



AZ Supreme Court: Freedom of speech trumps anti-discrimination law

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WASHINGTON – The Arizona Supreme Court Monday sided with two Phoenix women who said a city law aimed at preventing discrimination would have forced them to violate their Christian faith by creating custom invitations for same-sex weddings.

A narrow majority of the court said that the religious convictions of Brush & Nib owners Joanna Duka and Breanna Koski “may seem old-fashioned, or even offensive to some,” but they are still covered by the Arizona Constitution’s protection of free speech.

“The guarantees of free speech and freedom of religion are not only for those who are deemed sufficiently enlightened, advanced, or progressive. They are for everyone,” Justice Andrew Gould wrote for the majority in the 4-3 decision.

Gould said the case was only about freedom of speech and religion, and that it was “mischaracterization” to say it dealt with “discriminatory conduct based on a customer’s sexual orientation.”

But in a dissenting opinion, Justice Scott Bales said discrimination by a business is exactly what the case was about, “even if that disapproval is based on sincerely held religious beliefs.”

“This case does not concern the content of the made-to-order wedding products, but instead the identity of the customer and end user. Such a refusal constitutes discrimination based on sexual orientation,” Bales wrote.

“Arizona’s free speech clause does not entitle Brush & Nib or its owners to refuse to provide goods and services for same-sex couples that it otherwise provides to opposite-sex couples,” he wrote.

Duka and Koski own a custom stationery company that creates hand-drawn and lettered documents that they consider expressions of art. The two were never approached by a same-sex couple asking for custom wedding invitations, according to court documents, but they filed a pre-emptive suit against the city in 2016, claiming that Phoenix’s Human Relations Ordinance would have forced them to create the invitations against their will if someone did ask.

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The 1964 ordinance prohibits discrimination based on race, religion, ethnicity, gender among other protected classifications. It was amended in 2013 to prohibit discrimination based on gender identity and sexual orientation.

Under the law, the city's Equal Opportunity Department handles complaints of discriminatory behavior and can refer to them to the city attorney, which can file a criminal complaint. If the person is found guilty, they can be fined up to \$2,500, a fine that would be repeated for every day the discrimination continued.

After losing in lower courts, Koski and Duka welcomed Monday's ruling during a press conference at the offices of the Alliance Defending Freedom, the Scottsdale-based legal advocacy organization that represented them.

"We cannot separate our faith from our art. They are deeply interwoven," Koski said. "What we create stems from who we are and who we are stems from who God is and what he has done for us."

ADF senior counsel Jonathan Scruggs called the ruling "a win for all citizens of Arizona."

"Joanna and Breanna work with all people; they just don't promote all messages," Scruggs said in a statement shortly after the decision was handed down. "They, like all creative professionals, should be free to create art consistent with their convictions without the threat of government punishment."

But backlash to the ruling was swift, with critics like Rep. Greg Stanton, D-Phoenix, calling it a "shameful day for Arizona."

"Today's decision will hurt real people," said a statement from Stanton, the former mayor of Phoenix. "And after so many have worked so hard to show that Arizona is a welcoming place for everyone, this decision will harm our economy by sending the unfortunate message that discrimination on the grounds of sexual orientation is still acceptable by some state leaders."

The Human Rights Campaign agreed, saying the ruling would "open the door" to discrimination in the guise of religious freedom.

"Not only does this decision affect countless LGBTQ Arizonans, it sends a message about inclusivity to businesses and institutions seeking to invest in states that welcome all people," said a statement from HRC Deputy Campaign Director Justin Unga. "Today's decision could also open the door for discrimination against other communities protected by the ordinance including religious minorities and women."

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The law's supporters noted that the court's ruling was narrowly drawn to deal only with the question of wedding invitations.

Phoenix Mayor Kate Gallego argued that freedom of religion does not give anyone free rein to discriminate, and said that Phoenix will remain on what she called the right side of history, despite this setback.

“Our city has answered the question on whether we will accept discrimination at any level of our community – and the answer is a resounding no,” she said in a tweet. “That does not change with today’s ruling, our fight is not over.”

The was echoed by Julie Watters, Phoenix’s director of communications, who said that while the city does not agree with the ruling, it maintains that the ordinance is still valid, pointing to the “very narrow” decision that focused on just one service from one local business.

Walter Olson, senior fellow at the Cato Institute, said it is rare for a city or state to lose a case like this because of the “big, compelling state interest” in preventing discrimination, which can outweigh other rights. But he said he believes the court made the right call in this case.

“If it’s speech, you can’t force it,” Olson said.