IN THE SUPREME COURT

STATE OF ARIZONA

BRUSH & NIB STUDIO, LC, et al., Plaintiffs/Appellants/Cross-Appellees, v. CITY OF PHOENIX, Defendant/Appellee/Cross-Appellant.	Supreme Court No. CV-18-0176-PR Court of Appeals No. 1 CA–CV 16-0602 Maricopa County Superior Court No. CV2016-052251 **AMENDED TO COMPLY WITH PAGE LIMIT REQUIREMENTS**

BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND PROFESSORS DALE CARPENTER AND EUGENE VOLOKH IN SUPPORT OF BRUSH & NIB STUDIO, LC, ET AL.

THIS BRIEF IS FILED WITH THE WRITTEN CONSENT OF THE PARTIES

Michael L. Kitchen
MARGRAVE CELMINS, P.C.
Az Bar No. 019848
8171 East Indian Bend Rd., Suite 101
Scottsdale, Arizona 85250
mlkitchen@mclawfirm.com
Telephone (480) 994-2000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*

The Cato Institute is a nonpartisan public policy research foundation dedicated individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutional government that are the foundation of liberty. Cato scholars have published myriad commentary supporting both the First Amendment and gay rights. *See, e.g.*, Eugene Volokh & Ilya Shapiro, *Choosing What to Photograph Is a Form of Speech*, Wall St. J., Mar. 17, 2014, https://on.wsj.com/2QQ3p6W; Robert A. Levy, *The Moral and Constitutional Case for a Right to Gay Marriage*, N.Y. Daily News, Aug. 15, 2011, https://nydn.us/2SGYIJV. Cato is the only organization in the country to have filed in support of petitioners in both *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

Dale Carpenter is Judge William Hawley Atwell Chair of Constitutional Law and Professor of Law at SMU Dedman School of Law, and the author of *Flagrant Conduct: The Story of Lawrence v. Texas* (2012). He has written widely on sexual orientation and the law, as well as on the First Amendment.

Eugene Volokh, the Gary T. Schwartz Professor of Law at UCLA, is the author of *Same-Sex Marriage and Slippery Slopes*, 34 Hofstra L. Rev. 1155 (2006), which expressed support for same-sex marriage, *id*. at 1197–98. He has

also written a casebook and many law review articles on the First Amendment.

Amici differed on the correct outcome in *Masterpiece Cakeshop*—Carpenter and Volokh filed an *amicus* brief arguing that cakemaking is not sufficiently expressive for the First Amendment to apply—but they agree that expressive small businesses are indeed protected from speech compulsions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Joanna Duka and Breanna Koski are artists who happen to be practicing Christians. They own and operate Brush & Nib, an art studio in Phoenix. The two women create custom artwork—painting, calligraphy, and hand-lettering—in celebration of weddings and other special occasions. They only create work that does not conflict with their religious beliefs. But Phoenix's anti-discrimination law would force these artists to design custom invitations—and even recreations of wedding vows—for same-sex weddings, with which they fundamentally disagree. Joanna and Breanna are being forced to make a choice between creating messages that betray their faith, closing their business, or operating in accordance with their faith and facing criminal penalties.

Joanna and Breanna use calligraphy, a method of stylized writing with ancient roots, to design wedding invitations and other wedding-related pieces. Calligraphy, like painting, drawing, sculpture, dance, singing, or other forms of expression, is art. Both this Court and the U.S. Supreme Court have affirmed

that art in its many forms is protected under the First Amendment.

And the government may not require Americans to create speech of which they disapprove—just as the government may not require Americans to help distribute speech of which they disapprove. Given that even requiring people to *display* messages on their license plates is unconstitutional, *Wooley v. Maynard*, 430 U.S. 705 (1977), requiring them to *write out* messages by hand, when they disapprove of those messages, is *a fortiori* unconstitutional.

Nor does the fact that art is sold for profit reduce the artist's First Amendment protections. The First Amendment applies to writers when they sell books as much as when they give the books away, to tattoo artists who charge customers for the tattoos, etc. Brush & Nib, like writers, tattoo artists, painters, and others, produces and sells art. Its owners should not be compelled to speak against their consciences merely because their art is for sale.

Moreover, Brush & Nib is refusing to create particular *messages*, not to serve particular *customers*. The artists' objection is to creating art that they see as expressing a message they reject, not to the sexual orientation of their customers as such. In this respect, their actions are similar to those of the parade organizers in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), who chose not to spread a particular message—the self-identification of an LGBT Irish-American group—through their parade.

In *Hurley*, the Court noted that the state, in trying to force the organizers to include that group in a parade, was applying its antidiscrimination law "in a peculiar way," *id.* at 572: to mandate the inclusion of a message, not simply equal treatment for individuals. This application of antidiscrimination law violated the First Amendment, because it unconstitutionally compelled speech by the parade organizers. *Id*. at 581. Phoenix's attempt to apply such law to Brush & Nib's choice about artwork creation is likewise unconstitutional.

Surely a tattoo artist's freedom of speech extends, for instance, to refusing to tattoo religious symbols that he views as blasphemous. A Muslim artist can't be forced to tattoo the image of Mohammed, even if that image is used as a religious symbol by a dissenting Islamic sect. A Christian artist can't be forced to tattoo Satanist symbols; an atheist artist can't be forced to tattoo crosses. And that is so even though public accommodation law bars discrimination on religion or creed, and the symbols might be important to the religious would-be patrons. Likewise, tattoo artists and other creators cannot be forced to create messages connected with ceremonies that they reject.

Finally, while *Wooley* provides important constitutional protection, it also offers an important limiting principle to that protection: although photographers, writers, singers, actors, painters, and others who create First Amendment-protected speech must have the right to decide which

commissions to take and which to reject, this right does not apply to others who do not engage in protected speech. Limousine drivers have no First Amendment right to refuse to drive to same-sex weddings, because driving is not protected by the First Amendment. Likewise for many other businesses, such as hotels or caterers (even if the caterers view their cooking as a form of artistry). But the creation of art, and the refusal to create art, are so protected.

ARGUMENTS

I. Calligraphy Is Art Protected by the First Amendment

Calligraphy, like other forms of written speech, is fully protected by the First Amendment. That includes written speech that does not have a political or social message—nor any discernable message at all. *Hurley*, 515 U.S. at 569 (concluding that even works that express no "clear social position" are "unquestionably shielded" by the First Amendment, giving the nonsense words of Lewis Carroll's "Jabberwocky" poem as an example). This is just a special case of the broader proposition that expression in its many forms, even expression that has primarily visual rather than verbal appeal, is just as constitutionally protected as verbal expression. *See, e.g.*, *id.* (abstract art); *Brown v. Ent. Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011) (video games). This protection also extends to works that are created to be sold for money.

This logic is just as sound for calligraphers who create wedding

invitations as for these other kinds of speakers. Designing and creating calligraphy—like writing a press release or creating a painting—involves a great deal of effort and countless artistic decisions about substance, script, style, and technique. Calligraphy, as an art form, has long been part of the history of the United States. Our own Declaration of Independence, for instance, is a masterpiece of calligraphy, designed by the talented Timothy Matlack, a "fiery patriot" and expert in the English roundhand style. Judith Thurman, *In Defense of Cursive*, The New Yorker, July 5, 2012 https://bit.ly/2SG6QdN. The design of the document has become iconic. And calligraphy is famously important in many other cultures as well.[1]

This Court, in *Coleman v. City of Mesa*, held that tattoos are pure speech, just like "words" and "paintings." 230 Ariz. 352, 358 ¶¶ 18-19, 23, 360 ¶ 31 (2012). For some reason, however, the lower court here found that drawing words by hand for wedding invitations through a highly skilled technique "is not inherently expressive." Pet. at 13. Yet the difference between tattooing and calligraphy is often merely a difference in drawing tool and canvas—think of the countless people who have had a loved one's name

---

[1] In Chinese culture, for instance, calligraphy was a "fine art," representing their "devot[ion] to the power of the word." Metropolitan Museum of Art, *Chinese Calligraphy*, https://bit.ly/2h49lWy (accessed Dec. 12, 2018).

tattooed on their body (doubtless with careful attention to the artistry of the writing and not just to the words). And most people would likely view calligraphy as expressing at least as much of a message as "the unquestionably shielded painting of Jackson Pollock," *Hurley*, 515 U.S. at 569.

II. Under *Wooley v. Maynard,* the Right to Speak or Not Speak According to One's Own Conscience Is Protected by the First Amendment

Because the First Amendment protects the "individual freedom of mind," people may not be required to display speech with which they disagree. *Wooley*, 430 U.S. at 714. Likewise, this freedom of mind means that people may not be required to create speech that they disagree with. Like writers, book publishers, or painters, calligraphers are artists who have the right to choose which messages they create. Stylized writing on a wedding invitation, just like prose in a book or newspaper, is entitled to constitutional protection.

Indeed, *Wooley* should dispose of this case. In *Wooley*, the U.S. Supreme Court held that drivers have a right not to display "Live Free or Die" on their license plates. Of course, this state motto was created and printed by the government, and observers surely realized that it did not represent the drivers' own views. Yet the Court nonetheless held that the law requiring drivers to display this motto "in effect require[d] that [drivers] use their private property as a 'mobile billboard' for the State's ideological message." *Id*. at 715. And such a requirement, the Court concluded, unconstitutionally "invade[d] the

sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* (cleaned up).

"A system which secures the right to proselytize religious, political, and ideological causes," the Court held, "must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." *Id.* at 714 (cleaned up).

The court below tried to distinguish supposedly acceptable laws that restrict the "ability to create" from unacceptable ones "prohibiting . . . writing certain words." Pet. at 13. Yet there is no such distinction regarding expression. In *Hurley*, the Court reinforced its point in *Wooley*—that speech compulsions are as unconstitutional as speech restrictions, because "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley*, 515 U.S. at 573 (citation omitted).

It thus follows that compulsions of the creation of calligraphy are just as unconstitutional as prohibitions on creating calligraphy. And just as the Maynards had a "First Amendment right to avoid becoming the courier for [a] message," *id.* at 717, the owners of Brush & Nib have a First Amendment right to avoid creating the message. Indeed, if the government could not compel even "the passive act of carrying the state motto on a license plate," *id.* at 715,

it certainly may not compel the more active act of creating calligraphy for a wedding invitation. Further, Brush & Nib creates a wide array of wedding-related pieces; in addition to invitations, it also hand-designs artistic recreations of custom vows. If Brush & Nib's artists were forced to create those same messages for every ceremony, they would be forced to create speech that betrays their consciences and violate their "individual freedom of mind."

And the respect shown in *Wooley* for "individual freedom of mind," as a right not to take part in creating and distributing material one disagrees with, makes eminent sense. Democracy and liberty in large measure rely on citizens' ability to preserve their integrity as speakers and thinkers—their sense that their expression, and the expression that they "foster" and for which they act as "courier[s]," is consistent with what they actually believe.

In the dark days of Soviet repression, Aleksandr Solzhenitsyn implored his fellow Russians to "live not by lies": to refuse to endorse speech that they believe to be false. Aleksandr Solzhenitsyn, *Live Not by Lies*, Wash. Post, Feb. 18, 1974, at A26. Each person, he argued, must resolve to never "write, sign or print in any way a single phrase which in his opinion distorts the truth," to never "take into hand nor raise into the air a poster or slogan which he does not completely accept," and to never "depict, foster or broadcast a single idea which he can see is false or a distortion of the truth, whether it be in painting,

sculpture, photography, technical science or music." *Id.*

Wedding invitations must implicitly express a particular viewpoint: they ask friends and family to join in celebrating a special day for the couple, one that often holds great spiritual significance. Calligraphic invitations express that view in an especially beautiful and positive way. Mandating that someone make the expressive decisions needed to make such art—and create invitations for a ceremony that depict as sacred that which she views as profane—jeopardizes the person's "freedom of mind" at least as much as would mandating that she display a state motto on her license plate. Such a mandate becomes even more egregious when considering the artistic energy that goes into calligraphy. Surely, for instance, it would have been a grave imposition to force Matlack, the calligrapher behind the Declaration of Independence, to transcribe royal proclamations condemning the colonists as traitors.

To be sure, an uncompromising insistence on refusing to create speech that one disagrees with is not for everyone. Some people may choose to make peace with speech compulsions, even when they disagree with the speech that is being compelled. But those whose consciences require them to refuse to produce expression that violates their deepest-held beliefs—religious or secular—are constitutionally protected in that refusal.

III. For-Profit Speakers Enjoy the Freedom from Speech Compulsion Too

That Brush & Nib creates art for money does not strip it of its First Amendment protections. As noted above, the First Amendment fully protects both the dissemination and the creation of material for profit. The compelled-speech doctrine applies to commercial businesses, both newspapers, *see*, *e.g.*, *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), and non-media corporations, *see, e.g.*, *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986). A wide range of speakers, whether newspapers, photographers, freelance writers, or others, use speech to try to make money. And speech created to be distributed for money is likewise as protected as other speech. *Simon & Schuster Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011).

This is the nature of our economy: The prospect of financial gain gives speech creators an incentive to create, and the money they make by selling their creations gives them the ability to create more. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 469 (1995) (treating speech for money as fully protected, because "compensation [of authors] provides a significant incentive toward more expression"). Indeed, that is the premise of copyright law, *see Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) ("By establishing a marketable right to the use of one's expression, copyright

supplies the economic incentive to create and disseminate ideas.") (cleaned up), as well as of the free market more generally. If making money from one's work meant surrendering one's First Amendment rights to choose what to create, then a great many speakers would be stripped of their constitutional rights, including this country's most popular entertainers, authors, and artists.

Likewise, this Court has held that "the degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away." *Coleman*, 230 Ariz. at 360 ¶ 31 (cleaned up). In *Coleman*, this Court found that the "process of tattooing is expressive activity" and the "business of tattooing is constitutionally protected." 230 Ariz. at 359-60 ¶¶ 26, 31. Both the creation *and* sale of art get First Amendment protection.

The owners of Brush & Nib, just like tattoo artists, create and sell art. Their First Amendment right to free expression, as articulated by this Court in *Coleman*, should not disappear merely because they operate a business for profit. Like in *Coleman*, both the "process" and the "business" of producing custom wedding invitations are constitutionally protected.

These principles of course apply far beyond Brush & Nib's decisions. An artist—whether a calligrapher or a tattoo artist—must be free to refuse to create materials promoting Satanism, or Scientology, or, if it chooses, Christianity; the ban on discrimination against religious customers cannot

justify requiring a printer to print religious messages with which it disagrees (even when those messages are central to the customers' identity). An Israeli-American calligrapher or tattoo artist must be free to choose not to write messages that say "Support Palestine," and a Palestinian-American artist must be free to choose not to write "Support Israel." Again, the ban on discrimination based on national origin cannot justify requiring people to create messages with which they disagree, including when the disagreement stems from views related to the nationalities involved in a political dispute.

To offer one more example, some jurisdictions ban discrimination based on a customer's political affiliation.[2] Yet even in those places, artists must have the First Amendment right to refuse to create expression that contains the messages of the Communist Party or the National Socialist Party or the Democratic Party or the Republican Party. Similarly, artists must be free not to create expression that contains a message celebrating a same-sex wedding.

---

[2] *See*, *e.g.*, Ann Arbor, Mich. Code of Ordinances §§ 9:151, :153; Broward County, Fla. Code of Ordinances §§ 16½-3, -34; D.C. Code § 2-1411.02; Champaign, Ill. Code of Ordinances §§ 17-3, -56; Decorah, Iowa Code of Ordinances §§ 2.50.020, 2.50.050.B; Harford County, Md. Code § 95.3, .6; Howard County, Md. Code of Ordinances § 12.210; Lansing, Mich. Code of Ordinances §§ 297.02, .04; Prince George's County, Md. Code §§ 2-186, 2-220; Madison, Wisc. Code of Ordinances §§ 39.03(2)(cc), (5); Seattle, Wash. Mun. Code §§ 14.06.020(L), .030(B); Urbana, Ill. Code of Ordinances §§ 12-37, -39, -63; V.I. Code tit. 10, § 64(3) (2006).

IV. Forcing Brush & Nib to Create Expression Interferes More with Individual Freedom of Mind than Did the Laws in *Turner* or *Rumsfeld*

Brush & Nib is a small business owned by two people. It is not a vast publicly held company like the one in *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994), or a large nonprofit college, like the ones in *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006). Requiring it to create messages that its owners oppose interferes with their "freedom of mind" much more than imposing similar requirements on a TV network or a university.

In *Rumsfeld*, the U.S. Supreme Court held that the government could demand that universities let military recruiters access university property and send out e-mails and post purely factual signs mentioning the recruiters' presence. "Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter," the Court reasoned, "is simply not the same as . . . forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in . . . *Wooley* to suggest that it is." 547 U.S. at 62. But even if universities are far removed from the Maynards in *Wooley*, the owners of Brush & Nib are quite similar to those drivers. Like the Maynards, the owners are individuals who have to be closely and personally involved in the distribution of messages with which they disagree—in *Wooley*, by displaying the message on their own car, and in this case, by having to write the message in their own hand.

Turner is also different from this case because letting cable operators exclude certain channels interfered with those channels' ability to reach customers. As the U.S. Supreme Court noted in *Hurley*, "A cable is not only a conduit for speech produced by others and selected by cable operators for transmission, but a franchised channel giving monopolistic opportunity to shut out some speakers." 515 U.S. at 577. Because of this, the government had an interest in "limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed." *Id.* Likewise, in *Rumsfeld*, military recruiters would often find it much harder to reach students who study and often live on a secluded university campus, if the recruiters could not do so through the normal on-campus interview process.

But Brush & Nib is no monopoly. Competing calligraphers would be happy to take same-sex couples' money.[3] There is no need to protect same-sex couples' message by interfering with Brush & Nib' First Amendment rights.

V. First Amendment Protection against Compelled Speech Extends Only to Refusals to Create Protected Expression, Not Blanket Discrimination

The First Amendment protection offered by *Wooley* is limited in scope: It extends only to expressive conduct. Under *Wooley*, artists' First Amendment freedom of expression protects their right to choose which art and messages to

create, because visual art is protected by the First Amendment. But caterers, hotels, and limousine companies do not have such a right to refuse to deliver food, rent out rooms, or provide transportation, respectively, for use in same-sex weddings. This logic simply reflects the fact that the First Amendment does not extend to all human endeavors, but only to expression.

This point is well understood when it comes to laws that restrict activity. The First Amendment says nothing about government regulation of catering, hotels, or limousines. For instance, the state may, without running afoul of the First Amendment, create a monopoly on catering, restrict the operation of dance halls, set up a medallion system to limit the number of limousine drivers, or require a license for such businesses that the state had the discretion to grant or deny. *See, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (upholding a ban on pushcart vendors that allowed only a few old vendors to operate); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (upholding a ban on businesses that engage in "debt adjusting"); *City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (upholding a law that barred dance halls that cater to 14-to-18-year-olds from letting in adult patrons). But it would be an unconstitutional prior restraint for the government to require a license before someone could publish

(... continued)

[3] A cursory search for Phoenix wedding-invite designers netted 61 results on one site. Wedding Wire, https://wedwi.re/2Gdh8AT (searched Dec. 6, 2018).

a newspaper or write press releases, or to give certain writers, painters, or calligraphers a monopoly and bar others from engaging in such expression. *Cf. City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988) (striking down newspaper-rack licensing); *Mahaney v. City of Englewood*, 226 P.3d 1214, 1220 (Colo. Ct. App. 2009) (same for wall murals).

The line between expression and nonexpressive behavior must thus be drawn routinely by courts evaluating the constitutionality of conduct restrictions. Restrictions on expression trigger First Amendment scrutiny; restrictions on nonexpressive conduct do not. The same line can be drawn—and with no greater difficulty—when it comes to compulsions.

Such a line is clear, administrable, and protects a relatively narrow range of behavior: only that which involves the creation of constitutionally protected expression. If a person's action is not protected expression, then the person may be compelled to behave in a certain way without violating the First Amendment.[4] But if an activity is protected by the First Amendment, for instance because it involves writing or drawing, then it may not be compelled.

Upholding the First Amendment right against compelled speech that is implicated here would ultimately inflict little harm on customers. An artist who

views a same-sex marriage ceremony as immoral would be sub-optimal to the engaged couple in designing wedding invitations; there is some risk that the completed invitations will, even inadvertently, reflect that disapproval. Same-sex couples who are hiring others to create expression for their weddings would likely benefit from knowing that a prospective artist disapproves of the ceremony, so they could then turn to a more enthusiastic one.

The government's interest in preventing discrimination does not justify restricting Brush & Nib's First Amendment rights. To be sure, the U.S. Supreme Court has held that antidiscrimination laws "do not, as a general matter, violate the First . . . Amendment[]," in part because, in their usual application, they do not "target speech" but rather target "the act of discriminating against individuals." *Hurley*, 515 U.S. at 572. Yet an artist's refusal to create expression should not be viewed the same as discrimination based on characteristics such as sexual orientation, a practice that can be as harmful as it is arbitrary. Employment discrimination can jeopardize a person's livelihood. Discrimination in education can affect a person's future, as can discrimination in housing—especially when desirable housing is scarce. Not so for refusals to design a wedding invitation.

(... continued)

[4] Of course, other constitutional (and statutory or common law) rights may be implicated in such circumstances.

This is exactly the type of logic the Supreme Court relied on in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), when it held that a hotel could not refuse to offer accommodations to African-Americans based on race. The Court was moved by the fact that due to rampant discrimination "often [African-Americans] have been unable to obtain accommodations, and have had to call upon friends to put them up overnight." *Id.* at 252. People suffered major inconveniences, and had trouble finding even the most basic services.

Unlike the hotel in *Heart of Atlanta*, Joanna and Breanna are not being asked to simply offer a place for travelers to rest; nor are they among the few studios in Phoenix that design wedding invitations. Instead, these women would, under Phoenix's law, be forced to create expression that contradicts their sincerely held beliefs. Phoenix could impose exorbitant fines and penalties—$2,500 per day, or up to six months in jail—for refusing to comply. Pet. for Rev. at 10. While Joanna and Breanna would be facing a jail sentence, same-sex couples would be free to choose one of the many studios in the Phoenix area that would no doubt gladly create invitations for their wedding.

Of course, when an artist tells a couple that she cannot design their wedding invitations, the couple may understandably be offended by this rejection. But the First Amendment does not treat avoiding offense as a sufficient interest to justify restricting or compelling speech. *See, e.g.*, *Texas v.*

Johnson, 491 U.S. 397 (1989); *Cohen v. California*, 403 U.S. 15 (1971).

Nor does the First Amendment allow rules providing that, when people voluntarily choose to create some art, they must then create other art at the state's command. Creating expressive works such as calligraphy for a wedding invitation is the exercise of a fundamental constitutional right. States cannot impose new burdens on creators as a result of their having exercised this right.

The Supreme Court's decision in *Tornillo* illustrates that point. In *Tornillo*, the Court struck down a law that required newspapers to publish candidate replies to the extent that they published criticisms of the candidates. 418 U.S. at 243. The newspaper's publication of the initial criticism could not be the basis for compelling it to publish replies. Likewise, a person's choice to create constitutionally protected artistic expression cannot be the basis for compelling her to engage in artistic expression that she does not wish to create.

CONCLUSION

Calligraphers, like other speakers and like the drivers in *Wooley v. Maynard*, have a First Amendment right to choose which speech they will help disseminate and which they will not. The Judgment below should be reversed.

Respectfully submitted,
Michael Kitchen
Counsel of Record

/s/ Michael L. Kitchen
Counsel for *Amici Curiae*