SUPREME COURT OF ARIZONA

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

BRIEF OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ANTI-DEFAMATION LEAGUE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; CENTRAL CONFERENCE OF AMERICAN RABBIS; DISCIPLES CENTER FOR PUBLIC WITNESS; DISCIPLES JUSTICE ACTION NETWORK; EQUAL PARTNERS IN FAITH; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; HINDU AMERICAN FOUNDATION; INTERFAITH ALLIANCE FOUNDATION; MEN OF REFORM JUDAISM; MUSLIM ADVOCATES; NATIONAL COUNCIL OF CHURCHES; NATIONAL COUNCIL OF JEWISH WOMEN; SIKH COALITION; SOUTHWEST CONFERENCE OF THE UNITED CHURCH OF CHRIST; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM IN SUPPORT OF DEFENDANT-APPELLEE

FILED WITH WRITTEN CONSENT OF ALL PARTIES

Roopali H. Desai (024295)
COPPERSMITH BROCKELMAN PLC
2800 North Central Avenue
Suite 1900
Phoenix, AZ 85004
(602) 381-5478
rdesai@cblawyers.com

Alex J. Luchenitser*
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-3234
luchenitser@au.org

* *Pro hac vice* application pending.

Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions, Statutes, and Ordinances

Other Authorities

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Amici curiae are religious, religiously affiliated, and civil-rights organizations representing a variety of faiths and beliefs. *Amici* include Christian, Jewish, Muslim, Hindu, Sikh, multi-faith, and nonsectarian organizations. They are:

- Americans United for Separation of Church and State.
- Anti-Defamation League.
- Bend the Arc: A Jewish Partnership for Justice.
- Central Conference of American Rabbis.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- Hadassah, the Women's Zionist Organization of America, Inc.
- Hindu American Foundation.
- Interfaith Alliance Foundation.
- Men of Reform Judaism.
- Muslim Advocates.
- National Council of Churches.
- National Council of Jewish Women.
- Sikh Coalition.

- Southwest Conference of the United Church of Christ.
- Union for Reform Judaism.
- Women of Reform Judaism.

Amici share a commitment to religious freedom and to ensuring that LGBTQ people, and all Americans, remain free from officially sanctioned discrimination. *Amici* have a strong interest in preventing our Nation's fundamental commitments to equality and pluralism from ever being eroded or tainted by misuse of the language of religious freedom to afford official imprimatur to maltreatment of people based on religion, race, sex, sexual orientation, or other protected characteristics. *Amici* therefore oppose the argument that the Arizona Free Exercise of Religion Act should override Phoenix's prohibition against sexual-orientation discrimination by places of public accommodation.

No persons or entities other than *amici* and their members provided financial resources for the preparation of this brief.

INTRODUCTION AND SUMMARY

Religious freedom is a constitutionally and statutorily protected value of the highest order. It is not, and has never been, a license to discriminate in violation of neutral public-accommodations laws. Yet Brush & Nib asks this Court to grant it such a license. Brush & Nib contends that the Arizona Free Exercise of Religion Act entitles it to an exemption from a neutral public-accommodations ordinance that is intended to protect minorities, marginalized groups, and all other people in Phoenix from discrimination.

As Phoenix explains, FERA cannot properly be read to provide Brush & Nib an exemption that would permit the business to refuse service to and exclude customers based on religious disapproval of who they are. What is more, interpreting FERA to mandate such an exemption would cause the statute to conflict with the Establishment Clause of the First Amendment to the U.S. Constitution. For the Establishment Clause bars granting religious exemptions when their effect would be to impose undue costs, burdens, or harms on innocent third parties. Brush & Nib's requested exemption from Phoenix's antidiscrimination ordinance would do just that: It would confer on all commercial establishments official license to deny statutorily mandated equal treatment to anyone who does not live according to the religious views of the businesses' owners.

Brush & Nib's assertion of a religious-freedom right to violate antidiscrimination laws also reflects a basic misunderstanding of the fundamental protections for religious exercise embodied in FERA. Antidiscrimination laws protect religious freedom; they do not interfere with, impede, or frustrate the enjoyment of it. Antidiscrimination laws such as Phoenix's extend prohibitions against discrimination to religious groups just as to other protected classes. Thus they ensure that our nation's vibrant diversity of faiths and beliefs does not divide and roil society. They guarantee that a Muslim cannot be refused a meal by a Protestant restaurateur, a Sikh cannot be evicted by a Baptist landlord, and a Catholic cannot be fired by a Jewish supervisor for adhering to the "wrong" faith.

If Brush & Nib's argument for a religious exemption from Phoenix's public-accommodations law were accepted, such religiously motivated discriminatory acts would receive protection under FERA. The predictable consequence would be that persons of minority faiths, LGBTQ people, and other historically marginalized groups would be confronted with a Hobson's choice between hiding their identity to conform to others' religiously based expectations and being turned away from businesses open to the public. If religious freedom and equal justice under law mean anything, they surely mean that no one should be put to that choice.

ARGUMENT

I. Exempting Brush & Nib from Phoenix's antidiscrimination law would violate the Establishment Clause.

Phoenix correctly explains that FERA cannot properly be construed to provide Brush & Nib an exemption from the city's public-accommodations law. (*See* Def.'s Answering Br. 64–82; Combined Resp. to Pet. for Review, Conditional Cross-Pet. for Review, and App. 27–30; City of Phoenix's Suppl. Br. 11–16.) But even if FERA's text could be read to support the requested exemption, interpreting FERA in that manner would cause it to conflict with the federal Establishment Clause. For the Establishment Clause does not permit religious exemptions that—instead of protecting religious institutions' internal exercise of their beliefs—substantially burden third parties who do not share those beliefs.

"The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). To be constitutionally permissible, a religious accommodation or exemption therefore "must be measured so that it does not override other significant interests." *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

Thus, in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985), the U.S. Supreme Court held that a state law that provided a right

exclusively to Sabbath observers not to work on the Sabbath was unconstitutional in part because it "would cause the employer substantial economic burdens" and "require the imposition of significant burdens on other employees required to work in place of the Sabbath observers." Similarly, in *Texas Monthly, Inc. v. Bullock*, the Court ruled that a sales-tax exemption limited to religious publications violated the Establishment Clause in part because it "markedly" "burden[ed] nonbeneficiaries by increasing their tax bills by whatever amount [wa]s needed to offset the benefit bestowed on subscribers to religious publications." *See* 489 U.S. 1, 15, 18 n.8 (1989) (three-Justice plurality opinion); *see also id.* at 28 (Blackmun, J., joined by O'Connor, J., concurring in the judgment) (agreeing that exemption was not constitutional accommodation of religion).

Conversely, in *Sherbert v. Verner*, 374 U.S. 398, 409 (1963), the Court concluded that the Establishment Clause permitted a judicially created religious exemption from a state unemployment-benefits law for an employee who was fired for refusing to work on her Sabbath, because the exemption would not "abridge any other person's religious liberties." And in *Cutter*, 544 U.S. at 720, the Court held that to comport with the Establishment Clause any interpretation of the federal Religious Land Use

and Institutionalized Persons Act—which protects the religious exercise of prison inmates—"must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." This federal statute, known as RLUIPA, protects inmates' religious exercise under a standard similar to FERA's. *Compare* 42 U.S.C. § 2000cc-1(a) *with* A.R.S. § 41-1493.01(C).

Yet here, Brush & Nib contends that FERA grants businesses that open their doors to the public an unfettered right to refuse to serve same-sex couples on the same terms as other couples. That is discrimination, both in fact and as defined by Phoenix law. Such discrimination harms same-sex couples not only by forcing them to go somewhere else for service but also by labeling them as second-class citizens.

" 'Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public . . . .' " *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (quoting S. Rep. No. 872, 88th Cong., 2d Sess., 16). Under the legal regime that Brush & Nib advocates, same-sex couples would wake up each day knowing that, wherever they go, they may be turned away from public accommodations that deem them unfit to be

served. Or, as Brush & Nib suggests, same-sex couples would have to consult a government-curated list—akin to the Green Books used by African Americans when traveling during the Jim Crow era (*see* Rhonda Colvin, *Traveling While Black*, Wash. Post, Jan. 26, 2018, https://wapo.st/2LdxsjN)—of establishments that will deign to serve them. (*See* Appellants' Opening Br. 60 (arguing that "Phoenix could publicize a list of artists that will create" art for same-sex couples).) And same-sex couples would have no legal recourse to challenge such unequal treatment as long as the refusals to serve them were explained in religious terms.

But as the Supreme Court recently affirmed in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018), "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." The Court made clear that the Constitution must not be read to permit "a long list of persons who provide goods and services for marriages and weddings [to] refuse to do so for gay persons" on religious grounds, for that would "result[ ] in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *See id.* Rather, "it is a general rule that" "religious and philosophical objections" "do not allow business

owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Id.*

Those who oppose marriage of same-sex couples are undeniably entitled to their beliefs, but they "may [not] use the power of the State to enforce these views on the whole society." *See Lawrence v. Texas*, 539 U.S. 558, 571 (2003). The right to believe, or not, and to practice one's faith, or not, is sacrosanct. But it does not extend to rewriting the laws to impose the burdens of one's beliefs on innocent third parties—especially when one voluntarily becomes subject to those laws by choosing to enter the commercial arena. Government should not, and as a matter of law cannot, favor the particular religious beliefs of some at the expense of the rights, beliefs, and dignity of others. The Establishment Clause simply does not allow it.

II. Laws prohibiting discrimination safeguard religious freedom; granting the requested religious exemption would erode that freedom.

Far from offending religious freedom, antidiscrimination laws like Phoenix's public-accommodations ordinance explicitly serve and advance that fundamental value. There have been many documented incidents in which business owners have refused to serve customers because the

customers were of a different faith. Title II of the Civil Rights Act, the public-accommodations laws of forty-five states (including Arizona's, *see* A.R.S. § 41-1442(B)) and the District of Columbia, and countless local ordinances (including Phoenix's, *see* Phoenix, Ariz., City Code § 18-4(B)(1)) therefore prohibit discrimination in the provision of goods or services on the basis of religion (in addition to various other protected characteristics). *See, e.g.*, *State Public Accommodation Laws*, Nat'l Conference of State Legislatures (July 13, 2016), http://tinyurl.com/ycy9eugt. Religious freedom is threatened, not served, by efforts to use statutes such as FERA to override public-accommodations laws and license discrimination in the name of religion.

A. Antidiscrimination laws protect religious freedom.

When Congress enacted Title II to bar discrimination in public accommodations, it included religion as a protected category. *See* 42 U.S.C. § 2000a(a). It did so to remedy the systematic refusals of service that it recognized were occurring on the basis of religion as well as race. *See, e.g.*, 110 Cong. Rec. H1615 (daily ed. Feb. 1, 1964) (statement of Rep. Teague) (noting that Title II barred discrimination against Jews, who were "not allowed in certain hotels"); *A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearing on S. 1732*

Before the S. Comm. on Commerce, 88th Cong. 735 (1963) (statement of Franklin D. Roosevelt Jr., Under Secretary of Commerce) (explaining that in New York "it has been traditional, among some . . . resort places, to refuse to take members of the Jewish faith"). Senate committee hearings included references, for example, to a hotel in New Hampshire that set aside specific weeks when it rented exclusively to Christians and other weeks when it rented only to Jews. *Id.* at 780 (statement of Sen. Cotton). In other words, the hotel engaged in time-sharing to provide "equal but separate facilities" (*id.* at 1045), which Congress recognized to be a serious harm and a substantial barrier to full participation in civil society that warranted an equally serious and substantial federal remedy.

Title II, however, is limited both in the classifications for which it affords protections (race, color, religion, and national origin) and in the entities that it covers (hotels, rooming houses, restaurants, gas stations, and entertainment venues whose "operations affect [interstate] commerce"). *See* 42 U.S.C. § 2000a(b). To varying degrees, state and local public-accommodations laws fill the gaps in both respects. Phoenix's antidiscrimination ordinance, for example, bars discrimination based on "race, color, religion, sex, national origin, marital status, sexual orientation, gender identity or expression, [and] disability," and it applies to "all

establishments offering their services, facilities or goods to or soliciting patronage from the members of the general public." *See* Phoenix, Ariz., City Code §§ 18-3, 18-4(B)(1).

The "fundamental object of" such laws is "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.' " *Heart of Atlanta*, 379 U.S. at 250; *see also, e.g.*, *Romer v. Evans*, 517 U.S. 620, 631 (1996) (antidiscrimination laws "protect[ ] against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society"); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 32 (D.C. 1987) (D.C. Human Rights Act advances fundamental value "embodied in our Bill of Rights—the respect for individual dignity in a diverse population"). If FERA is construed to grant businesses a license to violate antidiscrimination laws whenever the businesses have a religious motivation, not only will LGBTQ people be deprived of their dignity, but the religiously based prejudices or animus that some people harbor toward racial minorities, women, unwed mothers, people with disabilities, and a wide array of other groups—including people of different faiths—would likewise receive legal sanction.

Indeed, people with religious identities that are different from those of the business owners who take advantage of such permission to discriminate would be among the principal victims of the discrimination. The case law shows—and the experiences of *amici* and our members confirm—that incidents of disfavor toward, unequal treatment of, and denial of service to members of minority faiths, persons adhering to a different faith, and nonbelievers are all too common. And religious discrimination, like other forms of discrimination, may be, and often is, premised on religious views or motivations.

In *Paletz v. Adaya*, No. B247184, 2014 WL 7402324 (Cal. Ct. App. Dec. 29, 2014), for example, a hotel owner in Santa Monica, California, ordered the closing of a poolside event hosted by a Jewish group. After looking at a pamphlet describing the group and seeing attendees at the event wearing T-shirts bearing the group's name, the hotelier told an employee, "I don't want any [f—ing] Jews in the pool" (*id.* at *2 (alteration in original)); said that "her family members would cut off her financing if they learned of the gathering" (Michael Cieply, *Jews Awarded Damages in California Hotel Case*, N.Y. Times, Aug. 15, 2012, http://tinyurl.com/9myoenc); and directed hotel staff to remove the Jewish guests from the property (*Paletz*, 2014 WL 7402324, at *2).

In *Khedr v. IHOP Restaurants, LLC*, 197 F. Supp. 3d 384, 385 (D. Conn. 2016), a family was refused service at an International House of Pancakes in Connecticut because the family was Muslim: "The restaurant manager started to look at us up and down with anger, hate, and dirty looks because my wife was wearing a veil, as per our religion of Islam." In front of the family's twelve-year-old child, the IHOP manager told his staff "not to serve 'these people' any food." *Id.*

And in Arkansas, a shooting range declared itself a "Muslim-free zone." Abby Ohlheiser, *Justice Department Will 'Monitor' the 'Muslim-Free' Gun Range in Arkansas*, Wash. Post, Apr. 24, 2015, http://tinyurl.com/yc4fdjzu. It also refused to allow a Hindu father and son of South Asian descent to use the range, erroneously assuming that they were Muslims. *See id.*; Complaint ¶¶ 24, 32, 34, *Fatihah v. Neal*, No. 6:16-cv-00058-KEW (E.D. Okla. Feb. 17, 2016), http://tinyurl.com/ycgey87l (alleging that range owners posted sign declaring facility a "MUSLIM FREE ESTABLISHMENT," armed themselves with handguns when a Muslim man wanted to use the facility, and accused him of wanting to murder them because "[his] Sharia law required" it). *See also* Steven Cook, *Gun Shop Says it Won't Sell to Muslims*, Daily Gazette, July 31, 2015, http://tinyurl.com/y7m6nywk (sporting-goods retailer in New York

adopted policy of not selling guns to Muslims, explaining, "I cannot tell a radical Muslim . . . from the 6 non radical Muslims left in the world").

What is more, in the related area of employment law, incidents of religious discrimination premised on employers' or fellow employees' religious beliefs are legion. For instance, in *Nappi v. Holland Christian Home Ass'n*, No. 11-cv-2832, 2015 WL 5023007 (D.N.J. Aug. 21, 2015), a Catholic maintenance worker in New Jersey was repeatedly harassed by his supervisor and colleagues, who identified as Protestant and Reformed Christian. They called Catholicism a " 'Mickey Mouse religion' and criticized Catholics for worshipping saints," encouraged the employee to leave his church, put religious literature in his locker, and "wanted to shoot [him]." *Id.* at *2. The supervisor terminated the plaintiff's employment, explaining that "he was being fired because, as a Roman Catholic, he was an 'outsider' who did not 'fit in.' " *Id.* at *3.

In *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610, 612 (9th Cir. 1988), an atheist was constructively discharged from his job at a mining-equipment manufacturer in California that held mandatory weekly meetings involving "prayer, thanksgiving to God, singing, testimony, and scripture reading, as well as discussion of business related matters." The Ninth Circuit rejected the business owners' defense "that the

Bible and their covenant with God require[d] them to share the Gospel with all of their employees," concluding that "[p]rotecting an employee's right to be free from forced observance of the religion of his employer is at the heart of Title VII's prohibition against religious discrimination." *Id.* at 620–21.

In *Huri v. Office of the Chief Judge of the Circuit Court*, 804 F.3d 826 (7th Cir. 2015), a Muslim childcare attendant who wore a hijab was harassed by her Christian supervisor in a county court in Illinois. The supervisor called the employee "evil," while describing herself, the chief judge, and another court employee as "good Christian[s]"; denied the employee time off for an Islamic religious holiday; and engaged in "social shunning, implicit criticism of non-Christians, and uniquely bad treatment of" the employee and her daughter. *Id.* at 830, 834.

And in *Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 846–47 (Minn. 1985), a health club allowed "only born-again Christians . . . to be managers or assistant managers"; "question[ed] prospective employees about marital status and religion; terminat[ed] employees because of a difference in religious beliefs; [and] refus[ed] to promote employees because of differing religious beliefs." Job "applicants were asked whether they attend church, read the Bible, are married or divorced, pray, engage in pre-marital or extra-marital sexual relations,

believe in God, heaven or hell, and other questions of a religious nature," in keeping with the gym owners' "fundamentalist religious convictions [that] require[d] them to act in accordance with the teachings of Jesus Christ and the will of God in their business as well as in their personal lives." *Id.* "[B]ased on an interpretation of the Bible, [the gym] w[ould] not hire, and w[ould] fire, individuals living with but not married to a person of the opposite sex; a young, single woman working without her father's consent or a married woman working without her husband's consent; a person whose commitment to a non-Christian religion is strong; and someone who is 'antagonistic to the Bible,' which according to *Galati[a]ns* 5:19-21 includes fornicators and homosexuals." *Id.* at 847. The gym "justifie[d its] rigid policy by relying on [its owners'] religious belief that they are forbidden by God, as set forth in the Bible, to work with 'unbelievers.' " *Id.*

B. Granting Brush & Nib the exemption it seeks would undermine religious freedom.

Religiously motivated discrimination like the conduct described above would become permissible across Arizona if FERA were interpreted as Brush & Nib desires. Though Brush & Nib asserts that it is willing to serve non-Christians (Appellants' Reply Br. 26), there is no logical limit to the exemption that the business seeks. Indeed, Brush & Nib's owners assert that "they cannot do anything in their art business that violates their

religious beliefs or dishonors God." (Appellants' Opening Br. 5.) The basic structure of Brush & Nib's argument is that, because it disapproves of weddings of same-sex couples based on its owners' religious views, it has the absolute right under FERA to refuse service, all antidiscrimination laws to the contrary notwithstanding. (*See id.* at 43–53.)

That argument is as expansive as it is troubling. If accepted, it would also permit other religiously motivated denials of service, including discrimination against people of a particular race, religion, national origin, sex, or any other protected characteristic. In the wedding context, suppose that an interfaith couple wished to marry, and in keeping with the religion of one, the couple planned to serve kosher (or halal) food. But the only kosher (or halal) caterers in town refused to prepare food for interfaith weddings based on their religious beliefs. Should the caterers have the right, even in the face of public-accommodations protections against religious discrimination, to force the couple to choose between not having food at their wedding reception or violating the sincere beliefs of one of them in the celebration of their wedding?

And what of the children who are part of a family that, in the opinion of any number of business owners, should not exist because the parents are of different faiths or were married within a faith that the merchants find

offensive or contrary to their own religious beliefs? Might the children be denied a floral arrangement for a first communion, a bar or bat mitzvah party, or even a birthday cake?

More broadly, may the local movie theater refuse to sell a ticket to a boy in a yarmulke because his faith is "at odds with" that of the manager? May a restaurant deny service to a Muslim woman who wears a Hijab or a Sikh man who wears a Turban? May the only grocer in town refuse to sell fruit to an unmarried mother and her child? And what about the recently widowed Catholic whose Protestant spouse would have wanted a Protestant funeral? May she be barred from all the nearby funeral homes on account of *her* faith, so that she is unable to find a place to honor and say goodbye to her spouse in accordance with the dictates of her beloved's faith?

If FERA licenses religiously motivated denials of service to same-sex couples, as Brush & Nib contends, then it would appear to authorize all other religiously motivated denials, including exclusions based on customers' faiths. One could be refused employment, thrown out of a hotel, or barred from purchasing a cup of coffee just for being of the "wrong" religion (or race, or sex, or sexual orientation), and no state or local authority or law could do anything to remedy the situation. Such an outcome would devastate religious freedom, not protect it.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED this 20th day of December, 2018.

By /s/ Roopali H. Desai
Roopali H. Desai (024295)
COPPERSMITH BROCKELMAN PLC
2800 North Central Avenue
Suite 1900
Phoenix, AZ 85004
(602) 381-5478
rdesai@cblawyers.com

Alex J. Luchenitser*
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE**
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-3234
luchenitser@au.org

* *Pro hac vice* application pending.
** Americans United Madison Fellow Claire L. Hillan (not making an appearance) substantially contributed to the preparation of this brief.

Counsel for *Amici Curiae*