

COMMONWEALTH OF KENTUCKY
SUPREME COURT
No. 2017-SC-000278-DG

LEXINGTON-FAYETTE URBAN
COUNTY HUMAN RIGHTS COMMISSION,

Appellant,

v.

HANDS ON ORIGINALS, INC.,

Appellee.

On Appeal From No. 2015-CA-000745

[PROPOSED] SUPPLEMENTAL 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; INTERFAITH ALLIANCE FOUNDATION; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; NATIONAL COUNCIL OF JEWISH WOMEN, INC.; PEOPLE FOR THE AMERICAN WAY FOUNDATION; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM TO UPDATE THE COURT ON *MASTERPIECE CAKESHOP, LTD. v. COLORADO CIVIL RIGHTS COMMISSION* AND *BRUSH & NIB STUDIO, LC v. CITY OF PHOENIX*

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**Pro hac vice by Court leave*

Certificate of Service

I certify that on June 22, 2018, copies of this brief were served using Federal Express overnight service on: Hon. James D. Ishmael, Jr., Judge, Fayette Circuit Court, Robert F. Stephens Circuit Courthouse, 120 N. Limestone, Lexington, KY 40507; Edward E. Dove, 201 West Short Street, Suite 300, Lexington, KY 40507, Counsel for Appellants; Bryan H. Beauman, Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Suite 1500, Lexington, KY 40507, Counsel for Appellee; and James A. Campbell and Kenneth J. Connelly, Alliance Defending Freedom, 15100 N. 90th Street, Scottsdale, AZ 85260, Counsel for Appellee.



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STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT 1

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,
__ U.S. __, 2018 WL 2465172 (June 4, 2018)..... 1, 2, 3, 4, 5

Brush & Nib Studio, LC v. City of Phoenix,
418 P.3d 426, (Ariz. Ct. App. 2018)..... 1, 3, 4, 5

COLO. REV. STAT. § 24-34-601 1

Newman v. Piggie Park Enters., Inc.,
390 U.S. 400, 402 (1968)..... 2

ARIZ. REV. STAT. § 41-1493.01..... 3

KY. REV. STAT. § 446.350..... 4

CONCLUSION 5

ARGUMENT

As explained in the accompanying motion, *amici* offer this supplemental brief to inform the Court of two recent decisions—*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, __ U.S. __, 2018 WL 2465172 (June 4, 2018), and *Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426 (Ariz. Ct. App. 2018)—and to explain the pertinence of those decisions to this case.

1. In *Masterpiece*, the U.S. Supreme Court held that the Colorado Civil Rights Commission violated the free-exercise rights of a baker who refused on religious grounds to sell a wedding cake to a same-sex couple. Although the underlying fact pattern in *Masterpiece*, like that here, is a refusal of service, the U.S. Supreme Court did not rely on any of those facts. Instead, the Court based its decision entirely on its determination that the Colorado Civil Rights Commission had acted with “religious hostility” in the adjudicatory proceeding to enforce the Colorado Anti-Discrimination Act, COLO. REV. STAT. § 24-34-601. *See* 2018 WL 2465172, at *3. Most notably, one commissioner described the bakery owner’s religious beliefs as “despicable.” *Id.* at *10. The Court viewed as further evidence of the Commission’s religious bias the fact that the Commission had treated the bakery’s religious objection to selling to same-sex couples inconsistently relative to cases concerning other bakeries’ objections to selling cakes with anti-LGBTQ themes and had offered no religiously neutral or otherwise principled explanation for doing so. *See id.* (majority opinion); *id.* at *13 (Kagan, J., joined by Breyer, J., concurring) (describing ways in which cases could have been reconciled that neither Commission nor Colorado court had offered, including that the *Masterpiece* couple had “requested a wedding cake that [the baker] would have made for an opposite-sex couple” whereas the

other cases involved requests “to make a cake . . . that [the bakers] would not have made for any customer”). And the State never disavowed the religious bias at any point in the state proceedings. *See id.* at *10, *12. Taken all together, the Court viewed that evidence of religious bias as tainting the state commission’s adjudicatory process.

Importantly, the U.S. Supreme Court also categorically reaffirmed the rights of LGBTQ people to live with equal dignity in the United States, and, accordingly, the ability of government to enforce antidiscrimination protections vigorously. *Id.* at *7. Indeed, the Court found it “unexceptional” that antidiscrimination law “can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.” *Id.* at *8. Because “gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,” the Court recognized, “the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights.” *Id.* Thus, the Court held that “it is a general rule that [religious] 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.* at *7 (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)); *see also, e.g., id.* at *13 (“these disputes must be resolved . . . without subjecting gay persons to indignities when they seek goods and services in an open market”).

The *Masterpiece* Court also stated multiple times that even if religious exemptions from antidiscrimination laws *could* lawfully be granted (a question that the Court did not expressly decide), any such exemptions would at the very least have to be extremely narrow and carefully circumscribed; otherwise, “a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting 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.” *Id.* at *7. And though the Court did not decide the free-speech question that the case presented, the Court did specifically comment that allowing businesses to post signs saying that they refuse to serve same-sex couples would “impose a serious stigma on gay persons.” *Id.* at *9.

Finally, the Court took pains to note that its decision in favor of the bakery does not determine the outcome of other, similar pending cases in which there is unbiased adjudication. *See id.* at *4, *13 (“The outcome of cases like this in other circumstances must await further elaboration in the courts”).

2. In the first decision to interpret and apply *Masterpiece*—*Brush & Nib, supra*—the Arizona Court of Appeals upheld enforcement of Phoenix’s antidiscrimination ordinance against a calligraphy business that refused on religious grounds to serve same-sex couples. 418 P.3d at 444–45. In doing so, that court rejected the business’s assertion that it had the right under the Arizona Free Exercise of Religion Act, ARIZ. REV. STAT. § 41-1493.01, to refuse service to same-sex couples. (The Arizona law employs language that is

virtually identical to the Kentucky Religious Freedom Restoration Act, KY. REV. STAT. § 446.350.)

The Arizona court held that Phoenix’s antidiscrimination law’s requirement that businesses serve same-sex couples on the same terms as other couples does not substantially burden a business’s exercise of religion—and that even if it did, the law would survive strict scrutiny under the Arizona Free Exercise of Religion Act because the state has a compelling interest in preventing discrimination. 418 P.3d at 444–45. For as the court held: “The least restrictive way to eliminate discrimination in places of public accommodation is to expressly prohibit such places from discriminating.” *Id.* at 445.

Addressing *Masterpiece* specifically, the Arizona court pointed to the U.S. Supreme Court’s identification of bias in the bakery’s adjudicatory proceeding. The Arizona court explained that, unlike *Masterpiece*, any free-exercise claim by the calligrapher in the case before it must fail because “[t]here is no evidence in the record to support any suggestion that Phoenix’s adoption of [its antidiscrimination ordinance], or its interpretation as it relates to *Brush & Nib*, has been anything other than neutral toward and respectful of their sincerely-expressed religious beliefs.” *Id.* at 443 n.13.

As for the calligraphy business’s compelled-speech claim, the *Brush & Nib* court concluded that the antidiscrimination ordinance regulates conduct, not speech, and that *Masterpiece* therefore supports the ordinance’s enforcement. *See, e.g., id.* at 438 (“allowing a vendor who provides goods and services for marriages and weddings to refuse similar services for gay persons

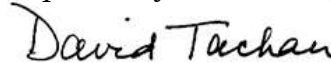
would result in ‘a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.’”) (quoting *Masterpiece*, 2018 WL 2465172, at *7). The court reached the same conclusion concerning the business’s expressive-association claim. 418 P.3d at 441.

3. Hands On’s claims should fail for the same reasons as the calligraphy business’s did in *Brush & Nib*. Our review of the record here reveals not the slightest whiff of antireligious bias, and Hands On claims none. Instead, the Kentucky Human Rights Commission properly acted neutrally in enforcing the antidiscrimination law. And *Masterpiece* and *Brush & Nib* do not alter the rule that antidiscrimination laws ought to be fully enforceable to protect against discrimination based on sexual orientation, even when a business asserts a religious basis for violating the law’s equal-treatment requirements. Hands On’s religious exercise is not substantially burdened by having to follow generally applicable public-accommodations law; and even if it were, Lexington-Fayette County would have a compelling interest in combatting discrimination based on sexual orientation through enforcement of the law (*see Brush & Nib*, 418 P.3d at 444–45).

CONCLUSION

The Order of the Kentucky Human Rights Commission should be affirmed.

Respectfully submitted,



David Tachau
Counsel for Amici Curiae