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

PLAINTIFFS/APPELLANTS/CROSS-APPELLEES' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

State Statutes

Other

INTRODUCTION

Courts have long recognized individuals' right "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). Yet Phoenix tramples that right when it requires a calligrapher to pick up her pen and a painter her brush, and then, under threat of jail and crippling fines, forces them to conceive and then create original artwork expressing messages that violate their core religious convictions. Such government compulsion violates the fundamental liberty "to refrain from speaking." *Id.* at 714.

Phoenix says this liberty is novel and dangerous; it is actually narrow and unexceptional. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) (enjoining public accommodations law from compelling speech). And Joanna and Breanna, the artists and owners of Brush & Nib Studio, are entitled to exercise it.[1] These women of deep religious faith gladly serve everyone, including those in the LGBT community; their faith simply prevents them from expressing certain messages *for anyone*. So this case is not about whether businesses can decline to serve an entire class of people. It is about whether artists can freely choose which messages their own art conveys.

[1] "Joanna and Breanna" refers to all Plaintiffs/Appellants/Cross-Appellees.

Inexplicably, the Court of Appeals held that writing words and painting images is merely unprotected conduct, not speech. *Brush & Nib Studio, LC v. City of Phx.*, 244 Ariz. 59, 71-72 ¶¶ 27-29 (Ct. App. 2018). Phoenix does not defend that holding. But the City still insists that Joanna and Breanna must create any custom artwork for same-sex weddings if they would create similar artwork to celebrate marriages between one man and one woman. ROA-111[2] at 27:1-8, 28:1-19. This includes (1) custom wedding vows committing to a spouse "[b]efore God … in accordance with God's law and holy design," (2) signs quoting the Bible to say God joined the couple together as "one flesh," and (3) invitations—all of which Phoenix admits "include language that is celebratory of the wedding." ROA-111 at 7:25-8:4, 8:24-9:4, 22:23-27; App.Docket-55[3] at 1 n.3.

That conclusion cannot possibly be right. If true, a Muslim tattoo artist can be compelled to write "My God is the only God" on a Christian's arm next to his preexisting cross tattoo. And an African-American sculptor can be forced to sculpt a cross for an Aryan Nations church event. No government possesses such power. Accordingly, this Court should reverse and uphold Joanna and Breanna's right to express messages about marriage consistent with their religious convictions.

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[2] The number following "ROA-" refers to the document number on the Superior Court's Electronic Index of Record. The cited "ROA" materials are available in the appendix accompanying Joanna and Breanna's petition for review.

[3] The number following "App.Docket-" refers to the document number on the Court of Appeals' docket.

ARGUMENT

I. The compelled-speech doctrine protects words and paintings and is limited, workable, and historically justified.

Under Article II, § 6 of the Arizona Constitution, Phoenix may not compel Joanna and Breanna to create artwork—i.e. speak messages—celebrating same-sex marriage.[4] Phoenix says this argument is unbounded and novel. But Phoenix's argument is the far reaching one. To show government-compelled speech, a party need only show (1) speech; (2) with a message the speaker objects to; (3) that the government compels. *Hurley*, 515 U.S. at 572-73 (applying these factors); *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (assessing same elements). These three elements are each satisfied here.

A. Paintings and words are pure speech.

The compelled-speech doctrine only applies to speech. That principle significantly limits the doctrine's reach because there are "innumerable goods and services that no one could argue implicate the First Amendment." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1728 (2018).

This case is the exception. Joanna and Breanna do not sell coffee or mow lawns. They create words and paintings. This expression is "pure speech."

[4] Joanna and Breanna facially challenged only one clause in Phoenix's law. The Court of Appeals struck that clause, and Phoenix does not appeal that ruling. Resp. to Pet. for Review ("Pet. Resp.") 9 n.1. So the only remaining challenges are as-applied.

Coleman v. City of Mesa, 230 Ariz. 352, 358-60 ¶¶ 18, 26, 31 (2012) (protecting the creation of words and paintings). That is why even Phoenix admits that Joanna and Breanna's artwork "qualif[ies] as speech." App.Docket-20 at 47.

B. Joanna and Breanna object to creating custom artwork that conveys celebratory messages about same-sex marriage.

The compelled-speech doctrine also only applies when the government forces speakers to convey a message to which they object. No one can decline to serve an entire class of persons because of their status. *Hurley*, 515 U.S. at 572 (allowing parade organizers that did not "exclude homosexuals as such" to exclude LGBT group because of "disagreement" with group's message); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653-54 (2000) (explaining this distinction).

The Court of Appeals rejected this message/status distinction because some courts decline to distinguish the conduct of same-sex marriage from LGBT status. *Brush & Nib*, 244 Ariz. at 69 ¶ 20. But as *Hurley* explained, that is the wrong approach. The question is whether Joanna and Breanna can distinguish *their own* message from *their clients*' status. They can and do. For example, Joanna and Breanna would happily create innumerable other messages for clients who identify as LGBT, just not messages celebrating an event they consider to be inconsistent with God's teachings. *World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 258 (Utah 1994) ("[A] publisher may discriminate on the basis of content even when content overlaps with a suspect classification ….").

Earlier in this litigation, Phoenix similarly refused to distinguish message from status, confirming its position that Joanna and Breanna must create "custom artwork *for or supporting* same-sex wedding ceremonies." ROA-111 at 28:5-19 (emphasis added); *see also id.* at 27:1-8. But now—for the first time—Phoenix concedes the message/status distinction, admitting that Joanna and Breanna can decline to write "marriage-equality words and symbols" because that "refusal would be based on message." Pet. Resp. 22. That concession is dispositive.

Phoenix tries to draw the line at what it calls "routine" artwork—wedding invitations, vows, place cards, and signs—with "routine celebratory message[s]," saying this artwork "is not the same thing as artwork celebrating the concept of same-sex weddings." Pet. Resp. 20, 22. But there is nothing "routine" about Joanna and Breanna's art. Joanna and Breanna consider the details of each wedding, imagine each piece of artwork from scratch, and handcraft each piece differently to celebrate each unique wedding. App.Docket-14 at 9-13; ROA-30 ¶¶ 19-23.

Phoenix's "routine" line is also a distinction without a difference, because even routine artwork is expressive. "Any artist's original painting holds potential to affect public attitudes by spurring thoughtful reflection in and discussion among its viewers." *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (cleaned up). And Phoenix's theory—that changing *words* (such as "names and logistical

information") and *context* (from opposite-sex to same-sex weddings) does not alter speech's "expressive content," Pet. Resp. 20, 22—contradicts *Hurley*.

In *Hurley*, the LGBT group simply wanted to display "a shamrock-strewn banner with the simple inscription 'Irish American Gay, Lesbian and Bisexual Group of Boston.'" 515 U.S. at 569-70, 574-75. This banner was surely similar to those of other parade groups; only the name was different. Yet *Hurley* concluded that simply *changing the name* was sufficient to "alter the [parade's] expressive content" and send a "message … not difficult to identify"—that "some Irish are gay, lesbian, or bisexual" and that "people of their sexual orientations" should receive "unqualified social acceptance." *Id*. at 572-74. Compelling the parade organizers to express that message was unconstitutional. *Id.* at 575, 581.

Overlooking this logic, Phoenix asks this Court to hold that writing "celebrate the marriage of John and Bob" in wedding invitations—or similar language in wedding vows, certificates, and signs—does not convey the message that "a wedding has occurred, a marriage has begun, and the couple should be celebrated." *Masterpiece*, 138 S. Ct. at 1743 (Thomas, J., concurring) (identifying objectionable message). Phoenix would instead say that the text "celebrate *the marriage* of John and Bob" conveys a different message than "celebrate the *same-sex marriage* of John and Bob." *See* Pet. Resp. 21-22 (distinguishing "routine" wedding invitations from those with "marriage-equality words and symbols"). But

this arbitrary distinction ignores that changing words matters—names included.[5] (And it also ignores that this case is not only about names but celebratory speech.)

For example, a sign saying "*Yahweh* is Lord" conveys a different message than one saying "*Allah* is Lord." An invitation saying "Celebrate Westboro Baptist Church" conveys a different message than one saying "Celebrate St. Mary's Roman Catholic Church." The government cannot compel artists to create signs and invitations just because their appearance and text look similar to other artwork they would create. Pet. Resp. 20-21.

In fact, the government cannot even compel similar wording on trivial matters. *Cf. United States v. United Foods, Inc.*, 533 U.S. 405, 408, 411, 413, 416 (2001) (mushroom producer could not be forced to fund advertisement where producer wanted to express a different message, even though the distinction was "minor"). Surely, then, Phoenix cannot compel artists to convey vastly different views on marriage, a topic of "transcendent importance." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).

Nor does *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* say otherwise. 547 U.S. 47 (2006). To be sure, *Rumsfeld* upheld a law forcing law schools to email logistics about a recruiting event. *Id*. at 61-62. But those emails

[5] The arbitrary distinction also indicates that Phoenix is trying to manipulate "the relevant level of generality" to target Joanna and Breanna's religious beliefs on marriage. *Masterpiece*, 138 S. Ct. at 1735-39 (Gorsuch, J., concurring).

did not contain celebratory text or convey celebratory messages about that event, like the artwork Phoenix compels here, and the schools did not disagree with the emails' message. *Klein v. Or. Bureau of Labor & Indus.*, 410 P.3d 1051, 1068 (Or. Ct. App. 2017) (distinguishing schools in *Rumsfeld* that "were not compelled to express a message with which they disagreed" from cake designer who disagreed with same-sex marriage).

In addition, the *Rumsfeld* emails were "speech incidental to … hosting," i.e. speech necessary to effectuate some other conduct the government could require. Eugene Volokh, *Compelled Speech*, TEX. L. REV. (forthcoming) (manuscript at 134-35), *available at* https://bit.ly/2G4AurT. In contrast, Joanna and Breanna's artwork is not tied to hosting same-sex weddings in their studio. They cannot be forced to speak about—much less celebrate—these weddings either.

In sum, Phoenix's looks-similar test ignores the impact changing words can have on a message. What's more, Phoenix's test ignores the importance of context, too. A sign saying "support our President" conveys a radically different message at a rally for Donald Trump than one for Barack Obama, just as a cross at a Ku Klux Klan event conveys a different message than one at a church's Easter service. *Accord, e.g.*, *Spence v. Washington*, 418 U.S. 405, 410 (1974) (per curiam) (noting "context … is important" because "context may give meaning to the symbol").

The same logic is true of wedding art. For instance, Joanna and Breanna created a custom sign quoting Mark 10: "The two shall become one flesh so they are no longer two but one. What therefore God has joined together let not man separate." ROA-111 at 22:23-27. This famous text refers to and approves of marriage between a man and woman.[6] Yet Phoenix would compel Joanna and Breanna to create this sign for a same-sex wedding. ROA-111 at 27:1-8, 28:1-19; App.Docket-20 at 52-53, 67-68. But the meaning of these words changes with the circumstances. By changing the sign's context, Phoenix would force Joanna and Breanna to take scripture's approval of opposite-sex marriage and affirm the same about same-sex marriage. Same text. Different message.

Instead of adopting Phoenix's looks-similar test, this Court should follow how *Hurley* distinguished message and status-based objections. There, the court considered the speech itself (the banner, 515 U.S. at 570), the speech's context (the parade, *id*. at 574), the fact that the parade organizers served the protected class (and did not "exclude homosexuals as such," *id*. at 572), and the purpose of the speech (noting that the LGBT group's "very purpose" was "to celebrate its members' identity," *id*. at 570). Joanna and Breanna satisfy all these factors.

[6] Preceding verses confirm this: "But from the beginning of creation, 'God made them male and female.' Therefore a man shall leave his father and mother and hold fast to his wife, and the two shall become one flesh.' ... What therefore God has joined together, let not man separate." *Mark* 10:6-9.

First, Phoenix concedes that *all* of Joanna and Breanna's custom wedding invitations "include language that is celebratory of the wedding." ROA-111 at 8:24-9:4. And Phoenix cannot deny that the purpose of speech associated with a same-sex wedding is to celebrate and affirm the same-sex wedding. *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) (a wedding ceremony is an expressive event whose "core … message" is "celebration of marriage and the uniting of two people in a committed long-term relationship"); *accord Masterpiece*, 138 S. Ct. at 1744 (Thomas, J., concurring).

Custom artwork like Joanna and Breanna's enhances the wedding's celebratory atmosphere and conveys the message that marriage is important and should be celebrated. What's more, this custom wedding artwork celebrates the associated marriage—whether through text in the artwork or through the more "subtle shaping of thought which characterizes all artistic expression." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952); ROA-30 ¶¶ 19-23, 68-69; *Dale*, 530 U.S. at 653-54 (deferring to speakers when evaluating their expression and what affects that expression).[7]

[7] Phoenix argues that artwork like place cards does not convey any message. But that theory ignores context and art's power to move audiences cognitively and emotionally, particularly when pieces like place cards are typically ordered and coordinated with other pieces, like invitations, to present a consistent artistic theme. And Phoenix cannot justify compelling invitations, vows, or signs by invoking place cards. Courts can tailor an injunction's scope to fit "the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Second, Joanna and Breanna gladly serve people in the LGBT community. ROA-30 ¶¶ 76-78. They sell their pre-made artwork to any person for any event. ROA-111 at 22:1-4. For their custom artwork, they evaluate whether the requested artwork expresses "a message [they] can convey." ROA-68 at 60:19-61:4. So they will create artwork celebrating an opposite-sex wedding whether asked by the couple's gay friend or heterosexual mother; they will not create custom artwork celebrating same-sex weddings no matter who asks them. ROA-111 at 22:23-23:11. These facts show that it is the "kind of [artwork], not the kind of customer" that matters to Joanna and Breanna. *Masterpiece*, 138 S. Ct. at 1735-36 (Gorsuch, J., concurring) (reaching same conclusion based on same facts); *World Peace Movement*, 879 P.2d at 258 (reaching similar conclusion when newspaper declined religious group's advertisement but would run other advertisements from group).

Similarly, Joanna and Breanna will not create artwork expressing numerous other kinds of messages, such as those demeaning others or inciting violence, *no matter who asks them*. ROA-102 at App. 261; ROA-68 at 56:4-19. And they treat clients seeking those messages the same as clients seeking other messages. Everyone receives the same treatment and has access to the same messages.

Finally, clients ask Joanna and Breanna to create wedding art to celebrate their marriage and wedding. Instead of purchasing stock invitations for far less, a client may pay Joanna and Breanna in excess of $900 to imagine, design, and

handcraft custom artwork because they want to convey that their wedding is a special, celebratory event. ROA-111 at 7:18-24. Just like in *Hurley*, private parties here want to compel Joanna and Breanna to express a message celebrating something that their faith prohibits them from celebrating. Phoenix lacks the constitutional authority to compel Joanna and Breanna to pick up pen and brush and do so.

C. Phoenix is forcing Joanna and Breanna to write words and paint paintings to which they object.

Phoenix's law would force Joanna and Breanna to write words and paint paintings expressing messages to which they object. Phoenix is therefore compelling Joanna and Breanna to speak.

This conclusion holds even though the "primary purpose" of Phoenix's law is to regulate conduct. *Brush & Nib*, 244 Ariz. at 71 ¶ 25. Laws that facially and primarily regulate conduct can still compel speech as-applied when they "alter [a speaker's] expressive content." *Hurley*, 515 U.S. at 572-73. Phoenix concedes this. Pet. Resp. 20 (admitting *Hurley* forbids laws that alter expressive content).

Joanna and Breanna are also the ones speaking when they create. Their artwork does not speak only for their clients. If tattoo artists speak when they imprint "standard designs or patterns" into their client's skin—as this Court held in *Coleman*, 230 Ariz. at 359-60 ¶¶ 25, 30—then Joanna and Breanna speak when they imagine and create original artwork. *Accord, e.g.*, *Hurley*, 515 U.S. at 570, 572-73 (newspapers can control editorials and advertisements "generated by other

persons"); *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 795–98 (1988) (paid fundraisers cannot be compelled to speak messages to which they object).

D. The Court of Appeals and Phoenix propose unworkable rules that allow governments to compel almost any speech.

Because the Court of Appeals rejects the message/status distinction and considers the creation of speech to be mere conduct, it would allow public accommodation laws to compel any speech associated with a protected class—from compelling a Muslim printer to design a promotional flyer for a Jewish synagogue to compelling an atheist to design a website for the Church of Scientology. Not even Phoenix will defend this rule.

Phoenix's "looks similar" rule works no better. For one thing, Phoenix never explains what is "similar" enough. If a film studio creates a promotional video for a Catholic church, must it create a "similar" video for a Baptist church? If an artist paints a wedding invitation with a man and woman holding hands, must the artist paint two men holding hands? If a printer creates a flyer for a pro-Israel group must that printer create a "similar" flyer for a pro-Palestine group? In all these scenarios, speakers are creating a "particular celebratory" video or painting or flyer. But Phoenix offers no guidance as to whether these scenarios are similar to or different from the circumstances presented here.

At the very least, Phoenix's rule would lead to egregious results. It would require a Mormon printer to print rainbow shirts for pro-LGBT events and require

a gay graphic designer to create a logo (two interlocking wedding rings inside a heart) for a Mormon marriage conference critical of same-sex marriage—just because they will create the same shirt and logo for other contexts.

In contrast, Joanna and Breanna's rule protects speakers of different views. It also can be applied easily and consistently: is there speech, with a message the speaker objects to (judged by the *Hurley* factors), that the government compels? If so, the government action is unconstitutional. This rule follows how other courts have distinguished message from status. It stops the government from compelling people to express messages that violate their core convictions. And it still allows the government to stop actual status discrimination. This approach strikes the right balance; compelling people to speak views with which they disagree does not.

II. Joanna and Breanna have the right to post a statement explaining why they cannot create artwork celebrating same-sex marriage.

Joanna and Breanna wish to post a statement on their website explaining why they cannot create art conveying messages that contradict their religious beliefs, including art for same-sex weddings. ROA-30 ¶¶ 148-149; ROA-31 (full text of statement). This statement allows Joanna and Breanna to be "respectful toward their customers and their customers' time" by avoiding situations where "customers falsely assume that [Joanna and Breanna] will create art when they cannot do so." ROA-30 ¶¶ 72-75. Phoenix insists it can ban this statement, and the

Court of Appeals agreed, likening the statement to a sign saying "White Applicants Only." Pet. Resp. 26-27; *Brush & Nib*, 244 Ariz. at 72 ¶ 30.

That analogy is inapt. The government can ban a "White Applicants Only" sign because it effectuates race-based discrimination. And while the government can ban class-based discrimination, it cannot compel speech on certain topics. The critical distinction here is that Joanna and Breanna never base their decision to create on who they're serving; they do so based on the message they've been asked to express. The former is impermissible; the latter is constitutionally protected.

This reality also negates the fear that many businesses will post signs indicating that they will not sell goods or services for same-sex weddings. *Brush & Nib*, 244 Ariz. at 72 ¶ 30. Phoenix can ban such signs because most businesses do not create speech. There is a world of difference between a wholesale denial of service based on a customer's status and a polite explanation of why certain messages cannot be created for anyone.

III. By forcing Joanna and Breanna to violate their beliefs, go to jail, or close their business, Phoenix inflicts a substantial burden under FERA.

Phoenix does not dispute the sincerity of Joanna and Breanna's beliefs or the religious motives for their decisions. *Brush & Nib*, 244 Ariz. at 77 ¶ 48. In this situation, Arizona's Free Exercise of Religion Act (FERA) requires strict scrutiny if Phoenix's law substantially burdens Joanna and Breanna's religious exercise. *State v. Hardesty*, 222 Ariz. 363, 366 ¶ 10 (2009).

And the law imposes such a burden. Violation triggers up to six months in jail and $2,500 in fines for *each day* Joanna and Breanna post their desired statement or decline to create artwork celebrating same-sex marriage. So this case does not involve a government rule whose "sole effect" is on someone's "subjective spiritual experience." *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1063, 1070 n.12 (9th Cir. 2008) (contrasting the "objective" effect of fines and jail time with mere objection to government's use of its land). Phoenix is forcing Joanna and Breanna "to act contrary to their religious beliefs by the threat of … criminal sanctions." *Id*. at 1070. That imposes a substantial burden.[8] *Id.*

In response, Phoenix attacks Joanna and Breanna's beliefs, claiming their "religion says nothing about making wedding invitations" and their objection to creating artwork "is too remote" to burden them. Pet. Resp. 28. But the first point ignores the record. ROA-30 ¶ 69 (explaining Joanna and Breanna's religious beliefs about artwork for same-sex weddings). The second point ignores decades of cases that forbid the government from deciding for itself what violates an adherent's religious beliefs. *E.g.*, *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981) (noting that claimant "drew a line, and it is not for us to say that the line he drew was an unreasonable one"). As the U.S. Supreme Court

[8] Prior briefing explained this point. App.Docket-14 at 49-53; Pet. for Review 13-15.

recently noted, the government cannot "in effect tell the plaintiffs that their beliefs are flawed." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014). The question is whether Phoenix "imposes a substantial burden on the ability of [Joanna and Breanna] to conduct business in accordance with *their religious beliefs*." *Id.* Here, if Joanna and Breanna attempt to live their faith in how they conduct their business, they will go to jail or incur penal fines that will bankrupt them. That is a substantial burden.

IV. Strict scrutiny applies, and Phoenix cannot satisfy it.

Courts impose strict scrutiny on laws that compel speech or substantially burden religion. This is particularly true of laws compelling speech because they severely burden speakers and regulate speech based on content and viewpoint. "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, [a law compelling speech] would require 'even more immediate and urgent grounds' than a law demanding silence." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps, Council 31*, 138 S. Ct. 2448, 2464 (2018) (citation omitted). *See also, e.g., Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (law was content-based because it "compell[ed] individuals to speak a particular message" they did not want to and therefore "alter[ed] the content of [their] speech." (cleaned up)).[9]

[9] *See* App.Docket-14 at 27-28; App.Docket-23 at 13-14; App.Docket-55 at 4-9.

Phoenix cannot satisfy this standard.[10] Its alleged interest—stopping discrimination—does not even apply here. Joanna and Breanna serve everyone; they just cannot create all messages. So forcing them to speak achieves no valid goal. In fact, Phoenix now admits that people can decline to speak messages they disagree with, and that businesses can decline to create artwork "with marriage-equality words and symbols." Pet. Resp. 22. But Phoenix cannot explain why it must force Joanna and Breanna to write "celebrate John and Bob's marriage" but it need not force them to write "celebrate the same-sex marriage of John and Bob." Phoenix's concession undermines any supposed interest. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (a "law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited" (citation omitted)).

The same concession also undermines invoking "social stigma" as the compelling interest. *Brush & Nib*, 244 Ariz. at 77-78 ¶ 50. In politely declining to create artwork for same-sex weddings, Joanna and Breanna inflict no more "stigma" than what Phoenix already says it would allow, or when speakers decline to convey other messages about religion, sexuality, or politics. This reality underscores why compelling speech to protect dignity and avoid humiliation,

[10] *See* App.Docket-14 at 53-61; App.Docket-23 at 28-31; App.Docket-40 at 34-53; App.Docket-55 at 4-9.

frustration, and embarrassment is "completely foreign to our free-speech jurisprudence." *Masterpiece*, 138 S. Ct. at 1746-47 (Thomas, J., concurring).

Finally, Phoenix's solution does not eliminate stigma; it inflicts stigma on Joanna and Breanna, forcing them to imagine, design, and handcraft custom artwork that contradicts their core beliefs. This compulsion is "always demeaning," violates a "cardinal constitutional command," and in most contexts is "universally condemned." *Janus*, 138 S. Ct. at 2463-64. And Phoenix would inflict this stigma not just on Joanna and Breanna, but on all other commissioned speakers with the same "decent and honorable religious" beliefs about marriage. *Obergefell*, 135 S. Ct. at 2602.

This government-imposed stigma is easily avoided. Joanna and Breanna have already identified alternatives Phoenix can use to stop discrimination without harming them. App.Docket-14 at 59-61. Other jurisdictions have even adopted laws protecting artists like them without creating problems. *E.g.*, Miss. Code Ann. § 11-62-5(5)(a) (protecting businesses like Joanna and Breanna's that decline to provide certain wedding services). Phoenix cannot explain why the same approach will not work here. In fact, most states—including Arizona—do not have public accommodation laws that would compel artists to celebrate same-sex marriage. This experience proves that Phoenix need not compel Joanna and Breanna.

CONCLUSION

True freedom means the freedom to disagree about important topics and "to choose the content of [your] own message." *Hurley*, 515 U.S. at 573. Joanna and Breanna can exercise these freedoms without hampering Phoenix's ability to stop status-based discrimination. In our pluralistic society, where people of good faith hold different views about marriage, giving creative professionals the freedom to disagree is far better than giving government the power to demand uniformity.

Accordingly, Joanna and Breanna respectfully ask this Court to stop Phoenix from applying § 18-4(B) to compel them to create custom artwork (such as their wedding invitations, vows, and signs) for same-sex weddings or to punish them for publishing their desired statement about the messages they can create.

NOTICE UNDER ARCAP 21(A)

Joanna and Breanna claim attorneys' fees and costs under 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 10th day of December, 2018.

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