

ARIZONA SUPREME COURT

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

**All Parties Consent to Filing  
this *Amicus* Brief.**

**BRIEF OF *AMICI CURIAE* ETHICS & RELIGIOUS LIBERTY COMMISSION  
OF THE SOUTHERN BAPTIST CONVENTION, JEWSISH COALITION  
FOR RELIGIOUS LIBERTY, ARIZONA CATHOLIC CONFERENCE,  
ASSOCIATION FOR BIBLICAL HIGHER EDUCATION, ASSOCIATION OF  
CHRISTIAN SCHOOLS INTERNATIONAL, NORTHWEST CHRISTIAN  
SCHOOL, CHRIST'S COMMUNITY CHURCH OF EL MIRAGE,  
COMPASSIONATE COUNSELORS, INC., CALVARY CHAPEL  
FARMINGTON IN SUPPORT OF APPELLANTS**

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## **IDENTITY AND INTERESTS OF *AMICI CURIAE***

**Ethics & Religious Liberty Commission (ERLC)** is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with about 50,000 churches and 15.8 million members. The ERLC addresses public policy affecting such issues as freedom of speech, religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of privacy and faith is a crucial protection on which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience under God in the practice of their faith, even in the market place.

**Arizona Catholic Conference (ACC)** is the public policy agency for the Diocese of Gallup, the Diocese of Phoenix, the Diocese of Tucson and the Holy Protection of Mary Byzantine Catholic Eparchy of Phoenix. Bishops from each of these dioceses comprise the Board of Directors of the ACC. Basing its mission on the Gospel of Jesus Christ, as particularly expressed in Roman Catholic social teaching and the consistent life ethic, the ACC works with other religious and secular groups in promoting the common good of the people of Arizona, including the promotion of such basic freedoms as speech and religious exercise. The ACC supports the Appellants and agrees that all citizens have the constitutional right not to

be compelled to participate, facilitate, or refer for matters that violate their religious beliefs.

**Jewish Coalition for Religious Liberty** is an incorporated cross-denominational group of lawyers, rabbis, and communal professionals who practice Judaism and are committed to defending religious liberty. JCRL members have written extensively on the role of religion in public life. Representing members of the legal profession, and adherents of a minority religion, JCRL has a unique interest in ensuring that Free Exercise jurisprudence enables the flourishing of religious viewpoints and practices in the United States.

**Association for Biblical Higher Education** in Canada and the United States (ABHE), headquartered in Orlando, FL, comprises a network of more than 200 institutions of Christian higher education, enrolling more than 50,000 students engaged in undergraduate and graduate studies *via* traditional residential, extension, and distance education models. ABHE encompasses campus locations in 8 time zones stretching from the Canadian Maritimes to Hawaii, from Alaska to Puerto Rico. Many graduates serve in church occupations, but many more serve in secular occupations—particularly in the so-called helping professions—with a sense of Christian vocation. ABHE advocates public policies protecting fundamental freedoms of speech and religious exercise that are vital to its educational mission and to its mission in the marketplace.

**Association of Christian Schools International** is a nonprofit, non-denominational, religious association providing support services to more than 3,800 Christian preschools, elementary, and secondary schools in the United States. One hundred forty-five post-secondary institutions are members of ACSI. ACSI also serves more than 22,000 schools outside the United States.

**Northwest Christian School, Phoenix, AZ** is private Christian school with a mission to provide an educational program that upholds high standards of scholastic and behavioral excellence and furnishes instruction in Bible-based Christian faith. The goal is to enable students to develop a Christian world view and to prepare them to fulfill their God-ordained roles, in the marketplace, in ministry, and in their homes.

**Christ's Community Church of El Mirage, AZ**, is Christian church with a mission to share the love of Jesus Christ in a Biblically-based, inspirational, and meaningful manner.

**Compassionate Counselors, Inc.**, Phoenix, AZ, is a non-profit Christian organization engaged in the ministry of biblical counseling, including chaplaincy services for Christian-owned businesses. Compassionate Counselors provides counseling through the lens of the Bible with the goal of not just changing behavior but changing the heart.

**Calvary Chapel Farmington** is an inter-denominational Christian church



located in Farmington, NM, that believes the Bible is the inspired and the only infallible, authoritative Word of God, and believes the church is to be a hospital for the broken not a museum for the Saints.

Your *amici* represent several faith groups and individuals with fundamentally divergent beliefs about the identity and nature of God from the Appellants, yet with similar views of religious obligations extending to behavior in both sacred and secular occupations.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The U.S. Supreme Court has ruled twice—in *Obergefell* and *Masterpiece Cakeshop*—that the government must respect and tolerate Americans who hold the belief that God has ordained marriage as between one man and one woman. While extending equal treatment generally to same-sex marriages, the Court has also promised to protect the dignity and worth of religious citizens who continue to advocate man-woman marriage. The freedom to live peacefully according to our beliefs, and to follow the dictates of conscience, is a fundamental right given by God and guaranteed by the First Amendment. Balancing these interests in a pluralistic society is the challenge before this Court, and your *amici* propose a balance that respects the dignity of all citizens while keeping the promise of *Obergefell*.

Appellant Brush & Nib Studio, LC, (“B&N”) is an upscale Phoenix art studio that creates custom artwork for many occasions and purposes, including weddings. Its owners and sole employees are Appellants Joanna Duka and Breanna Koski.<sup>1</sup> Most of its custom work consists of hand paintings and hand-written words.

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<sup>1</sup> “Appellants” refers collectively to Joanna Duka, Breanna Koski, and their business, Brush & Nib Studio, LC. The Free Exercise Clause protects individuals and their business entities. As the U.S. Supreme Court recently explained, affirming a small business’s Free Exercise rights “protects the religious liberty of the humans who own and control” that family-owned company. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

Joanna's and Breanna's faith infuses every aspect of B&N. The company's operating agreement describes Joanna and Breanna's belief "that Jesus Christ has authority over their entire lives, and that Jesus requires them to live their entire lives— vocations included—in an authentic manner consistent with the doctrines of their faith." This includes creating art that represents goodness, truth, and beauty, and declining to create art that dishonors God or distorts the expression of their religious beliefs.

As Christians, Joanna and Breanna are committed to using their creative and artistic gifts to affirm a biblical view of marriage between one man and one woman. They serve all people with dignity and respect, but they do not create all messages or perform all events. For example, they decline to promote messages that demean others, promote racism, or objectify the female body. B&N has never refused customers because of who they are; such a refusal would itself be contrary to the owners' beliefs.

Joanna and Breanna serve all customers, regardless of sexual orientation. Their decision to accept a commissioned assignment depends on the message that they are being asked to convey. It is the message expressed— not the identity of the customer—that dictates the work they can and cannot do. They feel obliged to refuse to produce artwork that contains a message they believe to be untrue or harmful to others. Joanna and Breanna's religious beliefs also motivate them to post a statement on their studio's website explaining how their religious beliefs prevent them from creating

certain artwork, including artwork celebrating same-sex marriage. The City says this website testimony is illegal because it states why B&N will not create certain artwork celebrating same sex weddings. The Court of Appeals struck down some phrases in the ordinance regarding speech restrictions which it said are vague and ambiguous, but they upheld part of the speech restrictions and said B&N can talk about their religion but cannot talk about declining certain messages or events. Such a hobbled statement does not fully express the truth as they understand it, and would not ameliorate the conscience concerns of B&N. Their conscience does not permit inconsistency between the truth in their art and the truth in their life. Affirmatively communicating the truth about marriage in their artwork is just as important as refraining from communicating false or harmful messages.

If B&N were asked to hand-craft a custom message on stationery: “God bless the marriage of Craig and Mullens”<sup>2</sup> for a same sex-wedding, they would respectfully decline the project due to their religious beliefs, and might refer the customer to another artist. This seemingly benign interaction, where all the parties have their needs satisfied, currently exposes B&N’s owners to jail time and crushing legal costs

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<sup>2</sup> Justice Ginsburg posed this hypothetical at the oral argument of *Masterpiece Cakeshop, Ltd* on 12/5/17, Case No. 16-111. See Transcript, page 76, lines 1-20. [tinyurl.com/y7vo7y8p](https://www.tinyurl.com/y7vo7y8p) (last accessed: 12/19/18). If the artist had done a prior wedding with the message “God bless Ruth and Marty” (Ginsburg’s reference to her own marriage), must the artist print the same words on request for a same-sex union? ACLU Counsel for Craig and Mullens said yes.

under the Phoenix public accommodation ordinance. The City will make no accommodation for B&N's religious conscience, but says B&N must either craft such custom messages contrary to their faith, or get out of the wedding business. This Hobson's choice violates the Arizona Constitution.

This is a stunning edict for the millions of business owners and workers who believe they are called to practice their faith at work, and to express their faith through their work. Surely their government cannot compel them to tacitly approve of what God disapproves? By politely declining the business and posting a brief explanation on line, B&N seeks respectfully to communicate the truth about marriage. It would be hypocritical and deceptive for B&N to create wedding products for an event that was not a true wedding in God's eyes. Government has no business forcing B&N to create the wedding products, or demanding a watered-down explanation on their website, as if to salve their conscience. Government is particularly inept in giving counsel about matters of conscience.

The Phoenix public-accommodation ordinance at issue here prohibits discrimination based on sexual orientation. As noted above, B&N does not consider its customers' sexual orientation – neither status nor conduct -- when B&N begins a new project. If a customer with a same-sex orientation desires to commission artwork that celebrates Jesus Christ as God's Son, Joanna and Breanna are happy to design and create such artwork. Conversely, if a customer with an opposite-sex orientation desires

to commission artwork that demeans women or affirms a view of marriage as anything other than a union between one man and one woman, Joanna and Breanna will turn the project down and might refer it elsewhere.

It is undisputed that Joanna and Breanna have no *animus* or invidious motive in these decisions. They, in fact, desire to promote the welfare of all their customers while remaining true to their faith. Thus, Joanna and Breanna value their religious freedom to express the truth, not just so they can feel at peace with their conscience, but so that they encourage the flourishing of those who hear and heed the truth.

The City of Phoenix has a different view. They consider any distinctions drawn by religious advocates of traditional marriage to be invidious discrimination, something to eradicate by the force of public accommodation laws. Published or spoken contradictions of the City's views about marriage could result in jail time for Joanna and Breanna, as well as crippling legal costs.

The trial court denied B&N's preliminary-injunction request, and then granted the City's motion for summary judgment. The Court of Appeals (CoA) affirmed as modified the superior court's summary judgment in favor of Phoenix.

The CoA struck down as void for vagueness certain phrases in the ordinance which prohibit making statements that might make a person feel "unwelcome, objectionable, unacceptable, undesirable" because of sexual orientation. The CoA

found the stricken terms to be severable and said the balance of the act could be enforced. CoA said Appellants were permitted to make statements “. . . to disclaim personal support for same sex-marriage and to proclaim their religious beliefs.” *Id.* ¶ 44. “What Appellants cannot do is use their religion as a shield to discriminate against potential customers. Although providing the same goods and services to same-sex couples might “decrease . . .the satisfaction” with which Appellants’ practice their religion this does not, *a fortiori*, make their compliance with Section 18-4(B) a substantial burden to their religion.” *Id.* ¶ 49.

## ARGUMENT

Individuals and religious organizations have never limited the way they express their faith to activities that take place in the home or a place of worship. To the contrary, one of the most fundamental ways to exercise religion is to live out one’s faith in the public square, including while running a business. Courts have never conditioned an individual’s constitutional rights to free expression and free exercise on that person’s willingness to keep her faith under a bushel basket and not engage in commerce. Shockingly, that condition is precisely what the City of Phoenix seeks to impose on B&N: promote messages that violate your faith and conscience, or forfeit your career.

It cannot be the case that the government, over a religious objection, can force a Muslim grocer to serve pork, a Jewish website designer to develop a website for

pornography, or a Christian screen printer to promote messages that conflict with the owners' deeply-held religious beliefs. A Catholic Legal Services attorney providing *pro bono* representation surely cannot be forced to advocate in legal matters that require her to express messages contrary to the Catholic faith. Yet that is the clear aim of the City's position here. This Court should use this case as an opportunity to recognize and reaffirm the fundamental role that faith plays in the workplace.

**I. Business owners or workers who affirm man-woman marriage must be treated with dignity and respect, not disparaged for their religious faith.**

**A. *Obergefell* promised to honor and protect religious practice.**

*Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), promised religious believers and organizations that they would remain secure in their constitutional right to believe, teach and live out their sincere religious convictions that marriage is between a man and woman, and that same-sex marriage should not be condoned.

The promise was unmistakable and unambiguous:

Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world. *Id.*, 2594

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. *Id.*, 2602

It must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First



Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.” *Id.*, 2607

***B. Masterpiece demanded that government tolerate and respect religious persons and businesses.***

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), Justice Kennedy, writing again for the majority, fulfilled the promise of *Obergefell* by protecting Jack Phillips’s Christian conscience from naked anti-religious *animus*:

At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. *Id.* 1727.

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.” *Id.* 1729

At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state." *Id.* 1729

The commissioner stated: I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be — I mean, we — we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to — to use their religion to hurt others. *Id.* 1729

In view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs. *Id.* 1731

The Court repudiated the bigotry and *animus* exposed by the commissioners' caustic comparisons between Mr. Phillips' faith and some of the most evil acts in history. Religious convictions about traditional marriage are deserving of dignity, respect and tolerance. The Constitution forbids such malice and denigration against religious persons by those who police discrimination. Treating religious objectors as evil because they object based on conscience is antithetical to Free Exercise.

**C. *Masterpiece* promised “further elaboration” in future cases.**

In *Masterpiece*, the Court found hostility in comments and arguments by the government “that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. *Id.* 1729. One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state."

Further, this Court recognized the temptation for some government officials to demonize religious dissenters who refuse to bow the knee to a particular public policy. *Id.* 1729-32

Moreover, the Court anticipated future cases involving the inevitable

collision between religious liberty and sexual liberty, but said courts must resolve them with mutual tolerance and respect. *Id.* 1732 <sup>3</sup>

This case provides the Court an opportunity to provide “further elaboration” on how government must respect the dignity interests of consumers while also respecting the dignity of sincere religious believers like Joanna Duka, Breanna Koski, and their business, Brush & Nib Studio, LC . *Id.* And the Court can correct the Court of Appeals’ (COA) misinterpretation of the Arizona Constitution’s Free Speech Clause and the Arizona Free Exercise of Religion Act (FERA).

## **II. Exercising one’s faith does not stop at the doorstep of one’s home or place of worship.**

The practice of faith does not end when a religious believer leaves her home or place of worship. Rather, the believer must live out her faith in every aspect of her life, including her work.<sup>4</sup> In creative and expressive work, the message expressed in

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<sup>3</sup> See, e.g., Douglas Laycock, *Afterward, Same-Sex Marriage and Religious Liberty: Emerging Conflicts* 189 (Douglas Laycock et al., 2000) (“All six contributors—religious and secular, left, center, and right—agree that *same-sex* marriage is a threat to religious liberty.”)

<sup>4</sup> In the Old Testament Book of Deuteronomy, Moses warns: “<sup>4</sup> Hear, O Israel: The Lord our God, the Lord is one. <sup>5</sup> Love the Lord your God with all your heart and with all your soul and with all your strength. <sup>6</sup> These commandments that I give you today are to be on your hearts. <sup>7</sup> Impress them on your children. Talk about them when you sit at home and when you walk along the road, when you lie down and when you get up. <sup>8</sup> Tie them as symbols on your hands and bind them on your foreheads. <sup>9</sup> Write them on the doorframes of your houses and on your gates. ... <sup>14</sup> You shall

her work must be true to her faith.<sup>5</sup> To do otherwise is hypocritical and misleading, and risks eternal consequences for the ones who are misled as well as the ones who mislead.<sup>6</sup>

Christian, Jewish, and Muslim teachers have emphasized the instruction that one's faith should be fully integrated in every aspect of one's life. For example, the Catechism of the Catholic Church instructs that "[b]y reason of their special vocation it belongs to the laity to seek the kingdom of God by engaging in temporal affairs and directing them according to God's will." Catechism of the Catholic Church (1997) ¶898. Lay believers are called "to illuminate and order all temporal things with which they are closely associated" considering the Catholic faith.

*Id.*

The Catholic Catechism's teaching on this point echoes a dominant theme of the Second Vatican Council of 1962-65. The Council's Pastoral Constitution of the

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not follow other gods, any of the gods of the peoples who surround you,<sup>15</sup> for the Lord your God in the midst of you is a jealous God; otherwise the anger of the Lord your God will be kindled against you, and He will wipe you off the face of the earth." Deuteronomy 6:4-9, 14-15 (NASB)

<sup>5</sup> In Exodus 31, God tells Moses that He has called Bezalel and Oholiah, and gifted them "in all kinds of craftsmanship to make artistic designs for work in gold, in silver, and in bronze ..." to "make all I have commanded you." Exodus 31:1-10 (NASB)

<sup>6</sup> For example Ezekiel 33:8 (NIV) warns: "When . . . you do not speak out to dissuade them from their ways, that wicked person will die for their sin, and I will hold you accountable for their blood."

Church in the Modern World instructed that “[t]he split between the faith which many profess and their daily lives deserves to be counted among the more serious errors of our age. . . . The Christian who neglects his temporal duties, neglects his duties toward his neighbor and even God, and jeopardizes his eternal salvation.” *Gaudium et Spes*, ¶ 43 (1965).<sup>7</sup> Catholics are called to bring their faith in Christ “to all their earthly activities and to their humane, domestic, professional, social and technical enterprises,” by “gathering them into one *vital synthesis* with religious values, under whose supreme direction all things are harmonized unto God’s glory.” *Id.* (emphasis added). The goal of this synthesis of religious values with work is to “contribute to the sanctification of the world by fulfilling their own particular duties” in personal and professional life. *Christifideles Laici*, ¶ 15 (1988).<sup>8</sup>

This synthesis is not limited to teachings regarding marriage and sexuality. The Catholic Church offers specific directives for how believers should act in the market with respect to advertising, *e.g.*, Saint Pope John Paul II, *Centesimus annus*, #36 (1991), fair wages, *e.g.*, Saint Pope John Paul II, *Centesimus annus*, #8 (1991), Catechism of the Catholic Church, ¶ 2434, employee ownership of companies, *e.g.*, Saint Pope John XXIII, *Mater et magistra* (1961) #77, and workplace hours, *e.g.*, Saint Pope John XXIII, *Rerum novarum* (1891) #42. See generally *A Catechism for*

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<sup>7</sup> <https://goo.gl/k1zvkv> (last accessed: 12/19/18)

<sup>8</sup> <https://goo.gl/xsvKm7> (last accessed: 12/19/18)

*Business: Tough Ethical Questions & Insights from Catholic Teaching* (Andrew V. Abela, Joseph E. Capizzi, ed. 2014).

Great teachers of the Protestant tradition agree. Martin Luther “often speaks about specific occupations, but the purpose in doing so is not to restrict vocation to occupation but to affirm that even the most mundane stations are places in which Christians ought to live out their faith.” Marc Kolden, *Luther on Vocation*, 3 Word & World 382 (Oct. 1, 2001).<sup>9</sup> Thus, as the Lutheran Church- Missouri Synod summarizes Luther, “Vocations are ‘masks of God.’ On the surface, we see an ordinary human face—our mother, the doctor, the teacher, the waitress, our pastor— but, beneath the appearances, God is ministering to us through them. God is hidden in human vocations.” Lutheran Church-Missouri Synod, *Life Library – Vocation* (2018)<sup>10</sup> “With the doctrine of vocation, everyday life is transfigured. We realize that the way to serve God is not by some extraordinary act of mystical devotion, but by serving our neighbors in the daily circumstances of life—in our families, our jobs, our church and our involvement in the community.” *Id.*

Similarly, reformer John Calvin “regarded vocation as a calling into the everyday world. The idea of a calling or vocation is first and foremost about being called by God, to serve Him within his world.” Alister McGrath, *Calvin and the*

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<sup>9</sup> <https://goo.gl/oSQ1S9> (last accessed: 12/19/18)

<sup>10</sup> <https://goo.gl/b7vx9r> (last accessed: 12/19/18)

*Christian Calling*, 1999 *First Things* 94 (July 1999).<sup>11</sup> One's daily occupations, including one's work, are part of a fully integrated synthesis of one's faith life: "Work was thus seen as an activity by which Christians could deepen their faith, leading it on to new qualities of commitment to God. Activity within the world, motivated, informed, and sanctioned by Christian faith, was the supreme means by which the believer could demonstrate his or her commitment and thankfulness to God." *Id.*

The Southern Baptist Convention's doctrinal statement, Baptist Faith and Message, 2000,<sup>12</sup> ("BFM") teaches laymen and clergy to "make the will of Christ supreme in our own lives and in human society" to "oppose racism, ... all forms of sexual immorality, including adultery, homosexuality, and pornography...." and to "bring industry, government, and society" under the way of biblical truth. (Article 15) BFM, Article 17, on Religious Liberty, says: "God alone is Lord of the conscience... . The state has no right to impose penalties for religious opinions of any kind." *Id.*

A prominent Baptist preacher aptly stated, "Our work, our jobs, our careers—those things are not just incidentals or necessary evils that we tack on to our spiritual lives. Our jobs are a massive arena in which God matures us as Christians and brings glory to himself." Southern Baptist Convention, Ethics & Religious Liberty

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<sup>11</sup> <https://goo.gl/aEaFft> (last accessed: 12/19/18)

<sup>12</sup> <https://goo.gl/tTrTdc> (last accessed 12/19/2018)

Commission, *The Gospel at Work: A Conversation with Greg Gilbert and Sebastian Traeger* (Jan. 15, 2014).<sup>13</sup> Similarly, a former President of the ERLC stated: “As Southern Baptists, we believe God has endowed all people with the freedom to believe and express religious faith. . . . Americans should not have to check the freedom to exercise their faith at the door of their workplace.” Southern Baptist Convention, Ethics and Religious Liberty Commission, *SBC’s Richard Land Testifies in Support of Workplace Religious Freedom Act* (Nov. 10, 2005).<sup>14</sup>

Contemporary evangelical teachers continue to emphasize this doctrine. Dr. Wayne Grudem, Research Professor of Theology and Biblical Studies at Phoenix Seminary in Arizona, has emphasized that the Eighth Commandment’s protection against theft necessarily implies that the businesses of Christians, including their “time, talents and opportunities,” are all things Christians have as “a stewardship from God” and that Christians “are accountable” for how those things are used. *The Eighth Commandment as the Moral Foundation for Property Rights, Human Flourishing, and Careers in Business*, THEMELIOS, 41.1 (April 2016) at 79, 82.<sup>15</sup>

Business author Hugh Welchel quotes modern Evangelical theologian Carl F. H. Henry on work: “According to the Scriptural perspective, work becomes a

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<sup>13</sup> <https://goo.gl/n7SXtK> (last accessed 12/19/2018)

<sup>14</sup> <https://goo.gl/GMFwPG> (last accessed: 12/19/18)

<sup>15</sup> <https://goo.gl/Fozuv6> (last accessed: 12/19/18)



waystation of spiritual witness and service, a daily traveled bridge between theology and social ethics. In other words, work for the believer is a sacred stewardship, and in fulfilling his job he will either accredit or violate the Christian witness.” Hugh Welchel, *How Then Should We Work? Rediscovering the Biblical Doctrine of Work*, 4 (2012).

In their theology of work, these evangelicals teach that God calls and equips some to be clergy (as in 1 Samuel 3), and others to be craftsmen (as in Exodus 31, *supra*). They note that the Apostle Paul sometimes made tents for a living, and he exhorted Christian laborers in Colossians 3:23-24 (NASB), “Whatever you do, do your work heartily, as for the Lord rather than for men, knowing that from the Lord you will receive the reward of the inheritance. It is the Lord Christ whom you serve.” Thus, both clergy and laity are called to glorify God in their work and spiritual witness.

The doctrine that one’s faith should be fully integrated into a believer’s daily life—including her profession—has deep roots in non-Christian religions as well. For example, it is a tenet of Judaism that, throughout one’s daily life, one should accept and act upon the great multitude of opportunities to improve one’s thoughts and behavior. Babylonian Talmud, Makkos 23b; see also Rabbi Moshe Chaim Luzzato, *Derech Ha-Shem* §§ 1:2:1–5. These opportunities are “mitzvot,” or commandments, which constitute a complete set of civil and criminal laws that govern all aspects of

Jewish life. The mitzvot apply as equally to commercial transactions as to a believer's personal life:

- Because many Jews believe themselves prohibited from deriving any benefit from a cooked mixture of dairy and meat, a Jewish store owner cannot sell a cheeseburger to any customer, Jewish or Gentile, and would not be allowed to profit from allowing one of his employees to cook meat and dairy together. *Why Not Milk and Meat?*, Aish.com<sup>16</sup>; Exodus 23:19, 34:26, Deuteronomy 14:21, and Babylonian Talmud: Hullin 113b, 115b
- Likewise, while a Jewish florist could contribute to a wedding between two Christians or two Muslims, or a Muslim and a Christian, many such florists would consider it inconsistent with their faith to contribute to an intermarriage between a Jew and a member of another religion. Deuteronomy 7:3; *Babylonian Talmud: Yevamoth 23a*
- Many religious Jews would refuse to engage in work that would enhance a polytheistic festival. Babylonian Talmud: Avodah Zarah 6a; *Code of Jewish Law: Yoreh De'ah 148:1*.
- The Bible prohibits Jews from wearing garments made from mixtures of wool and linen. Jews who follow this commandment would require an accommodation exempting them from wearing a prison, school, or military uniform made from a mixture of these materials. And many Jewish tailors would find it religiously objectionable to create such a garment for a Jewish customer. *Shatnez-Free Clothing*, Chabad.org<sup>17</sup>; Leviticus 19:19; Deuteronomy 22:9-11.
- A Jewish baker is restricted from providing services to a formal wedding that occurred on the Sabbath or select holy days. Menachem Posner, *What is Shabbat?*, Chabad.org.<sup>18</sup>

Similarly, “Islam regards it as meaningless to live life without putting [one’s] faith into action and practice,” and proclaims that living the central tenets of the faith “weaves [believers’] everyday activities and their beliefs into a single cloth of religious

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<sup>16</sup> <https://goo.gl/U1vr4C> (last accessed: 12/19/18)

<sup>17</sup> <https://goo.gl/K5PNVy> (last accessed: 12/19/18)

<sup>18</sup> <https://goo.gl/AqNGa4> (last accessed: 12/19/18)

devotion.” Oxford Islamic Information Centre, *Pillars of Islam*.<sup>19</sup> Islam has strict rules forbidding the charging of interest, and an entire global industry (Islamic Finance) has been created to comply. See generally Muhammad Ayub, *Understanding Islamic Finance* (2007).

Indeed, some of the country’s largest businesses participate in the market yet still engage in religiously motivated practices, including closing on Sunday (Chick-fil-A, Inc.), printing Bible references on products (In-N-Out Burger), publishing Bibles and other Christian media (Tyndale House Publishers, Inc.), providing financial advice based on the Bible (Lampo Group, Inc.), producing and selling kosher foods (Empire Kosher), offering financial products consistent with Islamic teachings about usury (LARIBA American Finance House), placing Bibles and the Book of Mormon in all its hotel rooms (Marriott, Inc.), employing chaplains to provide spiritual counseling to employees (Tyson Foods, Inc.), and taking out full-page newspaper ads to evangelize (Hobby Lobby, Inc.).

In sum, for millions of believers, “freedom to embrace religion as a way of life isn’t an optional extra added on to practicing that way of life; freedom to embrace and hold onto religion *is a constitutive component of a religion’s way of life* without which that very way of life is fundamentally compromised. For world religions, freedom of religion is a key substantive good.” Miroslav Volf,

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<sup>19</sup> <https://goo.gl/jKxE9U> (last accessed: 12/19/18)

*Flourishing: Why We Need Religion in a Globalized World* 113 (2015) (emphasis added). And secular society benefits when it honors religious liberty and allows religious practices to flourish. See generally Angus J. L. Menuge, *The secular state's interest in religious liberty*, in *Religious Liberty and the Law: Theistic and Non-Theistic Perspectives*, 89 (Angus J. L. Menuge ed., 2017)

### **III. The government should not be allowed to punish Brush & Nib Studio for its owners' faith.**

B&N's business is informed by its owners' Christian faith that God ordained marriage as a sacred and spiritual union between one man and one woman. They are not alone in that belief. *E.g.*, Thomas Aquinas, *Summa Theologica II-II*, Q. 154, art. 12 (Tr. 1920); *Summa Theologia Suppl.*, Q. 41, art. 1 and Q. 44 art. 1 (Tr. 1920)<sup>20</sup>; Martin Luther, 3 Luther's Works 255 (1961) (non-marital sexual relations "depart[] from the natural passion and longing of the male for the female, which is implanted into nature by God."); Rabbi Tzvi Hersh Weinreb, *Orthodox Response to Same-Sex Marriage* (June 5, 2006)<sup>21</sup> ("Homosexual behavior between males or between females is absolutely forbidden by Jewish law," as rooted in the procreative nature of male-female relations ordained in the Book of Genesis); Catechism of the Catholic Church (1997) ¶ 2357 ("Basing itself on Sacred Scripture, . . . tradition has always declared that 'homosexual acts are intrinsically disordered.' They are contrary to the

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<sup>20</sup> <https://goo.gl/7AGBGr> (last accessed: 12/19/18)

<sup>21</sup> <https://goo.gl/u4zjbd> (last accessed: 12/19/18)

natural law. They close the sexual act to the gift of life. They do not proceed from genuine affective and sexual complementarity.”); *Amoris Laetitia* (The Joy of Love), ¶ 52 (Mar. 19, 2016)<sup>22</sup> (“absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God’s plan for marriage and family”); Islamic Shura Council of Southern California, *Islamic Perspective on Same-Sex Marriage* (July 7, 2015) (noting what Islamic commentators on The Qur’an have concluded is a clear prohibition on same-sex relations).

1. The teachings of Judaism, Christianity, and Islam are not rooted in bigotry or *animus*. The biblical prohibition on homosexual conduct does not in any way suggest that believers should demean human beings who fall in to this sin. For example, describing “the attitude toward homosexual individuals prescribed by the Jewish tradition,” Rabbi Weinreb directs that “tolerance for individuals who manifest homosexual tendencies is certainly a Jewish value.” *Orthodox Response to Same-Sex Marriage supra*. Likewise, Rabbi Dr. Nachum Amsel comments that “[w]e do not and cannot reject people as Jews and as individuals because of a particular sin.” Rabbi Dr. Nachum Amsel, *Homosexuality in Orthodox Judaism*, p.

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<sup>22</sup> <https://goo.gl/qUvEsB> (last accessed: 12/19/18)

<sup>23</sup> <https://goo.gl/wMoxJw> (last accessed: 12/19/18)

Similarly, Christian teaching on marriage is founded on a divinely ordained understanding of human sexuality, and Christian churches condemn *any* rejection of individuals. The Catechism of the Catholic Church directs that all persons with homosexual inclinations “must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided.” Catechism of the Catholic Church ¶2358. Pope Francis confirmed this instruction in *Amoris Laetitia*, stating that “[w]e would like before all else to reaffirm that every person, regardless of sexual orientation, ought to be respected in his or her dignity and treated with consideration. . . .” *Amoris Laetitia* ¶250.

The SBC *Baptist Faith and Message, supra*, Article 18, on the Family, says marriage is uniting one man and one woman in covenant commitment for a lifetime, revealing the union of Christ and His church. Jesus Christ taught that marriage is rooted in creation and is a sacred, lifelong bond between one man and one woman. Matthew 19:4–6 (NASB)

See also “*The Nashville Statement*,” a contemporary “Christian Manifesto on human sexuality,” released on August 29, 2017, and endorsed by the ERLC and several evangelical leaders.<sup>24</sup> The statement is framed in terms of what signers affirm and what they deny, showing that religious exercise is sometimes expressed by a refusal. The Preamble declares that the liberty to proclaim the truth about

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<sup>24</sup> <https://goo.gl/zaEFzj> (last accessed: 12/19/18)

human sexuality is not primarily in service of the speaker's conscience, but is focused on the desire for human flourishing for the hearer.<sup>25</sup> Article 1 affirms that God designed marriage to be the union of man and woman, to signify covenant love between Christ and the Church. Article 10 denies that same-sex marriage can be approved morally, according to the Bible.

Muslim scholars similarly instruct that Muslims are to treat homosexual persons, both Muslim and non-Muslim, with the same respect due to all other people. For example, the Islamic Shura Council of Southern California instructs that “[p]eople practicing something immoral according to Islamic values still deserve the basic respect and rights of any other human being. . . . Muslims should not discriminate and/or harass anyone.” *Islamic Perspective on Same-Sex Marriage, supra*.

2. While uniformly and consistently upholding marriage between a man and a woman as divinely ordained and while condemning prejudice or animus against any person, teachers in Judaism, Christianity, and Islam counsel against any public witness or activity that would seem to celebrate, endorse, or condone same-sex weddings. In the wake of the recent creation of same-sex marriage, many

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<sup>25</sup> Preamble: We believe that God's design for his creation and his way of salvation serve to bring him the greatest glory and bring us the greatest good. God's good plan provides us with the greatest freedom. Jesus said he came that we might have life and have it in overflowing measure. He is for us and not against us. Therefore, in the hope of serving Christ's church and witnessing publicly to the good purposes of God for human sexuality revealed in Christian Scripture, we offer the following affirmations and denials.

Jewish, Christian, and Islamic leaders have called for believers to engage in respectful public witness supporting the historic understanding of marriage.

For example, the former chief Rabbi of Great Britain, Lord Rabbi Jonathan Sacks, has called for respectful and courteous public witness in support of the historic understanding of marriage. In a famous 2014 speech to a Vatican conference, Rabbi Sacks instructed that “our compassion for those who choose to live differently should not inhibit us from being advocates for the single most humanizing institution in history [i.e., male-female marriage].” Lord Rabbi Jonathan Sacks, *Humanum Colloquium on Complementarity* (Nov. 17, 2014).<sup>26</sup> Likewise, the President of the SBC’s ERLC (one of your *amici*) has publicly stated that “[a]ll of us must stand together on conserving the truth of marriage as a complementary union of man and woman. . . . [T]here is a distinctively Christian urgency for why the Christian churches must bear witness to these things.” Rev. Dr. Russell D. Moore, *Man, Woman, and the Mystery of Christ: An Evangelical Protestant Perspective*, Touchstone (Nov. 18, 2014).<sup>27</sup>

Islamic authorities concur: “Sexual behavior within a society is not a purely private concern but rather affects all the people living in that society. Islam does not forcefully impose its teachings upon people of other faiths and persuasions.

Nonetheless, it draws certain moral lines to make sure that the entire society is not

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<sup>26</sup> <https://goo.gl/oKvhhH> (last accessed: 12/19/18)

<sup>27</sup> <https://goo.gl/wQNf2B> (last accessed: 12/19/18)



affected negatively.” *Islamic Perspective on Same-Sex Marriage, supra*.

Many believers interpret these calls for positive public witness as necessarily meaning that believers should not publicly contradict their churches’ teachings on marriage, including by participating in the celebration of same-sex marriages. Thus, to be responsible public witnesses for their beliefs on marriage, there are many millions of faithful citizens who reasonably conclude that publicly witnessing to their belief in marriage as the union of man and woman requires refraining from participating in same-sex wedding ceremonies. Regardless of the circumstances, the government should never force individuals—or the faith communities to which they belong—to choose between violating their deeply held beliefs or withdrawing from the public square entirely, see *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), including the market for public accommodation.

To use government power and the courts to enforce such compulsion, as the City seeks to do, is to needlessly penalize people of faith, to wound the country’s long tradition of celebrating and protecting religious exercise, and to depress the fundamental pluralism that motivated our country’s founding. This Court should safeguard the right of all people to exercise their faith in the public square, including places of public accommodation.

## CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment of the Court of Appeals and enter judgment in favor of Appellants, permanently enjoining the City of Phoenix ordinance as applied to Appellants.

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Respectfully submitted,

By: /s/ Joshua W. Carden

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