ARIZONA SUPREME COURT

BRUSH & NIB STUDIO, LC, et al., Plaintiffs/Appellants/ Cross-Appellees, v. CITY OF PHOENIX, Defendant/Appellee/ Cross-Appellant.	Supreme Court No. _____ Court of Appeals No. 1 CA-CV 16-0602 Maricopa County Superior Court No. CV2016-052251

PLAINTIFFS/APPELLANTS/CROSS-APPELLEES' PETITION FOR REVIEW

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INTRODUCTION

This case "may be the first of its kind in Arizona." *Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426, 434 ¶ 10 (Ariz. Ct. App. 2018). It addresses whether public accommodation laws can force speakers to convey messages contrary to their faith.

Courts across the country have recognized this question's significance. The highest courts of Kentucky, Washington, New Mexico, and Utah chose to hear cases raising similar questions.[1] The U.S. Supreme Court did as well in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*. 138 S. Ct. 1719 (2018). The public and bar also consider this issue significant. *Amici curiae* filed seven briefs at the Court of Appeals (COA) below and nearly 100 briefs in *Masterpiece*. Even the *Masterpiece* decision charged other courts to "further elaborat[e]" on the important issues at stake.[2] *Id.* at 1723-24, 1732. And now this Court can do so while correcting the COA's misinterpretation of the Arizona

[1] *Lexington Fayette Urban Cty. Human Rights Comm'n v. Hands On Originals, Inc.*, 2017 WL 2211381 (Ky. Ct. App. May 12, 2017), *review granted* (awaiting oral argument); *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), *vacated and remanded*, ___ S. Ct. ___, 2018 WL 3096308 (June 25, 2018); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); *World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253 (Utah 1994).

[2] The COA denied the parties' joint motion to submit supplemental briefing regarding *Masterpiece*. COA Docket #85.

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

In this case, the COA held that Phoenix's public accommodation law can force two Christian artists to create custom wedding artwork celebrating same-sex marriage and can forbid them to post a religiously motivated statement explaining what they can and cannot create. According to the COA, compelling artists to write words and paint paintings does not regulate speech, and compelling those who believe in traditional marriage to create art celebrating same-sex marriage does not substantially burden their religious beliefs.

This rationale redefines speech, reformulates FERA's "substantial burden" test, and reduces free-speech and free-exercise protections for all Arizonans. In many respects, the COA's analysis parallels the (now-reversed) lower court's decision in *Masterpiece*, meaning it "flouts bedrock principles of our free-speech jurisprudence and would justify virtually any law that compels individuals to speak." *Masterpiece*, 138 S. Ct. at 1740 (Thomas, J., concurring). This Court should correct these flawed pronouncements and restore the freedoms protected by Arizona's Constitution and FERA.

ISSUES PRESENTED FOR REVIEW

I. Does Phoenix violate the Arizona Constitution's Free Speech Clause when it forces commissioned artists to create custom artwork—consisting of words and paintings—conveying messages they object to and when it bans commissioned artists from publishing a statement explaining the artwork they can and cannot create?

II. Does Phoenix violate Arizona's Free Exercise of Religion Act when it uses criminal penalties—including jail time—to force commissioned artists to create custom artwork expressing messages that violate their sincerely held religious beliefs and when it bans religiously motivated speech?

STATEMENT OF FACTS

Joanna Duka and Breanna Koski are Christian artists. ROA-111[3] at 3:23-4:5, 15:18-25. They own and operate Brush & Nib Studio, LC, a Phoenix art studio where they create custom artwork—through painting, calligraphy, and hand-lettering—for weddings and other occasions. *Id.* at 3:1-6, 3:19-22, 4:6-15.

[3] The number following "ROA-" refers to the document number on the Superior Court's Electronic Index of Record. The accompanying appendix contains these cited materials.

Joanna and Breanna[4] gladly serve everyone. They "will happily sell their pre-made works to anyone...for any event." *Id.* at 22:1-4. And when deciding whether to create artwork, they evaluate the *message* they will promote and celebrate through that artwork; they "do not consider customers' sexual orientations." ROA-68 at 26:19-25, 60:19-61:4; ROA-30 ¶¶ 76-77. They focus on the message because their Christian beliefs forbid them from creating "custom artwork that conveys messages condoning, supporting, or participating in activities or ideas that violate their religious beliefs." ROA-30 ¶¶ 57-60, 64-66, 78, 89. For example, they cannot create artwork expressing messages that "contradict biblical truth, demean others, endorse racism, [or] incite violence." ROA-102 at App. 261-262; ROA-68 at 55:19-56:3.

The majority of Joanna and Breanna's custom artwork is wedding related, such as wedding vows, signs, and invitations. ROA-68 at 74:19-75:3; ROA-111 at 7:25-8:4, 15:6-11; ROA-76 Exs. 9, 11, 12; ROA-1 Ex. 8. It is undisputed that *all* of their custom wedding invitations "include language that is celebratory of the wedding" and that they have previously created a wedding sign with a Bible verse about God joining together two people as "one flesh" in marriage. ROA-111 at 8:24-9:4, 22:23-27.

[4] This petition refers to Brush & Nib Studio, LC, Joanna Duka, and Breanna Koski collectively as "Joanna and Breanna."

Phoenix requires Joanna and Breanna to create *all* of these forms of custom artwork for same-sex weddings. *Id.* at 27:1-8, 28:1-19. But Joanna and Breanna believe "that God ordained marriage to be between one man and one woman," and they "cannot create custom artwork" for weddings celebrating any other union because doing so conveys messages celebrating those unions in violation of their beliefs. ROA-30 ¶¶ 22, 67-69.

Joanna and Breanna's religious beliefs also motivate them to post a statement on their studio's website explaining how their religious beliefs prevent them from creating certain artwork, including artwork celebrating same-sex marriage. *Id.* ¶¶ 71-75, 143-144, 146, 148-150; ROA-31. But Phoenix forbids this. ROA-111 at 27:9-15, 28:1-19.

If Joanna and Breanna politely decline to create custom artwork celebrating same-sex weddings or publish their desired statement, Phoenix will prosecute them under 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. *Id.* at 28:5-23, 29:15-20. But the COA upheld this application as consistent with Arizona's free-speech and free-exercise protections.

REASONS TO GRANT THIS PETITION

This Court should grant this petition to clarify whether public accommodation laws trump free-speech and free-exercise rights, to correct the COA's narrow understanding of these important freedoms, and to align Arizona's jurisprudence with recent U.S. Supreme Court decisions.

I. The COA incorrectly decided the important question of whether public accommodation laws can compel speakers to write text and create art contrary to their beliefs.

A. The COA incorrectly held that laws with the "main purpose" of eliminating discrimination never regulate pure speech.

The COA held that Phoenix's public accommodation law "regulates conduct, not speech"—even when applied to words and paintings—because its "main purpose" is prohibiting discrimination. 418 P.3d at 437 ¶ 24. But laws that facially regulate conduct can still regulate pure speech and trigger strict scrutiny in particular applications. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (considering law "directed at conduct" as one regulating speech because "as applied to plaintiffs the conduct triggering coverage...consists of communicating a message"). To say otherwise contradicts longstanding precedent and undermines free-speech protections.

Indeed, the U.S. Supreme Court has already found that public accommodation laws directed at discrimination sometimes compel speech as applied. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, a

public accommodation law forced parade organizers to accept a pro-LGBT group into their expressive medium—a parade. 515 U.S. 557, 571-73 (1995). Even though that law did "not, on its face, target speech," but instead focused on stopping discrimination (just like Phoenix's law), the law triggered intense scrutiny because it "applied in a peculiar way"—to "speech itself." *Id.* The same holds here. Art is "speech itself," and so a law compelling art compels speech.

Not recognizing this point, the COA cited *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* as proof that equal access laws regulate only conduct. 547 U.S. 47 (2006). But the law in *Rumsfeld* merely required schools to give military recruiters access to rooms. And compelling access to rooms (conduct)—which may incidentally require sending logistical e-mails—is different from compelling access to "inherently expressive" mediums like parades or artwork to force someone to speak objectionable messages. *See id*. at 60-64; *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 n.10 (2008) (distinguishing *Rumsfeld*); *Masterpiece*, 138 S. Ct. at 1744-45 (Thomas, J., concurring) (noting that *Rumsfeld* "do[es] not suggest that the government can force speakers to alter their *own* message"); *Klein v. Or. Bureau of Labor & Indus.*, 410 P.3d 1051, 1068-69 (Or. Ct. App. 2017) ("Essential to the holding in [*Rumsfeld*] was that the schools were not compelled to express a message with which they disagreed.").

Understanding *Rumsfeld* this way—rather than as the COA did—makes sense. Otherwise, governments could apply facially valid laws to compel and restrict pure speech *on any topic* free from the standards that typically protect pure speech. For example, a law against disorderly conduct could be applied to ban offensive signs. Or a law against political-affiliation discrimination could be applied to force paid Democratic speechwriters to write for Republican politicians. To avoid these results of the COA's logic, this Court should clarify that facially valid laws must overcome scrutiny whenever they are applied to pure speech.

B. The COA incorrectly held that creating written words and paintings is conduct, not speech.

In *Coleman v. City of Mesa*, this Court held that a tattoo business engaged in protected speech because tattoos, like "words" and "painting[s]," are pure speech. 230 Ariz. 352, 358 ¶¶ 18-19, 23, 360 ¶ 31 (2012). But the COA held that hand-creating words and paintings on "design-to-order wedding announcements, invitations, and the like is not inherently expressive" and does not even constitute expressive conduct. 418 P.3d at 439 ¶¶ 28-29. These rulings conflict and create significant repercussions for free speech.

The COA tries to reconcile its rationale with *Coleman* by limiting the latter to laws that restrict—rather than compel—speech. *See id.* at 438 ¶¶ 26-27 (contrasting laws barring the "ability to create" and "prohibiting...writing certain words" with requiring Joanna and Breanna to create artwork). But whether pure

speech exists cannot vary based on the regulation used. *Cf. Coleman*, 230 Ariz. at 358 n.3 (noting that "analysis of whether tattooing is protected speech" is unaffected by the type of regulation). Whether compelled or restricted, words and paintings do not stop speaking. *See Janus v. Am. Fed'n of State, Cty., & Mun. Emps. Council 31*, ___ S. Ct. ___, 2018 WL 3129785, at *9 (June 27, 2018) (stating that "measures compelling speech are at least as threatening" as "restrictions on what can be said").

Nor do they stop speaking when money is received. *See Coleman*, 230 Ariz. at 360 ¶ 31 (noting that free-speech protections are not diminished because speech is sold). And contrary to the COA's analysis, a law regulating commissioned speech does not merely regulate the "conduct of selling or refusing to sell merchandise." 418 P.3d at 438 ¶ 27. Rather, a regulation compelling the sale of *custom* artwork compels its creation—and *creating* artwork is itself protected speech.[5] *Coleman*, 230 Ariz. at 359-60 ¶¶ 26-31 (protecting the *process* and *business* of creating speech).

The COA also tries to downplay its redefinition of speech, claiming that the "general observer" would not view artwork created to "compl[y] with the law" as

[5] While the COA claimed that this case involves "a blanket refusal of service to the LGBTQ community," 418 P.3d at 438 ¶ 26, Joanna and Breanna will happily provide artwork to that community. *See* ROA-111 at 22:1-23:11 (admitting that Joanna and Breanna "will sell pre-made artwork to clients regardless of their sexual orientation"); ROA-30 ¶¶ 76-77.

"indicative of the [artists'] speech or personal beliefs." 418 P.3d at 439 ¶¶ 28-29. But the U.S. Supreme Court "has never accepted" this argument, which "would justify any law that compelled protected speech." *Masterpiece*, 138 S. Ct. at 1744 (Thomas, J., concurring). Indeed, under the COA's logic, the government could compel commissioned speech in almost every situation, from forcing a Muslim printer to produce a synagogue's promotional materials to forcing a gay graphics designer to create the cover art for a book defending Morman opposition to same-sex marriage.

To avoid this, even courts allowing public accommodation laws to compel the creation of floral arrangements and wedding cakes do not condone compelling the creation of text and paintings. *See Klein*, 410 P.3d at 1069 (recognizing that strict scrutiny may apply when "applying a public accommodations law to require the creation of pure speech or art"); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. Ct. App. 2015) (noting that wedding cakes with "written inscriptions" could implicate speech protections), *rev'd*, 138 S. Ct. 1719; *Arlene's Flowers*, 389 P.3d at 559 n.13 (concluding that floral arrangements do not implicate the speech concerns associated with "forms of pure expression"—like tattoos with words). By refusing to recognize that public accommodation laws may impermissibly regulate pure speech—like the words and paintings here—the COA severely undercut free speech in Arizona.

C. The COA incorrectly held that a law compelling speech and altering content warrants no scrutiny.

Laws compelling speech force speakers to alter the content of their desired message. Such laws are content-based, presumptively unconstitutional, and deserve strict scrutiny. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech" and is "a content-based regulation of speech."); *Nat'l Inst. of Family & Life Advocates v. Becerra*, ___ S. Ct. ___, 2018 WL 3116336, at *7 (June 26, 2018).

Here, Phoenix forces Joanna and Breanna to convey messages they object to, e.g., to write words encouraging people "to share in the joy of [a] marriage" and quoting the Bible to say that "God has joined together" the couple as "one flesh" when they believe that the union violates God's plan. ROA-111 at 8:24-9:4, 22:23-27, 27:1-8, 28:1-19; ROA-30 ¶¶ 67-69. This compulsion alters their message.

Yet the COA considered Phoenix's law to be content neutral by again analyzing the law's face, rather than its application. 418 P.3d at 440 ¶ 32. And again, that focus contradicts precedent and empowers officials to regulate speech based on content. *See Holder*, 561 U.S. at 26-28 (finding law that facially regulated conduct to be content-based as-applied); *Hurley*, 515 U.S. at 578 (noting that effect of public accommodation law was to "require speakers to modify the content of their expression").

By allowing content-based regulations to escape scrutiny, the COA set a dangerous precedent. As the U.S. Supreme Court recently noted, "[f]orcing...individuals to endorse ideas they find objectionable is always demeaning" and inflicts "additional damage" beyond "law[s] demanding silence." *Janus*, 2018 WL 3129785, at *9. Thus, "[g]overnments must not be allowed to force persons to express a message contrary to their deepest convictions." *See Becerra*, 2018 WL 3116336, at *16 (Kennedy, J., concurring). Yet that is precisely what the COA's decision allows.

D. The COA incorrectly held that a content and viewpoint-based restriction on speech warrants no scrutiny.

Phoenix prohibits Joanna and Breanna from posting a statement on their studio's website because it explains that they cannot create artwork celebrating same-sex weddings. This constitutes a content and viewpoint-based regulation of speech, which is "presumptively unconstitutional" and subject to strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226-27 (2015).

But the COA did not subject this restriction to any scrutiny, instead categorizing Joanna and Breanna's statement as effectuating illegal conduct. 418 P.3d at 439-40 ¶¶ 30-31. Not so. This statement explains a constitutionally protected decision—to not create artwork conveying objectionable messages. The COA's analysis, therefore, illegitimately relabels words as conduct. And that type of relabeling imperils speech throughout Arizona. *See NAACP v. Button*, 371 U.S.

415, 429 (1963) (noting that governments "cannot foreclose the exercise of constitutional rights by mere labels").

II. The COA incorrectly decided the important question of what constitutes a substantial burden under Arizona's Free Exercise of Religion Act.

Arizona's Free Exercise of Religion Act (FERA) prohibits governments from "substantially burden[ing] a person's exercise of religion" unless doing so can survive strict scrutiny. A.R.S. § 41-1493.01(C). This Court has addressed this critical law only once, but did not determine what constitutes a substantial burden under FERA. *State v. Hardesty*, 222 Ariz. 363, 366 ¶ 11 (2009). The COA's answer to that question contradicts U.S. Supreme Court cases and undercuts religious liberty.

Phoenix imposes a substantial burden by requiring Joanna and Breanna, under threat of fines and imprisonment, to either create wedding-related artwork contrary to their beliefs or cease their wedding work altogether, and by forbidding their religiously motivated statement. Yet the COA found no substantial burden because Joanna and Breanna can avoid the law's penalties if they "discontinue selling custom wedding-related merchandise." 418 P.3d at 444 ¶ 49.

First, it is always the case that a change in behavior can avoid violating a law, but that does not address the substantial burden on religious exercise. The COA's logic also ignores Joanna and Breanna's religious motivation to create

artwork—including wedding artwork—professionally. ROA-111 at 32:2-9. Stopping a religiously motivated activity does not avoid a substantial burden. It inflicts one. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2776 (2014) (rejecting suggestion of eliminating all insurance coverage to resolve the religious burden of providing contraception because it ignores the business owners' "religious reasons for providing health-insurance coverage for their employees").

Just as problematic, the COA allows another burden. If Joanna and Breanna stopped creating wedding-related art, they would "have to either significantly restructure [their] business or potentially consider closing it" because most of their artwork is custom, and most of that is for weddings. ROA-68 at 26:10-13, 74:22-75:3; ROA-111 at 7:14-17.

Thus, the COA would allow any law to evade FERA if there is some alternative—regardless of how burdensome—to violating the law and one's beliefs. But that is untenable. Taking costly measures to avoid violating the law does not remove the law's burden. It underscores it. As the U.S. Supreme Court said in *Sherbert v. Verner*, forcing people "to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to [enjoy benefits], on the other hand" imposes the "same kind of burden...as would a fine imposed" for

adhering to religious beliefs. 374 U.S. 398, 404 (1963). Because Phoenix's law forces Joanna and Breanna to choose between their faith, a jail cell, and losing their business, it necessarily inflicts a substantial burden. *See Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972) (finding that a $5 criminal fine creates a substantial burden).

The alternative view espoused by the COA would make FERA a dead letter. It would not protect a Muslim woman from being forced to uncover her head while driving because she could always ride a bus wearing her hijab. Nor would it protect a Catholic business owner from a law requiring businesses with more than ten employees to provide abortion coverage because the owner could always fire all but ten employees.

This Court should correct the COA's narrow definition of "substantial burden" so that FERA can offer meaningful protection.

III. The COA incorrectly decided the important question of whether declining to celebrate same-sex marriage constitutes per se status discrimination.

Although the COA wrongly concluded that Phoenix's application of its law does not trigger strict scrutiny, it alternatively upheld that application as necessary to stop discrimination. 418 P.3d at 444-45 ¶ 50. But that interest is not implicated here because Joanna and Breanna do not discriminate. They create artwork for

everyone regardless of their status. They simply will not create a *message* celebrating same-sex marriage *for anyone*. ROA-111 at 22:1-23:11.

The U.S. Supreme Court has repeatedly recognized this message/status distinction. *See Hurley*, 515 U.S. at 572-73 (distinguishing "exclud[ing] homosexuals as such" from declining to accept LGBT group's banner in parade); *Masterpiece*, 138 S. Ct. at 1723 (noting that declining to create something "with words or images celebrating the marriage" of a same-sex couple "might be different from a refusal to sell any [item] at all" to them). Yet the COA ignores the caselaw on this point.[6]

This Court should clarify that declining to express an objectionable message is not equivalent to status-based discrimination and that using public accommodation laws to "to require speakers to modify the content of their expression" serves no "legitimate end"—much less a compelling one. *Hurley*, 515 U.S. at 578-79.

CONCLUSION

Because the COA's decision undermines freedom of speech and religious exercise, this Court should grant this petition for review.

[6] While the COA cites cases condemning attempts to distinguish homosexual *conduct* and homosexual status, 418 P.3d at 436-37 ¶ 20, this case involves a different distinction—objections to speaking a *message* versus objections to someone's status.

NOTICE UNDER ARCAP 21(A)

Joanna and Breanna claim attorneys' fees and costs in accordance with A.R.S. §§ 12-341 *et seq.*, 12-348, 12-1840, 41-1493.01(D), and the private attorney general doctrine, *see Arnold v. Arizona Department of Health Services*, 160 Ariz. 593, 609 (1989).

Respectfully submitted this 9th day of July, 2018.

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