the Arizona Businesses claim that § 18-4(B) "provides significant business and economic benefits" and express fear that "creating an exception" to this law "would be disastrous for businesses and our

economy."[28] Buss. Br. 1. But that concern is completely irrelevant in this case because Joanna and Breanna do not discriminate. Just as Phoenix can stop status discrimination without impinging on Joanna and Breanna's speech-based choices, Arizona Businesses can recruit, retain, and deploy employees without bulldozing the right of two artists to choose what they can and cannot say. Buss. Br. 16.

Just as important though, the Arizona Businesses cannot put a price on constitutional freedoms and sell them to the highest bidder. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978) (declining to put value on damage award for violation of constitutional rights because "the law recognizes the importance to organized society that those rights be scrupulously observed"). For big business like Intel, PetSmart, GoDaddy, and the Arizona Diamondbacks to ask this Court to trample

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[28] Although the Arizona Businesses claim to file their brief with motives unrelated to profit, past practices suggest these business care more about perception and profit than stopping actual discrimination. *See, e.g.*, *Banner Health Settles EEOC Disability Discrimination Lawsuit for $255,000*, EEOC (July 30, 2012), https://www.eeoc.gov/eeoc/newsroom/release/7-30-12c.cfm; Abigail Rubenstein, *Go Daddy Loses Appeal Over Fired Muslim Worker*, LAW360 (Sept. 11, 2009), https://www.law360.com/articles/121580/go-daddy-loses-appeal-over-fired-muslim-worker (noting the affirmance of a jury verdict of $390,000 against GoDaddy "for firing a Muslim employee who claimed he was denied a management position because of his national origin and religion"); *EEOC Resolves Sex Discrimination Lawsuit Against NBA's Phoenix Suns and Sports Magic for $104,500*, EEOC (Oct. 9, 2003), https://www.eeoc.gov/eeoc/newsroom/release/archive/10-9-03b.html; *PetSmart Will Pay $125,000 to Settle EEOC Sexual Harassment and Retaliation Lawsuit*, EEOC (Aug. 19, 2009), https://www.eeoc.gov/eeoc/newsroom/release/8-19-09a.cfm.

on two artists' constitutional freedoms so that they can earn more profit and hire more quickly is antithetical to our constitutional tradition and ignores the judiciary's role in protecting unpopular groups and viewpoints. Indeed, "when the rights of persons are violated, the Constitution *requires* redress by the courts.… This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (emphasis added and quotations and citation omitted).

While economics is not the proper focus, the Arizona Businesses do not even justify their economic argument. These businesses do not substantiate a causal relationship between expansive public accommodation laws and economic growth. Indeed, of the top 10 best states for business according to *Chief Executive*, only two (Nevada and Wisconsin) have state laws prohibiting sexual-orientation discrimination by public accommodations.[29] In this respect, the Arizona businesses not only ask this Court to sell out constitutional rights, but to do so in exchange for pennies on the dollar.

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[29] *Compare 2017 Best & Worst States for Business*, CHIEF EXECUTIVE, http://chiefexecutive.net/2017-best-worst-states-business/ (last visited Aug. 30, 2017) *with State Public Accommodation Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx (last visited Aug. 30, 2017) (noting the categories of discrimination prohibited by each state).

One financial calculus the Arizona Businesses do prove is that businesses have enormous incentives not to discriminate, but to instead welcome the LGBT community with open arms when:

- "[T]wo-thirds (66%) of adults oppose laws allowing businesses to refuse service to LGBT persons because of their religious objections," Buss. Br. 16;
- More than 54% of consumers indicate that they would select an equality-focused brand rather than other options, Buss. Br. 12;
- 45% of consumers under the age of 34 indicate that they are more likely to do repeat business with LGBT-friendly companies, Buss. Br. 12;
- "LGBT adults represent $917 billion in annual buying power," Buss. Br. 20; and
- 71% of LGBT adults are likely to remain loyal to a LGBT-friendly company even if other companies offer lower prices or are more convenient, Buss. Br. 12.

In this market environment, no business would jettison a large part of its revenue base or ostracize the majority of people who disdain sexual-orientation discrimination. As one prominent advocate for LGBT rights explained, "social attitudes toward gay people have changed so decisively" that discrimination will be "checked by the very negative reactions of openly gay people, their family

members, and growing numbers of sympathizers," giving businesses "a powerful economic incentive to avoid the controversy." Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 644 (2015) [hereinafter *Religious Accommodations*]. These cultural and economic factors prove *Amici*'s fears are unsubstantiated. *Amici* can therefore rest easy knowing that their profits are secure. And this Court can rule with even more confidence that protecting constitutional freedoms puts value just where it should be.

C. Ensuring access to available services does not justify rejecting Joanna and Breanna's artistic judgment.

Although *Amici* cannot identify a single instance of sexual-orientation discrimination by a Phoenix public accommodation, *Amici* worry that ruling for Joanna and Breanna will cause societal disruptions created when businesses exclude people from the marketplace and serve only their own "kind." ACLU Br. 22-23; Buss. Br. 18-19. But *Amici* never explain how a ruling for Joanna and Breanna will cause these problems. Because Phoenix businesses do not currently discriminate on the basis of sexual orientation and economic incentives ensure the same in the future, *Amici* only offer speculation. *See supra* § V.A-B. When constitutional rights are at stake though, "ambiguous proof" or a mere "predictive judgment" "will not suffice." *Brown*, 564 U.S. at 799-800. *Amici* must demonstrate a "direct causal link" between the alleged adverse effects and

allowing two artists to decline requests for custom artwork that conflict with their faith. *Id*. They fail to do so. Add to this the fact that Joanna and Breanna serve everyone, including those from the LGBT community, and *Amici*'s fears of societal catastrophe prove irrelevant. *See Texas v. Johnson*, 491 U.S. 397, 407-10 (1989) (dismissing an interest asserted by the state because it was "not implicated on the[] facts").

Looking to actual evidence allays any of *Amici*'s concerns over access to goods. The actual evidence shows that numerous artists in Arizona happily create artwork celebrating same-sex weddings. ROA-36 ¶ 423-443. So the Phoenix community has abundant access to such artwork. Allowing two artists to follow their conscience will not change that, especially when Joanna and Breanna would direct prospective patrons to those artists who can create artwork celebrating same-sex marriages. *See* ROA-36 ¶ 444-445.

Ironically, the actual evidence does raise an access concern but not one *Amici* identify. The only people at risk of being excluded from the marketplace in this case are Joanna and Breanna. For if this Court rules against them and requires people of faith like them to promote same-sex weddings, they will have no choice but to betray their faith or leave the industry. *See* ROA-36 ¶¶ 390-391; ROA-39 ¶¶ 148-149 (explaining that Joanna and Breanna would rather close their business than violate their artistic and religious beliefs and that § 18-4(B) may prevent

them from operating their business in the future). As the U.S. Supreme Court recently said, this Court should be concerned about excluding religious people "from full participation in the economic life of the Nation." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014). A ruling against Joanna and Breanna would achieve exactly this. So any market access concerns favor them, not *Amici*.

D. Eliminating dignity harms does not justify repudiating Joanna and Breanna's dignity interests.

As an additional governmental interest, *Amici* assert the goal of eliminating the dignity harm that may occur when people are told "we don't serve your kind here." *See, e.g.*, Lambda Br. 12-13, 23-24. But the psychological injuries that may occur when people "are personally denied equal treatment *solely because of their membership in a disfavored group*" are not implicated here. Arizona Businesses 17-18 (quoting *Heckler v. Mathews*, 465 U.S. 728, 740 (1984)) (emphasis added). Joanna and Breanna will gladly create artwork for everyone, but there are certain *messages* they cannot express. ROA-68 at 60:19-61:4; ROA-30 ¶¶ 60-66, 76-78. Thus, any concerns about dignity harm here flow from Joanna and Breanna's decisions about what messages to convey based on their "decent and honorable" religious beliefs about marriage, *Obergefell*, 135 S. Ct. at 2602, not the denial of services to people because of their membership in a particular class. But

protecting dignity does not override Joanna and Breanna's decisions about what messages to communicate.

1. Dignity concerns do not override speech protections even though some may perceive that speech as hurtful.

As the U.S. Supreme Court established in *Hurley*, dignity concerns in the public accommodation context do not justify compelling speech. This is because the "point of all speech protection...is to shield just those choices of content that in someone's eyes are misguided, *or even hurtful*." *Hurley*, 515 U.S. at 574 (emphasis added).

This point merely reflects a broader principle of our free-speech tradition: dignity harms do not override free-speech protections. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 322 (1988) (expressing grave doubts about the government's "interest in protecting the dignity" of listeners from harmful speech since that is "inconsistent with our longstanding refusal to punish speech because the speech in question may have an adverse emotional impact on the audience" (quotation marks and alterations omitted)); *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) ("Speech may not be banned on the ground that it expresses ideas that offend."); *Snyder v. Phelps*, 562 U.S. 443, 448, 454, 456, 458, 460-61 (2011) (allowing picketers to display signs like "God Hates Fags" near a military funeral even though it was "upsetting," "arouses contempt," "is certainly hurtful," and "inflict[s] great pain"). This principle even applies in the marriage context. *See*

Obergefell, 135 S. Ct. at 2607 (explaining that people "may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned").

Beyond that decisive point, the risk of serious dignitary harms are quite low in this context where Joanna and Breanna politely decline to create art, politely express their beliefs favoring opposite-sex marriage, and willingly serve those in the LGBT community. At no time do Joanna and Breanna turn away an entire class of people. Saying "I can't create this one piece of artwork promoting one particular message" does not inflict the same harm as "I can't serve your kind anything here."

The social context alleviates any dignitary harm as well. Today, we live in a society where a solid majority (62%) of Americans favor same-sex marriage,[30] sports teams like the Arizona Diamondbacks hold "LGBT Pride Night[s]" (and modify their logo to "sport the rainbow flag"),[31] major businesses proudly file *amicus* briefs supporting the LGBT community, and the reaction to the Supreme Court's decision recognizing same-sex marriage was "a landslide of positivity"

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[30] *Support for Same-Sex Marriage Grows Even Among Groups That Had Been Skeptical*, PEW RESEARCH CENTER (June 26, 2017), http://pewrsr.ch/2sX3VBN.

[31] Zachary Hansen, *11 Pride Month and LGBT Events Around Arizona*, AZCENTRAL (updated June 14, 2017), http://www.azcentral.com/story/entertainment/events/2017/06/13/11-pride-month-lgbt-events-arizona/390415001/.

from "Corporate America, Madison Avenue and some of the top brands nationally and in Arizona."[32]

Against that backdrop of societal acceptance, a patron will find comfort from the loud and frequent societal messages affirming that patron's dignity even if that patron experiences a rare occasion when an artist will not celebrate same-sex marriage. *See Religious Accommodations*, *supra*, at 645 (noting that "[a]n insult that is unusual loses much of its sting," while an insult that "is part of a daily stream of abuse and rejection" can penetrate much deeper).

Because of this social context, the present circumstances do not compare to unforgiveable situations where our culture systematically and pervasively rejected an entire class of people, creating a "*daily* affront and humiliation involved in discriminatory denials of access to facilities." *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969) (citation omitted and emphasis added); Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to Nejaime and Siegel*, 125 YALE L.J. FORUM 369, 376 (2016) (explaining that "African-Americans were routinely turned away by a dominant majority that controlled political and

[32] Mike Sunnucks, *Why Corporate America and Big Arizona Brands Hailed Same-Sex Marriage Ruling*, PHOENIX BUSINESS JOURNAL (updated June 29, 2015), https://www.bizjournals.com/phoenix/blog/business/2015/06/why-corporate-america-and-big-arizonabrands.html.

economic power and public opinion" in the segregated South, and "dignitary and material harms were enormous" in that situation).

With that situation nowhere in sight, the potential and severity of any dignity harms cannot justify overriding the constitutional rights of artists like Joanna and Breanna and certainly cannot justify overturning our long-held free-speech tradition of protecting freedom regardless of dignity concerns.

2. Joanna and Breanna will suffer significant dignity harms if Phoenix excludes them from the marketplace.

While *Amici* plead with this Court to consider how its ruling will effect dignity interests, *Amici* completely ignore the dignity of Joanna and Breanna and those who share their religious beliefs. But dignity concerns not only come from both sides in this case — they actually favor Joanna and Breanna.

These dignity concerns tip in Joanna and Breanna's favor because they would suffer extreme dignity harm were Phoenix allowed to exclude them and other religious adherents from the marketplace, sending a message that the government views them as pariahs unworthy of even tolerance. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring) (explaining that "free exercise is essential in preserving the...dignity" of religious adherents and that free exercise includes the right "to establish one's religious (or nonreligious) self-definition in the...economic life of our larger community"); *Religious Accommodations*, *supra*, at 653 (noting that the question of accommodating those with religious objections

to celebrating same-sex marriage "raises the question whether the millions of Americans with conservative religious views about sexuality have any legitimate place in American society").

This *governmental* message of ostracism and condemnation speaks far louder and more painfully than a *private* artist's message politely declining to create commissioned artwork. *Cf. Obergefell*, 135 S. Ct. at 2596 (emphasizing that "the state itself" was interfering with the dignity of same-sex couples). This message of condemnation speaks especially loud when Phoenix and *Amici* can so easily accommodate all sides in this dispute: stop status discrimination but allow speaker autonomy. For Phoenix and *Amici* to ignore this easy answer, to go out of their way to condemn particular religious views, to give no breathing space for Joanna and Breanna's religious beliefs even when it "makes no rational sense to refuse to accommodate them," *Religious Accommodations*, *supra*, at 652, attacks the very core of Joanna and Breanna's dignity and their claim to equal citizenship. In this sense, if Phoenix and *Amici* truly cared about protecting the dignity of protected classes, they would adopt a more inclusive approach and relent from excluding religious dissenters like Joanna and Breanna.

3. Phoenix and *Amici*'s approach to eliminating dignity harms is underinclusive.

Even taking *Amici* and Phoenix at their word that they seek to prevent dignity harms, their efforts are fatally underinclusive. A "law cannot be regarded

as protecting an interest of the highest order...when it leaves appreciable damage to that supposedly vital interest unprohibited." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (citation omitted). Underinclusivity therefore provides another reason why Phoenix and *Amici* cannot demonstrate a compelling interest in enforcing § 18-4(B) against Joanna and Breanna.

The underinclusivity problem arises here because Phoenix and *Amici* seek to eliminate the dignity harm created from the message sent when an artist declines to create particular artwork celebrating a same-sex wedding. But someone need merely go on the internet or social media to see messages attacking protected classes. Explicit messages in these mediums produce a much greater dignitary harm on observers than a polite "I'm sorry, I can't celebrate a view of marriage I disagree with." Yet Phoenix does nothing to stop these explicit attacks on people's dignity; nor do *Amici* ask for such restrictions.

Phoenix only makes this underinclusivity problem worse, for its law exempts many commercial sources of dignity harm. For example, Phoenix's nondiscrimination law does nothing to prevent businesses from publishing patently discriminatory statements about their hiring practices (e.g., "I won't hire gay people"). *See* Reply Br. 30; Opening Br. 58. And while *Amici* bemoan alleged adverse effects created by religious organizations that have sent "anti-gay messages," Lambda Br. 24-25, § 18-4(B)(4)(a) exempts "bona fide religious

organizations" from the prohibitions concerning sexual-orientation discrimination. Phoenix even provided an *ad hoc* exemption to ordained ministers performing ministerial functions through for-profit companies. *See* ROA-76 Ex. 34 at COMPL. EXHIBITS 0075-0077, 0166-0167.

These unregulated sources can convey just as hurtful messages as the entities that Phoenix and *Amici* seek to suppress and convey much more hurtful messages than Joanna and Breanna in particular who want to politely and respectfully decline to celebrate same-sex marriages. This discrepancy undermines any basis for Phoenix or *Amici* to restrict just Joanna and Breanna. *Cf. Reed*, 135 S. Ct. at 2232 ("The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.").

E. Phoenix and *Amici* can further their interests without trampling Joanna and Breanna's freedom.

While Phoenix and *Amici* do not assert any compelling interest, the interests they do assert can be furthered without violating Joanna and Breanna's free-speech and free-exercise rights. Joanna and Breanna detailed some of those options in prior briefing. *See* Opening Br. 59-61; Reply Br. 30-31.

But Phoenix and *Amici* can pursue many other options as well. For example, Phoenix and *Amici* could publish a list of businesses that are able to

create custom artwork celebrating same-sex marriages, thereby ensuring that people can receive the artwork they wish without the risk of having an artist decline to express their requested message. Or Phoenix and *Amici* could use billboards, TV and newspaper ads, and internet posting to affirm the value of those in the LGBT community, thereby minimizing any dignitary harm someone in that community might feel.

Finally, Phoenix could apply its public accommodation law only to businesses with storefronts (which Joanna and Breanna lack). Wisconsin has recently interpreted its public accommodation law in this way rather than apply its law to compel a photographer to promote same-sex weddings.[33] If a state can achieve its interest to stop sexual-orientation discrimination by public accommodations without regulating any internet business in the state, then Phoenix can stop sexual-orientation discrimination without compelling one online art studio to promote messages it disagrees with. In light of these viable alternatives and the lack of any compelling interest, neither Phoenix nor *Amici* can justify discarding Joanna and Breanna's constitutional freedoms.

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[33] *Amy Lynn Photography Studio, LLC v. City of Madison*, No. 17CV0555, slip op. at 1, 3-4 (Wis. Cir. Ct., Dane Cty. Aug. 11, 2017) (explaining that a photography studio operating out of the owner's private apartment is not a public accommodation under Wisconsin law because the studio "does not operate a physical storefront" accessible to the public), *available at* https://goo.gl/vmEJ6a.

CONCLUSION

As *Amici* note, this Court should pursue a ruling that "permits…a flourishing coexistence of the diverse religious, secular, and other belief systems that animate our nation while ensuring equal opportunity for everyone in the public marketplace." Lambda Br. 28. That is exactly the ruling Joanna and Breanna seek. *Amici* desire something else.

They request a ruling that would empower Phoenix to drive religious dissenters from the marketplace — to tell them that "their kind" are not welcome — because of their dissenting views on marriage. In short, *Amici* seek a ruling that "mandates orthodoxy, not anti-discrimination." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). But "[t]olerance is a two-way street." *Id*. Joanna and Breanna ask for true tolerance — tolerance to control their speech, tolerance to express their views, tolerance to dissent. Joanna and Breanna extend this tolerance to *Amici.* They only ask for the same tolerance in return.

CERTIFICATE OF COMPLIANCE

This certificate of compliance concerns a brief and is submitted pursuant to Arizona Rule of Civil Appellate Procedure 14(a)(5). The undersigned certifies that this brief to which this certificate is attached uses type of at least 14 points, is double-spaced, and contains 11,961 words.

The document to which this Certificate is attached does not exceed the word limit that is set by Rule 14.

Respectfully submitted this 6th day of September, 2017.

By: /s/ Jonathan A. Scruggs

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