ARIZONA SUPREME COURT

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 AMICUS, PROFESSOR ADAM J. MACLEOD, IN SUPPORT OF PETITION FOR REVIEW

(filed with the written consent of the parties)

Robert J. Bozelli
State Bar of Arizona No. 033530
bozellilaw@cox.net; &
bozellilaw@gmail.com
The Bozelli Law Firm, A Professional Corporation
2040 South Alma School Road,
Suite One, Number 486
Chandler, Arizona, 85286
(480) 699 – 9756 [office]
(512) 532 – 6630 [facsimile]
Attorney for Amicus, Professor Adam J. MacLeod

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES

Cases ***Page***

Statutes

Other Sources

IDENTITY AND INTEREST OF AMICUS

Adam J. MacLeod is Professor of Law at Faulkner University, Thomas Goode Jones School of Law. An expert on common law rights and duties, he is the author of PROPERTY AND PRACTICAL REASON from Cambridge University Press (2015) and academic articles in peer-reviewed journals and law reviews in the United States, United Kingdom, and Australia. Amicus has reviewed the rulings below and is familiar with the issues. Amicus has researched and written about the nondiscrimination norm in civil rights laws such as the Arizona law at issue.

ISSUE ADDRESSED

The issue is whether this Court should preserve the ancient, Anglo-American right not to be discriminated against with a particularly-proscribed intention—for a particularly-prohibited reason—rather than render the moral judgment that declining to communicate a message one thinks untrue is an unfair and discriminatory act.

SUMMARY OF THE ARGUMENT

Every person has the ancient and fundamental right to equal treatment under the law. *Somerset v. Stewart* (1772) 98 Eng. Rep. 499. And every person has the ancient and fundamental right not to communicate a message they think is false. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). These rights are

central to our legal and constitutional heritage. Far from competing with each other, they are mutually-reinforcing structural elements of American ordered liberty.

In recent years, some state tribunals have brought those fundamental rights into needless and avoidable conflict with each other, as the Court of Appeals did in this case. In the common-law context in which they grew, the rights work together with other fundamental rights and duties to secure the equal liberty of all. However, when abstracted from the duties with which they correlate and the institutions which mediate between them they become a right not to suffer dignitary harm, on one side, and a right to discriminate for religious reasons, on the other. The contest between those abstract rights is a zero-sum game. But those abstract rights are not the fundamental rights of our legal heritage.

When a proprietor declines to provide a service, which would communicate a message that she wishes not to communicate, the reason for her declining—the reason *because of* which she declines in the language of public accommodation laws—is the message, not necessarily the person requesting the service. The qualified duty of proprietors not to discriminate in places of public accommodation is a duty not to discriminate *intentionally*, for an unlawful *reason*. It is a duty not to decline service because of a person's status in a protected class. It is not a duty to prevent all undesirable consequence of one's business decisions.

The public accommodation rule originates in common law. Common-law institutions mediate the boundaries of rights to redress wrongs without abrogating anyone's rights. The common law secures an owner's property rights, but qualifies those rights when an owner opens her premises to the public. An owner who opens to the public grants to members of the public a limited license to enter for the purpose of requesting goods or services. The owner may terminate the license, and may decline to provide goods and services, for any valid reason. At common law, race is never a valid reason. Statutes such as Arizona's add new categories of prohibited reasons, such as sexual orientation. The validity of other motivations is a fact question to be resolved by a jury.

Recognizing this, the Supreme Courts of the United States and United Kingdom adhere to the advice which the U.S. Supreme Court offered decades ago in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995), to interpret public accommodation laws as declaratory of the common law in order to secure fundamental civil rights for everyone without unnecessarily generating conflict between those rights. This enables them to distinguish between lawfully communicating only views of sexuality and marriage one finds true, on one hand, and unlawful bigotry on the other.

ARGUMENT

I. Common Law Institutions Secure and Mediate Between Civil Rights

A. Equal Civil Rights for Everyone

Every person has equal civil rights, whether they operate or do business at an abortion clinic, a university, or a Christian bakery. The common law has long guaranteed both equal liberty under law and the right of owners to use their resources for personal expression and self-constitution. ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON 64-121 (2015). Common law institutions such as private property ownership, the public accommodation license, and the civil jury secure and mediate between those rights. Property enables free expression and autonomy. The public accommodation license facilitates association with others while also securing the right not to be excluded for particular discriminatory reasons. And a civil jury determines when a discriminatory action is taken for an unlawful reason.

The right of the owner of a public accommodation to exclude for any valid reason, and the correlative privilege of a customer or other licensee to be excluded only for a valid reason related to the purpose of the license, are not privileges recently invented by the Arizona legislature or Phoenix City Council. They are common-law rights of ancient origin. *Bell* v. *Maryland*, 378 U.S. 226 (1964), at 254 (Douglas, concurring) and at 293-94 (Goldberg, concurring); Adam J. MacLeod, *Tempering Civil Rights Conflicts: Common Law for the Moral Marketplace*, 2016 MICH. STATE L. REV. 643 (2016). Among those ancient civil rights which

nondiscrimination laws declare is the right not to be discriminated against in a place of public accommodation for the reason of one's race. *Shepard* v. *Milwaukee Gas Light Co.*, 6 Wis. 539 (1858); *Coger* v. *Northwestern Union Packet Co.*, 37 Iowa 145 (1873); *Donnell* v. *State*, 48 Miss. 661, 682 (1873); *Messenger* v. *State*, 41 N.W. 638 (Neb. 1889); *Ferguson* v. *Gies*, 46 N.W. 718 (Mich 1890); Alfred Avins, *What Is a Place of "Public" Accommodation*, 52 MARQ. L. REV. 1, 2-4 (1968).

The right to be treated equally is consistent with, and does not derogate from, property rights. The law does not recognize a universal right to be served. Rather, the common law recognizes a variety of customer licenses. Ralph W. Aigler, *Revocability of Licenses: The Rule of Wood v. Leadbitter*, 13 MICH. L. REV. 401 (1915). At one end of the spectrum, a license created by *contract*, such as an entrance ticket, is determined according to the terms of the contract and can be terminated without reason. *Wood* v. *Leadbitter*, 13 M. & W. 838 (Exchequer 1845); *Marrone* v. *Washington Jockey Club*, 227 U.S. 633 (1913). At the other end, *common carriers* and *public utilities*, who enjoy a monopoly position or state-conferred advantage, bear a general duty to serve. Public accommodations on *private property* fall between those two extremes, vesting in the public a qualified privilege to enter, though not an absolute right to be served.

William Blackstone explained, "[A] man may justify entering into an inn or public house, without the leave of the owner first specially asked; because, when a

man professes the keeping of such inn or public house, he thereby gives a general license to any person to enter his doors." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 212 (1769). The public's license is not the creation of positive law. Rather, it is carved out of the owner's estate with the owner's consent and shaped by the owner's purposes. And it is not an absolute right to enter or remain on the premises. It is a privilege to be admitted except for relevant reasons. An "inn-keeper, or other victualler," impliedly engages passers-by and can be held liable "for damages, if he without good reason refuses to admit a traveler." Id at 164.

A license to access one's business premises does not entail a duty to provide any particular services. *Fell* v. *Spokane Transit Authority*, 128 Wash. 2d 618, 638-39 (1996). While the privilege to enter a business is a property license, the terms of service, if any, are determined by the express or implied agreement between the parties. 3 BLACKSTONE, COMMENTARIES, at 164. When implied, the scope of the license is determined by the owner's purposes for holding open to the public. This is why the abortion clinic, the university, and the Christian artist all have the right to decline to associate with or to provide services that contravene their fundamental commitments. Adam J. MacLeod, *Equal Property Rights for All, Including Christian Wedding Cake Bakers*, PUBLIC DISCOURSE (November 30, 2017) (https://www.thepublicdiscourse.com/2017/11/20584/); Adam J. MacLeod, *Universities as Constitutional Lawmakers*, 17 U. PA. J. CON. L. ONLINE 1 (2014).

They are prohibited only from discriminating for inherently wrongful reasons: reasons that are morally arbitrary from the perspective of their plan of business, such as race and ethnicity.

B. Property Licenses Facilitate Expression and Self-Constitution

Many property owners exercise their rights to generate licenses in order to form and build together their own life plans, not only in the privacy of the home, but also in religious assemblies, charitable works, businesses, and civic groups. MacLeod, PROPERTY AND PRACTICAL REASON, at 74-87, 114-21. Those plans are often predicated on unique moral visions. Indeed, property rights have stood guard around many of the most powerful social reform movements in American history. The civil rights protests that were planned in Southern black churches and the LGBT activism of more recent decades were possible because of the owners' rights both to include others in their use of property and to tell others to keep out. MacLeod, PROPERTY AND PRACTICAL REASON, at 33-34; John D. Inazu, *A Confident Pluralism*, 88 SO. CAL. L. REV. 587, 590 & n.17 (2015); Lawrence A. Wilson & Raphael Shannon, *Homosexual Organizations and the Right of Association*, 30 HASTINGS L.J. 1029, 1043, 1046-49, 1054-55 (1979).

Property ownership entails not only the right to exclude but also the right to include others for common purposes, for shared reasons in a common plan. In the marketplace, those shared reasons are proposed by various businesses. As the *Hurley*

Court observed, at common law those who profess to be employed by the public on their private property grant to the public a license to enter for the purpose of acquiring the goods or services on offer. 2 BLACKSTONE, COMMENTARIES, at *212. That license can be refused or terminated for a "good reason." *Hurley*, 515 U.S. at 571, citing *Lane* v. *Cotton*, 12 Mod. 472, 484–485, 88 Eng. Rep. 1458, 1464–1465 (K.B.1701) (Holt, C.J.); *Markham* v. *Brown*, 8 N.H. 523, 529-30, 531 (N.H. 1837); 3 Blackstone, at *164, *166. This means that business owners have a limited nondiscrimination duty; they can refuse service but must have a valid reason for that refusal.

C. The Jury Mediates in Cases of Conflict

What counts as a good reason for not extending a license is determined first by the purposes for which the owner holds open to licensees. *State* v. *DeCoster*, 653 A.2d 891, 893–94 (Me. 1995); Adam Mossoff, *The False Promise of the Right to Exclude*, 8 ECON JOURNAL WATCH 255, 260 (2011); MACLEOD, PROPERTY AND PRACTICAL REASON, at 38. In case of dispute, the validity of an owner's reason is a fact question to be resolved by a jury, with one exception: The racial identity of the would-be licensee is per se *not* a valid reason. In an exemplary decision, the Supreme Court of Michigan explained that to refuse service to a person "for no other reason than" that person's race is contrary to "absolute, unconditional equality of white and colored men before the law." *Ferguson* v. *Gies*, 46 N.W. 718, 719, 720 (Mich. 1890).

Discrimination on the basis of race is "not only not humane, but unreasonable." *Id*. at 721. That is why racial discrimination in public accommodations is contrary to the common law and nondiscrimination statutes that prohibit racial discrimination in public accommodations are not novel innovations but are "only declaratory of the common law." *Id*. at 720.

Yet valid reasons other than race may be offered for an exclusion or a refusal of service, and no principle or rule of law excludes moral and religious reasons, even where the unintended effect of an owner's decision falls disproportionately on people of a particular race. Apart from a reason that is per se invalid, the validity of an owner's reason for excluding or refusing service to a potential patron is a fact question. *Fell*, 128 Wash. 2d at 642-43. Thus, "the ultimate issue of discrimination is to be treated by courts in the same manner as any other issue of fact." *Lewis* v. *Doll*, 53 Wash. App. 203, 206-07 (1989). The validity of a licensor's reasons for exclusion is settled on a case-by-case basis by the common law's institutions of private ordering: first by the purpose for the license and, where necessary, by a civil jury.

II. Public Accommodations Doctrine Law Prohibits Only Intentional Discrimination

A. The Common Law Rule Refers to the Owner's Intention

Whether an owner has infringed a customer's license is a question of fact, which turns on the business purpose for which the owner extended the license in the first place and the reasonableness of her decision not to extend a license to this customer in particular. The touchstone is the validity of the owner's reason—her purpose or intention—not the effects of her decision. Nondiscrimination laws refer to wrongful discriminatory intention because it is the intention to act for a prohibited reason that is wrongful, regardless of consequences. Undesirable effect is neither a necessary nor a sufficient condition to make discrimination unlawful because harmful effect is not what makes wrongful discrimination illicit. "The wrongness of the act is not contingent on its consequences." Adam Slavny and Tom Parr, *Harmless Discrimination*, 21 LEGAL THEORY 100 (2015).

The common law doctrine adheres to that common-sense, moral understanding. An employer or business owner who acts for wrongful, racist motivations should be liable even if the employee or customer was better off as a result (because, e.g., she found a better job or superior service elsewhere). *Id*. at 5-13. For the same reason, an employer or business owner, such as Brush & Nib, who acts from pure motivations, untainted by any of the wrongful grounds of action enumerated in law, should not be liable even if her actions left an employee or customer feeling worse about themselves or had some other, undesirable effect.

The Supreme Court of the United States accurately restated these common law doctrines in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 571-72 (1995), *Christian Legal Society Chapter of the University of California, Hastings College of the Law* v. *Martinez*, 561 U.S. 661, 679 (2011), and in other cases. As that Court observed in *Martinez*, 561 U.S. at 679, essential to property ownership is the right to decide for what purposes property will be used. Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 University of Toronto L. J. 275 (2008). This entails that property owners have the right to preserve the integrity of the purposes for which they hold their premises open to licensees when they act without discriminatory intent and have not created a public forum.

B. Still the Law

Just this year, both the Supreme Court of the United States and the United Kingdom Supreme Court have re-affirmed the common-law rule that the intentions of business owners, rather than the foreseen effects of their actions, determines their liability or non-liability under the public accommodation doctrine. The opinions in those cases restate and affirm the admonition of the U.S. Supreme Court in *Hurley* that state supreme courts should interpret their public accommodation laws as codifying the common law rule to avoid constitutional conflicts and infirmities. And they teach that state courts can avoid making unconstitutional decisions by adhering to the common-law rule that is declared in state statutes, instead of creating a more expansive rule to prohibit undesirable effects.

In their concurring opinions in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. __, 138 S. Ct. 719 (2018) last term, both Justice Kagan and Justice Gorsuch explained that discrimination for an unlawful *reason*, but not discrimination that results in an undesirable *effect*, contravenes the owner's public accommodation duty. Justice Kagan referred to a case in which a customer named Jack asked bakers who are in favor of same-sex intimacy to bake a cake bearing a pro-marriage message. Kagan reasoned that the refusal of those bakers was not unlawful discrimination. "In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have

treated anyone else—just as [Colorado law] requires." Their reason for refusing was the message Jack requested, and they would have similarly refused anyone else whose message they disagreed with.

Justice Gorsuch agreed. He explained the role of intention in practical reasoning, and in law specifically, in greater detail.

> The distinction between intended and knowingly accepted effects is familiar in life and law. Often the purposeful pursuit of worthy commitments requires us to accept unwanted but entirely foreseeable side effects: so, for example, choosing to spend time with family means the foreseeable loss of time for charitable work, just as opting for more time in the office means knowingly forgoing time at home with loved ones. The law, too, sometimes distinguishes between intended and foreseeable effects.

Justice Gorsuch was more modest than Justice Kagan in his interpretation of Colorado law. Colorado courts have the power to interpret a state statute to forbid only intentional discrimination or rather also to forbid acts that have undesirable, unintended effects. The problem in his view was that the Colorado tribunals used an intentional-discrimination standard in some cases and a discriminatory-effect standard in others.

In this, Justices Kagan and Gorsuch restated the Court's repeated admonitions to state supreme courts to avoid constitutional conflict. The Court has on many occasions admonished state judiciaries and inferior federal tribunals to let institutions of plural ordering, especially property rights and licenses, resolve

freighted moral conflicts except where the owner of a public accommodation excludes for a prohibited reason. In *Hurley*, *Martinez*, *Bell*, and other decisions, the Court adhered to the common-law contours of the public accommodations doctrine as a source of the customer's license that is determined by the owner's intention, her reasons for opening her business to the public for some purposes and not others.

The United Kingdom Supreme Court recently did the same in *Lee v. Ashers Baking Company Ltd.* [2018] UKSC 49.[1] Writing for the Court, Lady Hale reversed

[1] In its supplemental brief, the City of Phoenix asserts concerning this case, "As the Supreme Court of the United Kingdom recently held, refusing to bake a cake iced with 'Support Gay Marriage' is message-based discrimination, but refusing to bake a cake for a same-sex couple that the baker would willingly bake for an opposite-sex couple is not." City of Phoenix's Supplemental Brief, at 7 n.3. There occurs no charitable way to put this: That statement is false. The United Kingdom Supreme Court held that Asher Baking did *not* discriminate unlawfully. Nothing in the court's reasoning, holding, or even dicta suggests that baking a cake to celebrate the union of a same-sex couple is not expressive conduct, nor that it is the same action as baking a cake for an opposite-sex couple, much less that refusal to do so is unlawful, as opposed to message-based, discrimination. And the paragraphs which the City cites in support of this false statement all stand for the propositions that Ashers Baking did *not* engage in unlawful discrimination and that the service requested was expressive in nature.

The City's assertion is not only false but also ironic. Implied in the phrase "a cake for a same-sex couple that the baker would willingly bake for an opposite-sex couple" is the proposition that a cake celebrating those two different relationships is the same cake for relevant purposes. That is precisely the proposition that the plaintiffs wish not to communicate, impliedly or expressly. In arguing to this Court that coercing Brush & Nib to perform actions that presuppose the moral equivalence of same-sex coupling and marriage does not imply that equivalence, the City implies that equivalence. And it implies that message because it wants this Court to accept it as true. In other words, the City is expressing the very proposition which it insists is non-expressive.

a judgment against a Christian baker who could not in good conscience produce a cake bearing the message, "Support Gay Marriage." *Id*. at ¶ 12. She reasoned that this was not unlawful discrimination because the bakers objected "to the message, not the messenger." *Id*. at ¶ 22. She noted that "they would also have refused to supply a cake with the message requested to a hetero-sexual customer." *Id*. The reason for their decision was not the customer's "sexual orientation but the message he wanted to be iced on the cake. Anyone who wanted that message would have been treated in the same way." *Id*. at 23. That the effect on the customer was more acute because of his sexual orientation was regrettable—and the bakers took deliberate measures to spare him embarrassment, *id*. at 12—but that effect did not make their decision unlawful discrimination. *Id*. at 23.

C. Declining to Provide an Expressive Service is Not Discrimination

Separately, Lady Hale noted that the U.S. Supreme Court in *Masterpiece Cakeshop* had also affirmed the difference between actions that communicate a message and a customer's status. After summarizing all of the separate opinions in *Masterpiece Cakeshop*, Lady Hale observed,

> The important message from the *Masterpiece Cakeshop* case is that there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics.

Id. at ¶62. She concluded that refusal to produce a cake which communicates that a same-sex union is a marriage is "no discrimination on grounds of sexual orientation" where the baker would not make such a cake for anyone, regardless of how they identify. *Id*.

The lesson of recent decisions of the high courts of the United States and United Kingdom is that unintended effects do not constitute unlawful discrimination and should not be construed to be unlawful, lest Arizona courts generate unnecessary constitutional conflicts. Arizona can and should affirm that ancient teaching. Arizona's public accommodations laws, like other state and federal statutes that use the same or similar language, codify the common law rule. Phoenix City Code §18-4(b) also prohibits only intentional discrimination. It does not forbid causing undesired effects. It prohibits discriminating "because of" a prohibited reason, especially race. Also, like other such laws, it adds new categories of prohibited reasons, including sexual orientation. But it does not otherwise alter the common-law rule which it codifies, that the proprietor is prohibited from excluding only because of—for the reason of—a prohibited reason.

The Court of Appeals was therefore mistaken in its assertion that to allow Brush & Nib to communicate only messages they believe to be true would be to allow them to "refuse service to customers based on sexual orientation." *Brush & Nib Studio, LC v. City of Phoenix*, 244 Ariz. 59, 67 (Ct. App. Ariz. 2018). The Court

of Appeals equated Brush & Nib's proposal to racial discrimination and other "demeaning" conduct and accused the Appellants of invoking "religious beliefs as justification for discriminatory practices." *Id*. at 66. In gratuitously disparaging the Appellants and assuming that they intend to act unlawfully, the Court of Appeals revealed its ignorance of the law of public accommodations. When an owner acts for a lawful reason, such as a conviction about the nature of marriage, the fact that the owner's action has an undesired disparate effect does not render the action unlawful or unlawfully discriminatory.

This Court would be well advised to follow the teachings of the common law for legal and constitutional reasons. A statute must be read not to abrogate common law rights and duties absent a clear expression of legislative intent to do so. *Carrow Co. v. Lusby*, 167 Ariz. 18, 21 (1990). Declaratory statutes are to be construed broadly while statutes that might abrogate ancient and fundamental rights and duties are to be construed strictly. *Miller v. Dawson*, 1775 Ariz. 610, 613 (1993); *Potter* v. *Washington State Patrol*, 165 Wash. 2d 67, 76-77 (2008). Thus, state law should be read to declare and codify the common-law property rights of licensors and licensees rather than to abrogate them. *Phillips* v. *Pembroke Real Estate, Inc.*, 819 N.E.2d 579, 584-85 & n. 12 (Mass. 2004). Fortunately, Arizona's law does declare and codify long-standing common law rights. While the Phoenix ordinance extends the licensee's common law rights by adding a few prohibited reasons for action, it does

not fundamentally alter or transform those rights into rights not to suffer the undesirable consequences of a lawful business decision.

CONCLUSION

The lesson of *Masterpiece Cakeshop* and *Ashers Baking* is that the common-law doctrine which the U.S. Supreme Court endorsed in *Bell* and *Hurley* remains the preferred means to avoid constitutional conflict between religion and expression liberties on one hand and rights of equal protection on the other. The same lesson applies in this case and commends reversal. Brush & Nib Studio is not proposing to discriminate against people because of—for the reason of—their sexual orientation. Ms. Duka and Ms. Koski desire only to operate their business according to their convictions and to communicate only messages about sexuality and marriage that they understand to be true, regardless of the sexual orientation of their customers.

This Court can and should follow the lead of the Supreme Courts of the United States and United Kingdom and interpret Phoenix Code §18-4 as a declaration and codification of the common law rule. It should not endorse the judgment of the lower courts. The public accommodation doctrine is not intended to generate unnecessary conflict between civil rights to avoid undesirable harms. It instead has long prohibited unlawful intentional discrimination. This Court can set an example for

other state supreme courts to follow by adhering to the long-standing common-law rule.