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

BRIEF OF *AMICI CURIAE* TYNDALE HOUSE PUBLISHERS, INC., CROSSROADS PRODUCTIONS, INC. D/B/A CATHOLIC CREATIVES AND CHRISTIAN PROFESSIONAL PHOTOGRAPHERS *FILED WITH CONSENT OF THE PARTIES

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STATEMENT OF INTEREST OF AMICI

Tyndale House Publishers was founded in 1962 by Dr. Kenneth N. Taylor as a means of publishing *The Living Bible*. Tyndale publishes Christian fiction, nonfiction, children's books, and other resources, including Bibles in the New Living Translation (NLT). Tyndale products include many *New York Times* best sellers, including the popular *Left Behind* fiction series by Tim LaHaye and Jerry B. Jenkins, novels by Francine Rivers, Karen Kingsbury and Joel C. Rosenberg, plus numerous nonfiction works. Tyndale House Publishers is substantially owned by Tyndale House Foundation. As a result, the company's profits help underwrite the foundation's mission, which is to spread the Good News of Christ around the world. Tyndale House's purpose is to minister to the spiritual needs of people, primarily through literature consistent with biblical principles.

Tyndale House is located in Carol Stream, Illinois. Its publications are sold in every state of the union, including 15 commercial bookstores in Arizona. In addition, Tyndale House has sold direct to nearly 300 individual consumers and 52 churches in Arizona over the past two years. In the past year Tyndale House sold more than 10 million copies of its Christian books and Bibles through independent bookstores, chain bookstores (e.g., Barnes & Noble and Lifeway Christian Stores), and mass retailers (e.g., Amazon, Wal-Mart, and Target).

Catholic Creatives is an arm of Crossroads Productions Inc. dedicated to forwarding the Gospel of Jesus Christ through media and creativity. It currently has a DBA for Catholic Creatives. The mission of Catholic Creatives is: "Setting Creatives free so that they can unleash a new renaissance of beauty into the world." Catholic Creatives is an international community of about 3,000 makers, creatives, designers, artists, and entrepreneurs who advocate for creative freedom and free speech because creativity comes from the heart and cannot be coerced or silenced without real consequences to the creativity of our culture.

Christian Professional Photographers is an association of like-minded photographers who believe their faith guides them in how they practice the art of photography. Founded almost thirty years ago, the association has had members in every state, as well as members from several countries around the world. As an association of Christian photographers, the groups has a unique understanding of how photography creates and tells stories and expresses powerful messages to clients and the world alike. The association represents members with a wide range of photography experience, including weddings, portraits, newborns, and landscapes, to name a few subjects.

Christian Professional Photographers has an interest in protecting the First Amendment rights of photographers to be free from compelled speech and to freely exercise religion without undue government interference. The group's members are diverse and some may not hold a religious objection to photographing a same-sex

wedding or celebration. Those that do object do so on the basis of sincerely held religious beliefs. The association is united, however, in its commitment that each photographer should have the right to pursue his or her artistic profession in a manner consistent with his or her sincere religious convictions on this developing and, often, emotionally-charged issue.

ARGUMENT

The City of Phoenix has passed a local ordinance which seeks to force the speech of its citizens about certain topics. The City's justifications to compel the speech of its citizens relate to an issue of crucial importance to everyone – that of individual freedom from government coercion to do or say things that violate the individual's conscience. More specifically, as a practical matter, the decision below, when taken to its logical conclusion, threatens the most basic right of a publisher or other business involved in creating and disseminating various forms of speech – that of editorial discretion. For these reasons, and as explained in detail below, these amici file this brief in support of Appellants.[1]

"The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster … an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). In the instant case a governmental entity seizes the authority to penalize and punish (actually, to imprison)

[1] All parties have consented to the filing of this brief.

a private business owner for refusing to print a message that violates her conscience. This law is not a matter of unlawful discrimination on the part of a business but of unlawful coercion on the part of the government.

Forcing a person to speak, especially in a way that violates his or her conscience, is a *per se* violation of the First Amendment.[2] It seems that the unconstitutional application of this Ordinance has heretofore been lost on the City of Phoenix. But it should not be any longer, as the Supreme Court of the United States plainly held earlier this year – *twice*. "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Janus v. American Federation of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448, 2463, 201 L. Ed. 2d 924 (2018) (holding Illinois law violated the Freedom of Speech Clause where it required governmental employees to pay union fees). The City of Phoenix "must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief." *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S.Ct. 2361 (2018) (holding California statute violated

[2] *See Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) ("It is … a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'") (*quoting Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006)); *see also W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (finding local authorities' compelling students to salute to and pledge to the flag "transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control").

the Freedom of Speech Clause where it mandated certain speech by pro-life pregnancy centers). Like the California statute, this City Ordinance "imperils those liberties [of freedom of thought and belief]." *Id.*, at 2379 (Kennedy, J., concurring).

And it makes no difference whether the Ordinance's implication on speech derives from restraint, compulsion, or subsidy, since the First Amendment says the government may neither prohibit particular speech nor force particular speech. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714 (forbidding state government from requiring citizens to display the state motto on license plates). Fighting for and preserving this right has a long history in Western, and especially American, legal tradition. Arizona's history is no different. This Court has repeatedly held that "the words of Arizona's free speech provision 'are too plain for equivocation. The right of every person to freely speak, write and publish may not be limited.'" *State v. Stummer*, 219 Ariz. 137, 194 P.3d 1043, 1048 (2008) (quoting *Mountain States Tel. and Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354-55, 773 P.2d 455, 459-460 (1989); *Phoenix Newspapers, Inc. v. Superior Court (Thurman)*, 101 Ariz. 257, 259, 418 P.2d 594, 596 (1966)).

Interpreting a local fairness ordinance in a manner that contradicts these basic principles that are woven into the fabric of our legal history is repugnant to the very concept of free speech. Such an outcome would have far-reaching, devastating effects on all businesses involved in creating, promoting, or disseminating any message. The

right to be free from compelled speech safeguards the "individual freedom of mind," *Wooley*, 430 U.S. at 714, and is required by "the premise of individual dignity and choice" that underlies the First Amendment. *Leathers v. Medlock*, 499 U.S. 439, 449 (1991) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). To do otherwise harms the speaker because "individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning…" *Janus*, 138 S.Ct. at 2464.

I. The right to exercise editorial discretion in determining the content of one's speech has a long and important history in the Anglo-American legal tradition.

American jurisprudence has long protected citizens from government coercion concerning the content of their speech. "The government may not . . . compel the endorsement of ideas that it approves." *Knox* v. *Service Employees*, 567 U.S. 298, 309 (2012). Instead, the First Amendment's protection of speech reflects the fundamental American principle that "each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Development,* 133 S. Ct. at 2327 (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994)). There is no distinction as to whether the speech infringement involves a restriction or a compulsion. *Agency for Int'l Development*, 133 S. Ct. at 2327. In fact, as the Supreme Court held a few short months ago, "a law commanding 'involuntary affirmation' of objected to beliefs would require even more immediate and urgent

grounds than a law demanding silence." *Janus*, 138 S.Ct. 2464 (quoting *Barnette*, 319 U.S. at 633).

The right to be free from compelled speech has been recognized as including the right to exercise editorial discretion in fields that create and produce messages such as publishing, broadcasting, and cable programming.[3] *See Ark. Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 673-74 (1998) (explaining why entities that exercise editorial discretion in selecting and communicating certain messages engage in speech activity protected by the First Amendment); *see also Turner Broad. Sys.*, 512 U.S. at 636 ("There can be no disagreement" that when cable programmers and cable operators "exercise[] editorial discretion" over what content to include, they "engage in and transmit speech" and "are entitled to the protection of the speech and press provisions of the First Amendment.")

The freedom of publishers and others engaged in similar activities to determine what speech to convey has not always been protected by governments. Rather, these freedoms have been fought for, won, and preserved over time and at great cost. The history of that struggle can be traced through English history and colonial America. American jurisprudence traditionally has had great respect for that history. Indeed, the framers of the Arizona Constitution recognized these rights were so fundamental to a

[3] Or even in re-producing speech – the Constitution makes no distinction. *See* Section II below.

free society that they enshrined in the Arizona Constitution greater protection for speech than what is even afforded under the federal constitution.[4]

Within that long history, and of particular significance to amici, is the legacy of William Tyndale. Tyndale House Publishers is named in honor of William Tyndale, a name forgotten by many but nevertheless a figure important in any case implicating the freedom of speech for any publisher or printer. In the centuries following the invention of the movable-type printing press, governments had to grapple with the unprecedented ability of private citizens to disseminate literature, opinions, and political views in vastly greater volume and at a far greater speed than ever before in history – an ability which those in power often perceived as a threat to their authority and control. William Tyndale was one of several early publishers whose publications the government viewed as threatening to the status quo, and he paid the ultimate price for his choice of publication.

Tyndale lived in England from about 1494 to 1536 under the reign of Henry VIII and was a contemporary of Martin Luther and Sir Thomas More. Although highly controversial at the time because of his religious views, Tyndale was the first to translate

[4] *See, e.g., Coleman v. City of Mesa*, 230 Ariz. 352, 361, 284 P.3d 863, 872 n.5 (2012) (noting that Article 2, Section 6 is "more protective of free speech rights than the First Amendment"); *State v. Stummer*, 219 Ariz. at 143, 194 P.3d at 1049 ¶17 (affirming that Article 2, Section 6 has "greater scope than the first amendment"); *Mountain States Tel. & Tel. Co.*, 160 Ariz. at 358, 773 P.2d at 463 (noting the Arizona Constitution provides "more stringent protections" to free speech than the Federal Constitution).

the New Testament (as well as portions of the Old Testament) into English, and he used the relatively new printing press to publish it, along with many other works.[5] Tyndale's publication of the Bible into English, as well as his published criticisms of the King's actions, infuriated Henry VIII along with other political and church leaders, and resulted in his exile from England. Because of the content of his publications, Tyndale was declared a heretic, was eventually captured in Antwerp, and on October 5, 1536, he was strangled and burned at the stake.

Tyndale's legacy cannot be understated. His writings, translations, and publications had a profound effect on the development and standardization of the English language.[6] While Tyndale may be less known than Shakespeare, in our modern English language we arguably use more of Tyndale's original words than Shakespeare's.[7]

Nearly two centuries later, even in Colonial America, freedom of speech for printers and publishers was still not entirely secure. One of the more notable early cases

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[5] Although John Wycliffe (ca. 1320-1384) is credited with completing the first English translation of the Bible, his translation was in "Middle English," which was significantly different from the "modern" English that Tyndale used, and Wycliffe did his work many decades before the invention of the movable-type printing press.

[6] The *Oxford English Dictionary* credits Tyndale with the first usage in English (as we know it) of multiple words including: network, atonement, Godspeed, Jehovah, Passover, intend, complainer, sorcerer, viper, castaway, fisherman, inexcusable, childishness, ourselves, scapegoat, uproar, wave, and many more. David Teems, *Tyndale: The Man Who Gave God An English Voice* 268-69 (2012); *see also Oxford English Dictionary* 2018. http://www.oed.com/.

[7] Teems, at xix.

in American legal history concerning censorship of printers was the famous libel trial of a publisher named John Peter Zenger. In 1733, Zenger created the *New York Weekly Journal*, the first opposition newspaper in the Colonies. His publication attacked New York's British Governor, William Cosby. Zenger's publication used sarcasm, innuendo, and allegory to ridicule the royal governor, and it was also the first American publication to include essays by leading English libertarian philosophers as well as the popular *Cato's Letters* which played a key role in the American Revolution.[8] Because of his criticisms of the governor, Zenger was charged with seditious libel.

At trial, Zenger argued for acquittal, not by denying that he had published the materials at issue, but rather arguing that the content of what he published was true. Upon his subsequent acquittal by the jury, Zenger was the last colonial printer to be prosecuted by royal authorities.[9] Zenger's case established in the Colonies that printers would be free to criticize the government, and this became one of many factors helping shape the political culture that led to the Revolutionary War and the adoption of the First Amendment.[10]

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[8] "Zenger Trial," *The Oxford Companion to United States History* (Paul S. Boyer ed., Oxford University Press 2001).

[9] *Id.* at 858.

[10] *Id.* at 858-59.

II. Free Speech protections for a speaker's editorial discretion remain intact even when the speaker conveys speech on behalf of a third party.

Of primary importance for a publisher or printer is that speakers do not lose constitutional free speech protection because they convey speech on behalf of someone else. And it matters not whether they print or publish pamphlets, papers, photos, or promotional materials. Or tattoos, as the leading Arizona case recognizes. Or Bibles, as concerns amici. Or even wedding invitations. The protection guaranteed by the First Amendment "does not end at the spoken or written word … but extends to various forms of artistic expression." *Buehrle v. City of Key W.*, 813 F.3d 973, 976 (11th Cir. 2015) (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). Such protection is not a "mantle, worn by one party to the exclusion of another and passed between them depending on … each party's degree of creative or expressive input." *Id.* at 977. Because the government cannot force citizens to speak "another speaker's message," both creators and editors of speech retain just as much interest in their speech as those who request or receive it. *Rumsfeld*, 547 U.S. 47 at 63 (collecting cases); *see also Simon & Schuster, Inc. v. N.Y. Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (acknowledging that both author and publisher have First Amendments rights).

A. Both creators and editors of speech use editorial judgment and therefore deserve First Amendment protection.

Brush and Nib Studio's printing of promotional materials is like the work of other speech editors (e.g. newspapers, magazines, printers, search engines, etc.) who use

their editorial judgment to publish speech created by others. Numerous cases illustrate the sweeping protections provided to all speakers along the chain of communication (a chain that squarely encompasses Joanna Duka and Breanna Koski, the artists in this case).

This Court has previously addressed the issue concerning the application of Free Speech protection to a business owner who reproduced the speech of others – and rejected the idea that the distinction was of any importance. In *Coleman v. City of Mesa*, 230 Ariz 352, 284 P.2d 863 (2012), this Court permitted the challenge to a municipal ordinance's regulation of tattoos parlors because the local law attempted to regulate the speech of the tattoo artist. There, this Court recognized that speech protection encompassing tattoo artists "is also not affected by the fact that tattoo artists may use standard designs or patterns…First Amendment protection [does not] require a speaker to generate, as an original matter, each item featured in the communication." *Id.*, 230 Ariz. at 360, 284 P.3d at 871 (quoting *Hurley* 515 U.S. at 570). The same principle applies equally to Brush and Nib. The fact that Joanna or Breanna "may use a standard design or message, such as iconic images… does not make the resulting [product] any less expressive." *Coleman*, *id.*[11]

[11] As this Court recognized in *Coleman*, standard images "of the Virgin de Guadalupe or the words 'Don't tread on me' beside a coiled rattlesnake, does not make the resulting tattoo any less expressive." *Id.*

As for finding tattoo artists protected under constitutional speech provisions, this Court has sound company. *See, e.g. Anderson v. City of Hermosa Beach,* 621 F.3d 1051, 1061 (9th Cir. 2010) (holding that tattooing was protected speech and reasoning that "[t]he principal difference between a tattoo and, for example, a pen-and-ink drawing, is that a tattoo is engrafted onto a person's skin rather than drawn on paper.... [A] form of speech does not lose First Amendment protection based on the kind of surface it is applied to"); *Buehrle*, 813 F.3d at 977. ("Protected artistic expression frequently encompasses a sequence of acts by different parties, often in relation to the same piece of work. The First Amendment protects the artist who paints a piece just as surely as it protects the gallery owner who displays it, the buyer who purchases it, and the people who view it.") (citation omitted).

Perhaps newspapers are the most popular example of speech protection for reproduction of the original speech of others. The seminal United States Supreme Court case *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) struck down a Florida statute requiring newspapers to print counter-opinion pieces if the paper had previously published articles critical of an elected official. In doing so, the Court rejected any argument that the newspaper was not protected by the First Amendment simply because it printed the speech of others. *Id.* at 258 ("A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether

fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.").[12] Any compulsion "to publish that which 'reason' tells them should not be published" is unconstitutional. *Id.* at 256.

Multiple rulings from the Ninth Circuit apply the same principle. *See, e.g., McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 959 (9th Cir. 2010) ("It is clear that the First Amendment erects a barrier against government interference with a newspaper's exercise of editorial control over its content."); *Assocs. & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 136 (9th Cir. 1971) ("We can find nothing in the United States Constitution, any federal statute, or any controlling precedent that allows us to

[12] *See also Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (Newspapers do not lose First Amendment rights just because they are "paid for printing" an advertisement.); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266-71 (1964) (overturning a jury verdict for alleged slander because the newspaper did not forfeit its editorial rights under the First Amendment by publishing statements in the form of a paid advertisement, *id.* at 266, and because of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open…." i*d.* at 270; and emphasizing that "[t]he constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered," *id.* at 271) (internal citations and quotation marks omitted); *Assoc. Press v. NLRB*, 301 U.S. 103 (1937) (recognizing that neutral laws must yield to the First Amendment if they interfere with the newspaper's editorial control over the content of its paper); *Passaic Daily News v. NLRB*, 237 F.2d 1543 (D.C. Cir. 1984) (holding that although the NLRB could require newspaper to re-hire the editor it had fired for his union activities, it could not force the paper to resume publication of the editor's weekly column because such compulsion would interfere with the editorial judgment protected by the First Amendment).

compel a private newspaper to publish advertisements without editorial control of their content….").[13]

But the First Amendment's protection applies well beyond newspapers. Television stations have similar security in declining to produce others' speech.[14] Certainly, photographers – not just the subjects of the photos or those who hire them – find similar protection under the First Amendment,[15] as do internet search engine

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[13] Other federal circuit courts follow suit. *See, e.g., Homefinders of America, Inc. v. Providence Journal Co.*, 621 F.2d 441, 444 (1st Cir. 1980) (The First Amendment prohibits the government from ordering a newspaper "to publish advertising against its will."); *Kania v. Fordham*, 702 F.2d 475, 477 n.5 (4th Cir. 1983) ("The University could not compel *The Daily Tar Heel* to provide equal access to those disagreeing with its editorial positions without running afoul of the constitutional guarantee of freedom of the press.") (citations omitted); *Groswirt v Columbus Dispatch*, 238 F.3d 421, 2000 U.S. App. LEXIS 33466, *5 (6th Cir. 2000) (Table) ("A private publication has a First Amendment free press right to refuse to print material submitted to it for publication."); *Chicago Joint Bd., Amalgamated Clothing Workers of Am., AFL-CIO v. Chicago Tribune Co.*, 435 F.2d 470, 478 (7th Cir. 1970) (finding that a newspaper may not be required to open its "printing press and distribution systems without [its] consent" to accommodate someone else's speech that it opposes); *Novotny v. Tripp County, S.D.*, 664 F.3d 1173, 1177 (8th Cir. 2011) ("[A]n individual does not possess a constitutional right to require that a privately owned newspaper publish his letter to the editor. Indeed, a contrary rule would infringe upon the right of the newspaper itself to decide what content it includes on its own editorial page.").

[14] *See, e.g., Columbia Broad. Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (upholding the broadcaster's editorial judgment by striking down restrictions on broadcaster's rights to refuse political advertisements).

[15] *See, e.g.*, *Baker v. Peddlers Task Force*, 1996 U.S. Dist. LEXIS 19140, *3 (S.D.N.Y. Dec. 30, 1996) ("The City cites no authority for the proposition that commissioned works are excluded from the protection of the First Amendment, and common sense and even a casual acquaintance with the history of the visual arts strongly suggest that a commissioned work is expression.").

websites,[16] and even Facebook.[17] Likewise, painters, not merely their models or those who commission their work, enjoy the full breadth and scope of First Amendment protection.[18] How, then, can a calligrapher and design artist be treated differently? They certainly should not be. *See Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 740 (1996) ("The history of this Court's First Amendment jurisprudence, however, is one of continual development, as the Constitution's general command that 'Congress shall make no law ... abridging the freedom of speech, or of the press,' has been applied to new circumstances requiring different adaptations of prior principles and precedents."). Of utmost concern to amici, should the governmental compulsion of speech prevail in this case, is that if Brush and Nib Studio can be compelled to print messages with which it disagrees, why not also a company that publishes books? Why not also photographers with regard to their artistic craft?

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[16] *See, e.g.*, *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014) (affirming that search engines exercise protected editorial control over the information in their search list); *Langdon v. Google*, Inc., 474 F. Supp. 2d 622 (D. Del. 2007) (same); *e-ventures Worldwide, LLC v. Google Inc.*, 2017 U.S. Dist. LEXIS 88650 (M.D. Florida Feb. 8, 2017) (same).

[17] *See, e.g.*, *La'Tiejira v. Facebook, Inc.*, 2017 U.S. Dist. LEXIS 125246 (Aug. 7, 2017) (recognizing that the First Amendment protects Facebook's editorial control over what it chooses to censor from users of its platform).

[18] *See, e.g., ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 925 (6th Cir. 2003) (holding that distributing limited edition prints of original painting was protected speech because "[p]ublishers disseminating the work of others who create expressive materials also come wholly within the protective shield of the First Amendment.").

B. First Amendment protections are no different in the face of an alleged violation of an anti-discrimination law.

The fact that this case involves a First Amendment challenge to a non-discrimination law changes nothing. Time and again courts have recognized the supremacy of the First Amendment to different non-discrimination statutes including the 1866 Civil Rights Act,[19] the Americans with Disabilities Act,[20] Title

[19] *See, e.g.*, *Groswirt*, 238 F.3d at 421 (affirming dismissal of a suit against a newspaper for refusing to publish letters because of the author's race, since a private publication has a First Amendment right to refuse to print material submitted to it for publication); *Johari*, 76 F. 3d at 379 (affirming dismissal of a suit for racial discrimination and upholding newspapers' right to exercise editorial judgment over what it publishes, even when it solicits letters from its readers); *Claybrooks v Am. Broad. Co.*, 898 F. Supp. 2d 986, 1000 (M.D. Tenn. 2012) (dismissing a suit for racial discrimination under 42 U.S.C. § 1981 brought by African-American men who auditioned for, but were rejected by, ABC's television show *The Bachelor* because "the First Amendment protects the producers' right unilaterally to control their own creative content" and base their casting decisions "on whatever considerations the producers wish to take into account.").

[20] *See, e.g*, *Treanor v. Washington Post Co.*, 826 F. Supp. 568, 569 (D.D.C. 1993) (dismissing a suit for alleged discrimination brought by a disabled individual against a newspaper for refusing to publish the person's book review and finding that "requiring newspaper editors to publish certain articles or reviews would likely be inconsistent with the First Amendment").

VII/harassment,[21] age-discrimination complaints,[22] and public-accommodation laws.[23] Accordingly, the primacy of the First Amendment must prevail in cases such as this one —where the government uses a public-accommodation law to force a calligrapher and

[21] *See, e.g.*, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (court enjoined a school harassment policy that regulated speech, recognizing that "[w]hen laws against harassment attempt to regulate oral or written expression on such topics, however detestable the view expressed may be, we cannot turn a blind eye to the First Amendment implications."); *DeAngelis v. El Paso Mun. Police Officers Ass'n,* 51 F.3d 591, 596-97 (5th Cir. 1995) (court overturned jury verdict against police association based on a sexist column by an anonymous columnist in its newsletter, recognizing that "[w]here pure expression is involved, Title VII steers into the territory of the First Amendment.").

[22] *See, e.g.*, *Ingels v. Westwood One Broad. Serv., Inc.*, 129 Cal. App. 4th 1050, 1974 (2005) (affirming dismissal of an age-discrimination suit, and upholding First Amendment rights of a radio show to choose the content of its programming, stating "[h]ere, the broadcaster's choice of which callers to allow on the air is part of the content of speech") (citing *Riley v. Nat. Red. of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988)).

[23] *See, e.g.*, *Dale v. Boy Scouts of Am.*, 530 U.S. 640 (2000) (upholding the Boy Scouts' free association rights in face of challenge that they had violated public accommodation law by removing a gay scout leader); *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (upholding parade organizers' First Amendment right to exclude LGBT advocacy group from marching under a banner in a St. Patrick's Day parade); *S. Bos. Allied War Veterans Council v. City of Boston*, 297 F. Supp. 2d 388, 392-93 (D. Mass 2003) (relying on *Hurley*, 515 U.S. at 579, for the proposition that private speakers have the right "not [to] have the message of an opposing group forced on them by the state," and thereby finding that state officials violated the First Amendment rights of parade organizers by forcing them under the public accommodations law to allow an anti-war group to march at the end of their parade); *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56, 59 (N.D. Ohio 1995) (holding that when Cleveland used a state public-accommodations law to prevent Nation of Islam ministers from delivering "separate speeches to men and women" at a conference and forcing the ministers to speak to a mixed gender audience, such requirements would necessarily change "the content and character of the speech" which would be a violation of the First Amendment).

designer to create content to which they object. Such a compulsion destroys editorial and artistic judgment and contradicts well-settled case law. The courts have long protected the editorial and artistic judgment of those who print, publish, or transmit others' speech.

CONCLUSION

The American legal tradition fiercely protects the autonomy of the speaker in exercising his or her editorial judgment. Interpreting public-accommodation ordinances in a manner that permits local governments to coerce particular expressions is not only unconstitutional, but also will have far-reaching effects on any publisher, printer, or other business that historically has exercised editorial discretion in the message it produces or promotes.

Just as with the government action concerning William Tyndale or John Peter Zenger, laws that have the effect of either "stifl[ing] speech on account of its message, or *that require[ ] the utterance of a particular message* … pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion." *NIFLA*, 138 S.Ct. at 2374 (quoting *Turner*, 512 U.S. at 641) (emphasis added). It is no mere coincidence then that the government regulation here seeks not only to compel Joanna and Breanna's speech but to fine or even *imprison them* for declining to "betray[] their convictions." *Janus*, 138 S.Ct. at 2464. That very risk—"that the Government

may effectively drive certain ideas or viewpoints from the marketplace"—is one of the reasons that freedom of speech must be guarded and protected. *Turner*, (quoting *Simon & Shuster, Inc.*, 502 U.S. at 116).

Respectfully submitted,

/s/ Bert E. Moll

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