

ARIZONA SUPREME  
COURT

BRUSH & NIB STUDIO LC, et al.,

Plaintiffs/Appellants/  
Cross-Appellees,

v.

CITY OF PHOENIX,

Defendant/Appellee/  
Cross-Appellant.

Supreme Court  
No. CV18-0176-  
PR

Court of Appeals  
No. 1 CA-CV 16-0602

Maricopa County  
Superior Court  
No. CV2016-052251

All Parties Consent to this  
*Amicus* Brief

**BRIEF OF *AMICUS CURIAE* JEWISH COALITION  
FOR RELIGIOUS LIBERTY  
IN SUPPORT OF APPELLANTS**

Joshua Carden, SBN 021698 Joshua  
Carden Law Firm, P.C.  
16427 N. Scottsdale Road, Suite 410  
Scottsdale, AZ 85254  
(480) 454-1100  
joshua@cardenlawfirm.com

*Of Counsel:*  
Michael K. Whitehead  
Whitehead Law LLC  
229 SE Douglas St. #210  
Lee's Summit, MO 64063  
(816) 398-8967  
Mike@TheWhiteheadFirm.com

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
INDEX OF AUTHORITIES.....	3
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i> .....	4
INTRODUCTION.....	5
ARGUMENT.....	10
FREE EXERCISE OF RELIGION BY SECULAR VOCATIONS IN THE MARKETPLACE SHOULD BE NO LESS PROTECTED THAN SACRED VOCATIONS. ....	10
A. MANY FAITHS TEACH THAT SECULAR VOCATIONS ARE CALLINGS TO INTEGRATE WORK AND WITNESS.....	10
B. MEMBERS OF MANY FAITHS DO NOT CONDONE SAME-SEX MARRIAGE.....	14
C. MANY FAITHS TEACH THE PRINCIPLE OF MORAL COMPLICITY...	15
CONCLUSION .....	17

## INDEX OF AUTHORITIES

### Cases

<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 134 S. Ct. 2751, 2768 (2014).....	6, 10, 16
<i>Christian Legal Soc’y v. Martinez</i> , 561 U.S. 661, 689 (2010) .....	8
<i>Hobby Lobby Stores, Inc. v. Sebelius</i> , Case No. 12-6294 (10th Cir. 2013).....	15
Marc Kolden, <i>Luther on Vocation</i> , 3 <i>Word &amp; World</i> 382 (Oct. 1, 2001) .....	13
<i>Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission</i> , 138 S. Ct. 1719 (2018), .....	5
Menachem Posner, <i>What is Shabbat?</i> , Chabbad.org .....	12
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015).....	5, 8, 9

### Statutes

Arizona Free Exercise of Religion Act (FERA) .....	6
Phoenix City Code § 18-4(B).....	6

### Other Authorities

1 Samuel 3 .....	11
Baptist Faith and Message, 2000 .....	13, 15
Colossians 3:23-24 .....	12
Douglas Laycock, <i>Afterward, Same-Sex Marriage and Religious Liberty: Emerging Conflicts</i> 189 (Douglas Laycock et al., 2000).....	6
Exodus 16:26-30 .....	12
Exodus 31 .....	11
Hugh Welchel, <i>How Then Should We Work? Rediscovering the Biblical Doctrine of Work</i> , 4 (2012).....	13
Maimonides, <i>Mishneh Torah, Laws of Repentance</i> 3:10.....	16
Matthew 19:4–6.....	14
Miroslav Volf, <i>Flourishing: Why We Need Religion in a Globalized World</i> 113 (2015).....	14
Rabbi Joseph Caro, <i>Shulchan Aruch - Code of Jewish Law</i> , O.C. 169:1-2. Y.D. 151:1-3 .....	16
Rabbi Moses Feinstein, <i>Igros Moshe</i> , O.C. 1:99 .....	16
Talmud, <i>Makkos</i> .....	12
The Nashville Statement.....	15
Why Not Milk and Meat, <i>Aish.com</i> 9 .....	12

### Constitutional Provisions

Arizona Constitution’s Free Speech Clause .....	6
---	---

## **IDENTITY AND INTEREST OF *AMICUS CURIAE***

**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. Amicus's members have each written extensively on the role of religion in public life. Representing members of the legal profession, and as adherents of a minority religion, amicus has a unique interest in ensuring that Free Exercise jurisprudence enables the flourishing of religious viewpoints and practices in the United States, including for communities of traditional faith.

## INTRODUCTION

In announcing a new constitutional right to same-sex marriage, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), promised that religious believers and organizations 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

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the United States Supreme Court honored the promise of *Obergefell* by defending Jack Phillips’s religious beliefs about marriage from naked animus. The *Masterpiece* decision charged other courts to “further elaborat[e]” on the important issues at stake. *Id.* at 1723-24, 1732. And now this Court can do so while correcting

the Court of Appeals' (COA) misinterpretation of the Arizona Constitution's Free Speech Clause and the Arizona Free Exercise of Religion Act (FERA).

Same-sex marriage has led to conflicts with religious freedom, just as informed observers long predicted.<sup>1</sup> Your *amicus* join with Joanna Duka and Breanna Koski, owners of Brush and Nib Studio, LC, in asking this Court to give “proper protection” to their “decent and honorable” religious beliefs about God’s design for marriage and their custom design for artwork celebrating marriage. Your *amicus* seeks this protection for all people of faith, and people of no faith. Pluralism, not the dominance of one faction over another, was *Obergefell*’s promise. *Id.*

Petitioners<sup>2</sup> challenge the use of the Phoenix City Code § 18-4(B)—which carries penalties of up to six months in jail and \$2,500 in fines for each day they are found in violation. ROA-111 at 28:5-23, 29:15-20. But the COA upheld this application-- compelling them to use their artistry to design and create wedding artwork to celebrate a same-sex marriage, against their will and contrary to their religious convictions--as consistent with Arizona’s Free Speech and Free Exercise

---

<sup>1</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>2</sup> “Petitioners” 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).

protections. *Amicus* endorses petitioners' well-reasoned arguments for reversal. The constitutional doctrines they invoke must be rigorously applied to allow a healthy pluralism on the contentious and consequential topic of marriage. But in addition to those arguments, this Court should also reverse the decision below because Free Exercise precludes States from imposing penalties on a person's pursuit of their chosen occupation or vocation.

Your *amicus* represents a faith group and individuals with fundamentally divergent beliefs about the identity and nature of God from the petitioners, yet with similar views of religious obligations extending to behavior in both sacred and secular occupations.

Free Exercise rights extend to secular vocations as well. Most religious adherents will work in the secular marketplace rather than religious callings. However, for religious Jews, religious beliefs and requirements are infused in every aspect of their lives including their professional lives. If the government demands otherwise, they will leave their businesses before they will dishonor God and violate His commandments. They believe they would be engaging in sin if they failed to follow the Torah in their professional lives.

It is no response that religious people are free to believe anything they want about marriage outside the commercial sphere, if government coerces them inside it, to engage in expressive conduct that contradicts and violates those beliefs. Such a demarcation simply does not exist within Judaism.

While it is true that government has compelling reasons for narrowly circumscribing conduct based on invidious racist beliefs, the same is not true of religious beliefs about traditional marriage, which, as this Court expressly recognized in *Obergefell*, are “based on decent and honorable religious or philosophical premises” that are central to the lives of decent and honorable people. 135 S. Ct. at 2607. Those religious beliefs, which for Petitioners are an integral part of their status and personal identity as Christians, cannot be divorced from the expressive conduct that gives voice to those beliefs. *Cf. Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 689 (2010) (in some contexts homosexual status and sexual conduct cannot be separated). If government may coerce Petitioners to design and create custom artwork celebrating an event contrary to “divine precepts,” then government may effectively exclude all Americans who hold such beliefs from the wedding industry. That is antithetical to the Free Exercise of religion.

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 at work and while running a business. And courts have never conditioned an individual’s constitutional rights to free expression and Free exercise on that person’s willingness to keep her faith beliefs under a bushel basket and not engage in commerce. And that condition is precisely what the City of Phoenix seeks to impose on Brush & Nib: promote messages that



violate your faith and conscience, or else.

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 pagan worship, or a Christian screen printer to promote messages that conflict with the printer-owner's deeply-held religious beliefs. Yet that is the City's position here. This Court should use this case as an opportunity to recognize and reaffirm that religious liberty protections reach as far as adherents' religious convictions.

Reversal offers a chance to honor the promise of *Obergefell, supra*.

## ARGUMENT

**Free exercise of religion by secular vocations in the marketplace should be no less protected than sacred vocations.**

**A. Many faiths teach that secular vocations are callings to integrate work and witness.**

Religious liberty does not belong only to the church, mosque or synagogue. Free Exercise of religion extends to individuals and businesses in the marketplace as well. It extends to those in secular vocations in for-profit businesses as well as those employed by a synagogue or non-profit religious organization.

This Court recently protected the statutory free exercise rights of the Green family, (who are Southern Baptists) and the Hahn family (who are Mennonites), owners of successful closely held for-profit corporations, Hobby Lobby Stores, Inc. and Conestoga Wood Specialties. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The Court’s opinion reviewed the history of Free Exercise claims by merchants in for-profit trades, incorporated or not, in which religious adherents sought protection of the Free Exercise of their religion. The government disputed that for-profit corporations could “exercise religion” apart from the human beings who operated it, to which the Court retorted that corporations could do nothing apart from those human beings. *Id.*, at 2768.

Indeed, some of the country’s largest businesses participate in the marketplace, yet still engage in religiously motivated practices, such as 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.).

Christian, Jewish, and Muslim teachers have all emphasized that one's faith should be fully integrated in every aspect of one's life. A true believer is called to live out his faith—including fundamental beliefs about sex, marriage, and the family—in every aspect of his life, including the workplace. To do otherwise is sinful. In their theology of work, some would reject the clergy-laity distinction or the secular-sacred divide and teach that all believers are called to work and to glorify God in their work and spiritual witness. Many would say God calls and equips some to be clergy (e.g., 1 Samuel 3) and some to be craftsmen (e.g. Exodus 31).

For example, 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.”

It is a central 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. *Talmud, Makkos*. These opportunities are "mitzvot," or commandments, which constitute civil and criminal rules that govern virtually all aspects of the believer's life, personal and commercial. For example:

- A Jewish merchant cannot sell a cheeseburger to any customer, Jewish or Gentile, because of a mitzvah against deriving any profit from a cooked mixture of dairy and meat. *Why Not Milk and Meat*, Aish.com.

- A Jewish baker is restricted from providing services to a formal wedding that occurs on the Sabbath or select holy days. Menachem Posner, *What is Shabbat?*, Chabbad.org; Exodus 16:26-30.

Other faiths have similar beliefs. The Apostle Paul, who sometimes made tents for a living, exhorted Christian laborers in Colossians 3:23-24, "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."

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 devotion." Oxford Islamic Information Centre, *Five Pillars of Islam*. See [tinyurl.com/yaab2chh](http://tinyurl.com/yaab2chh) (last accessed 9/25/18)

Martin Luther affirmed 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).

John Calvin likewise “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 Christian Calling*, 1999 *First Things* 94 (July 1999).

Contemporary evangelical teachers continue to emphasize this doctrine. Business author Hugh Welchel quotes theologian Carl F. H. Henry on work: “According to the Scriptural perspective, work becomes a 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).

The Southern Baptist Convention’s doctrinal statement, *Baptist Faith and Message*, 2000, (“*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) See [www.sbc.net/bfm2000/bfm2000.asp](http://www.sbc.net/bfm2000/bfm2000.asp) (last accessed: 9/25/18)

*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.*

In sum, for millions of believers, “freedom to embrace religion *as a way of life . . .* is a key substantive good.” Miroslav Volf, *Flourishing: Why We Need Religion in a Globalized World* 113 (2015) (emphasis added). This court should recognize that the Free Exercise of religion protects the decision to embrace religion as a way of life and the myriad consequences that flow from that acceptance. A more limited protection would be wholly inadequate and would force religious adherents to make an impossible decision between their faith and full participation in American life.

**B. Members of many faiths do not condone same-sex marriage.**

Many Orthodox Jews do not condone homosexual relationships, including same-sex marriage. Rabbi Tzvi Hersh Weinreb, *Orthodox Response to Same-Sex Marriage* (June 5, 2006) See [tinyurl.com/ycb8w268](http://tinyurl.com/ycb8w268) (last accessed 9/25/18) Most Orthodox Rabbis will not officiate at same-sex weddings, and in fact, do not consider such a thing possible under Jewish law.

Islamic officials have recently affirmed that the Qur’an clearly prohibits same-sex marriage.

Christians believe that Jesus Christ stated that marriage is rooted in creation and is a sacred, lifelong bond between one man and one woman. Matthew 19:4–6. This has been the traditional orthodox view of the Christian church from its beginning.

The *Baptist Faith and Message*, 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. *Supra*.

See also “*The Nashville Statement*,” a contemporary “Christian Manifesto on human sexuality,” released on August 29, 2017. The statement is framed in terms of what signers affirm and what they deny, showing that religious exercise is sometimes expressed by a refusal. 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. See [cbmw.org/nashville-statement](http://cbmw.org/nashville-statement) (last accessed: 9/25/2018).

### **C. Many faiths teach the principle of moral complicity.**

Another principle that is common to many faiths is moral complicity. In a concurring opinion in *Hobby Lobby Stores, Inc. v. Sebelius*, Case No. 12-6294 (10th Cir. 2013), Justice (then Judge) Gorsuch wrote: “All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability. . . . Understanding that is the key to understanding this case.” This Court later agreed, and declined to tell plaintiffs

their moral thinking was flawed, in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 at 2778 (2014)

Orthodox Jewish law prohibits encouraging, causing, or even assisting sinful behavior on the part of others. These prohibitions against complicity in sin involve a wide variety of areas, including providing materials for idolatrous practices, encouraging other Jews to violate the Sabbath for one's own convenience, and even providing another Jew with food without reminding him to recite the traditionally appropriate blessing should he forget to do so. These prohibitions against moral complicity are quite serious (Rabbi Joseph Caro, *Shulchan Aruch - Code of Jewish Law*, O.C. 169:1-2. Y.D. 151:1-3; Rabbi Moses Feinstein, *Igros Moshe*, O.C. 1:99). One of the most esteemed Jewish law codes regards someone who forces or misleads the public into sinning as forfeiting his share in heaven (Maimonides, *Mishneh Torah, Laws of Repentance* 3:10).

Understanding the principle of moral complicity may also be the key to understanding this case, and why your *amicus* supports Petitioners in this matter.



## CONCLUSION

For all the foregoing reasons, your *amicus* urges this Court to reverse the trial court, render summary judgment in favor of Petitioners, and permanently enjoin the City of Phoenix's ordinance as applied to Petitioners.

Dated: September 28, 2018

Respectfully submitted,

By: /s/ Joshua W. Carden

Joshua W. Carden

JOSHUA CARDEN LAW FIRM, P.C.

*Of counsel:*

Michael K. Whitehead

WHITEHEAD LAW FIRM, LLC

229 SE Douglas St. Suite 210

Lee's Summit, MO 64063

(816) 398-8967

Mike@TheWhiteheadFirm.com

*Attorneys for Amicus Curiae*