IN THE SUPREME COURT

STATE OF ARIZONA

BRUSH & NIB STUDIO, LC, et al., Plaintiffs/Appellants/ Cross-Appellees, vs. 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 *AMICUS CURIAE* NATIONAL CENTER FOR LAW AND POLICY IN SUPPORT OF PETITIONERS

(filed with the written consent of the parties)

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INTEREST OF AMICUS CURIAE

The National Center for Law and Policy ("NCLP") is a non-profit legal and public policy advocacy organization that has, since its inception, promoted and defended constitutionally protected rights of conscience and religious freedom in the courts and culture. The NCLP is deeply concerned about the future of religious freedom throughout the United States, including the growing threat state anti-discrimination statutes pose to the constitutionally protected liberties of individuals, groups, and organizations to believe, express, and live out their religious faith, free from the oppressive burden of coercive governmental control. NCLP submits this brief to show how a more disciplined approach to interpreting the protections of the Arizona Constitution can give effect to the guarantees of personal liberty articulated by Arizona's Founders.

INTRODUCTION

This case gives the Court an opportunity to clarify its jurisprudence on rights guaranteed by the Arizona Constitution. As illustrated by the Court of Appeal's opinion below, Arizona courts tend to avoid analysis of the Arizona Constitution when dealing with these fundamental rights, often acting as if they were interchangeable with the Federal Bill of Rights. This approach is misguided and fails to give independent effect to Arizona law.

The Arizona Constitution clearly affords more stringent protections to many fundamental liberties than does the First Amendment, including free speech and religious liberty. While this Court has often acknowledged this to be the case, it has not described the fundamental analytical structure by which lower courts should review claims under the Arizona Constitution's free speech and religious liberty clauses. This lack of a disciplined framework for review has likely contributed to the neglected role of the Arizona Constitution in protecting civil liberty in this state. Without a framework to analyze civil liberty claims under the state constitution, it is not surprising that lower courts will fall back on the federal counterparts for these rights, even if these counterparts do not protect civil liberties as vigorously as the state constitution.

This brief proposes the following framework for analyzing rights claimed under the Arizona Constitution:

1. Rigorously apply the text of the Arizona Constitution to each case, without regard for case law construing the Federal Bill of Rights. This gives independent meaning to the wording selected by the drafters and ratifiers of the Arizona Constitution, and properly does not allow judicial decisions construing federal law—particularly decisions post-dating the drafting and approval of the Arizona Constitution, which were never incorporated into the

Arizona Constitution through any democratic process—to effectively amend the Arizona Constitution.

2. Allow the government to overcome the original public meaning of the Arizona Constitution where a law or action (a) directly advances a compelling state interest and (b) is narrowly tailored to avoid burdening the constitutional right. This effectively recognizes, for pragmatic reasons, a "strict scrutiny" exception to the liberties articulated in the Arizona Constitution.

Under this framework, the Arizona Constitution would offer greater protections than the Federal Bill of Rights where (a) the wording of the Arizona Constitution is more expansive than the wording of its Federal counterpart and/or (b) burdens on Federal constitutional rights are reviewed under a more deferential standard than strict scrutiny.

As explained below, in this case the city ordinance that requires Appellants to create artwork that expresses a view contrary to their religious sentiments is a clear violation of the freedoms guaranteed by the Declaration of Rights and should be subject to strict scrutiny and declared to violate the Arizona Constitution.

ARGUMENT

I. This case presents an opportunity to establish a framework to analyze the civil rights guaranteed by the Arizona Constitution.

A. Arizona's Founders anticipated that the Arizona Constitution would provide the sole basis to securing civil liberties against infringement by the State of Arizona.

Arizona's Constitution intentionally sets forth basic civil liberties in broad and sweeping language that goes beyond the negative rights ("Congress shall make no law . . .") afforded by the First Amendment.

The free speech clause of the Arizona Constitution, Article II, Section 6 states, "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

Likewise, the Arizona Constitution grants expansive protections to religious liberties. Article XX, Paragraph 1 states, "Perfect toleration of religious sentiment shall be secured to every inhabitant of this state, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship, or lack of the same."

At the time of the ratification of Arizona's Constitution, the Federal Bill of Rights had not yet been incorporated to apply to the actions of state and local governments, and the founders recognized that the rights under the Arizona Constitution would be the sole constitutional protections of individual liberties against actions by the state government. *The Records of the Arizona Constitutional Convention of 1910*, 759 (John S. Goff ed., 1991) (hereinafter "Goff") (reporting the statement of Delegate Ingraham that "[t]he first ten amendments to the United States Constitution . . . have no application to the state law; they are restrictions upon the power of the United States"). In securing these rights Arizona's drafters chose to

adopt the free speech provisions, along with other provisions in the Arizona Declaration of Rights, from similar provisions in Washington's constitution, rather than the Federal Constitution. *See State v. Stummer*, 219 Ariz. 137, 142 n4, 194 P.3d 1043, 1048 n.4 (2008) ("The framers declined to adopt the language of the First Amendment's free speech provision, although they did use some federal constitutional provisions as models for related provisions of the Arizona Constitution."); *see also* Goff at 658-59. The result is a constitutional basis for protecting civil liberties that is distinct from the First Amendment.

B. Arizona's Constitution affords greater protections to personal liberty than does the Federal Constitution

(i) Free speech

Arizona courts have often recognized that Article 2, Section 6 affords greater protections than the First Amendment. *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"); *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 358, 773 P.2d 455, 463 (1989) (noting the Arizona Constitution provides "more stringent protections" to free speech than the Federal Constitution).

However, this Court has yet to develop a systematic approach to analyze free-speech cases under the Arizona Constitution. *See Salib v. City of Mesa*, 212 Ariz. 446, 453–54, 133 P.3d 756, 763–64 (Ct. App. 2006), as corrected (May 5, 2006)

(noting that the scope of the difference between Article 2, Section 6 and the First Amendment has never been defined).

As a result, the majority of Arizona free-speech cases involve interpretations of only the First Amendment. When the Arizona Constitution's protections are raised in cases, the answers provided by the Arizona Constitution often follow the guidance of the First Amendment. *See* John D. Leshy, *The Arizona Constitution: A Reference Guide* 43 (1993) ("Most free speech decisions rendered by Arizona courts . . . either (1) have addressed only the First Amendment . . . ; (2) have explicitly addressed both [Article II, Section 6] and the federal Constitution but grounded the discussion solely on cases construing the federal Constitution . . . ; or (3) have discussed the First Amendment and [Section 6] without suggesting any difference between the two . . . .").

The result has been a disjointed and under-developed approach to the application of Article II, Section 6 jurisprudence. The distinct formulation of the right to free speech in the Arizona Constitution, however, suggests that Arizona's founders wanted to provide distinct protections beyond what the Federal Bill of Rights affords. *Mountain States*, 160 Ariz. at 355–56, 773 P.2d at 460–61 ("Arizona enacted its declaration of rights before the United States Supreme Court adopted the doctrine of incorporation, applying the federal Bill of Rights to the states. Thus, our

framers and people must have intended the Arizona declaration of rights to be the main formulation of rights and privileges conferred on Arizonans.").

This interpretation of the Founder's intent, based on the plain language of the Arizona Constitution, finds support in the fact that other provisions of the Arizona Constitution also extend protections to individual liberty beyond what the Federal Constitution provides. In *State v. Ault,* for example, this Court found that "[t]he Arizona Constitution is even more explicit than its federal counterpart in safeguarding the fundamental liberty of Arizona citizens." 150 Ariz. 459, 463, 724 P.2d 545, 549 (1986). Accordingly, the Court held that Article II, Section 8[1] prohibits "warrantless entry into a home in the absence of exigent circumstances or other necessity," and it prohibits the admission of evidence found in violation of a warrantless entry even if the inevitable discovery rule under Federal law might allow admission of the evidence. *Id.*

(ii) Religious liberty

Case law interpreting Arizona's counterpart to the free exercise clause is even more sparse. There has been little to no attempt to craft a systematic approach to its scope, even though the language of the Article XX, Paragraph 1 is clearly distinct from the Free Exercise Clause of the First Amendment.

[1] "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Ariz. Const. art. II, § 8

This lack of the attention given to Article XX, Paragraph 1 could be attributed partly to its placement in Article XX, entitled "Ordinances" rather than with the other central protections to civil liberties located in the Declaration of Rights in Article II. This is due to historical peculiarities surrounding Arizona's admittance into statehood, rather than a belief that these liberties are less fundamental than others found in the Declaration of Rights. Article XX derives almost entirely from section 20 of the statehood enabling act, which contained a set of unusually specific directives to the Arizona constitutional convention. Leshy at 326.

> Section 20's last paragraph explicitly required the framers to include in this constitution the provisions of this article, 'in such terms as shall positively preclude [changing them] in whole or in part without the consent of Congress.' The Arizona framers dutifully complied, even to the extent of retaining the enabling act's heading ('ordinance') and its style of referring to the individual provisions ordinally rather than using cardinal numbers for the individual sections, as in the other articles." *Id.*

During the Constitution Convention, the language that appeared in Article XX also appeared verbatim in Article II, Section 12, where the other discussions of the exercise of religion appear. However, because it is duplicative of the language that appears in Article XX, Delegate Webb moved that the language be stricken in order make the Constitution more concise.[2]

[2] Mr. Webb: I believe that it is the desire of every member of this convention that the constitution should be brief, concise and to the point, and that there should be as few repetitions as possible, and I will ask the members kindly refer to Proposition 119 [later adopted as Article XX] which I will now read: 'Perfect toleration of religious sentiment shall be secured to every inhabitant of this state, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.' Now

Later court interpretations of Article XX have therefore determined that Article II, Section 12 should be read in conjunction with Article XX, Paragraph 1. *See Matter of Appeal In Cochise Cty. Juvenile Action No. 5666-J*, 133 Ariz. 157, 163, 650 P.2d 459, 465 (1982). There is little doubt that the founders intended Article XX to represent a fundamental right on par with the protections afforded for freedoms of speech. And as with the protections for freedom of speech, the protections afforded to freedom of religious expression by the Arizona Constitution represented the only check on state power at the time of Arizona's founding.

Despite the expansive scope of Arizona's religious liberty clause, there has been surprisingly little reliance on this language. *See, e.g., Estate of Reinen v. N. Arizona Orthopedics, Ltd.*, 198 Ariz. 283, 291, 9 P.3d 314, 322 (2000) (declining to reach arguments based on Art. XX Sec. 1 when other grounds were dispositive). The vast majority of Arizona cases that involve freedom of religion have been decided on the grounds of the First Amendment or more recently the Free Exercise of Religion Act ("FERA"). *See, e.g., State v. Hardesty*, 222 Ariz. 363, 367, 214 P.3d 1004, 1008 (2009) (disposing of case under FERA and noting that the case arose in the lower courts under the First Amendment). This is certainly odd given the fact

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this is covered again, a repetition almost of identical language in section 11 of this proposition. I therefore move to strike out section 11 from the beginning down to and including 'but' where the same occurs in line 3, striking out 'hereby' in line 4, inserting after the word 'secured' in line 4 'by the provisions of this constitution." Goff at 663–64.

that Article XX provides for such broader protections for religious expression than the First Amendment does. *See* Leshy at 327 (describing Article XX, Paragraph 1 as a "ringing statement of religious freedom").

The only recent case to have mentioned Arizona's religious freedom clause, however, is *Matter of Appeal In Cochise Cty.*, 133 Ariz. 157. In that case, the Arizona Supreme Court held that the religious liberties of a mother respecting medical care for her children did not warrant a finding that the children were dependent on the state. *Id.* In reaching its decision, this Court cited both the First Amendment and Article XX of the Arizona Constitution. However, the case contained no discussion of how the protections afforded by the "perfect religious toleration" guaranteed by the Arizona Constitution compared to the First Amendment's Free Exercise Clause. Instead, this Court substantively relied on the standards developed in Federal, citing *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) to reach its decision. *See Matter of Appeal In Cochise Cty.*, 133 Ariz. at 163. No attempt was made to define how the Arizona Constitution differed from the Free Exercise Clause.[3]

II. This Court should adopt a textual approach to analyzing the Declaration of Rights.

[3] Because the Court found in favor of the mother's free exercise of religion, the distinctions between the Arizona and Federal guarantees respecting religious liberty would not have been dispositive.

There is therefore a gap in Arizona's constitutional jurisprudence. Despite the sweeping language of Article II, Section 6 and Article XX, Paragraph 1, a structured analysis of what this language means has not been developed. This case, however, gives the Court a perfect opportunity to fill this gap.

In so doing, this Court is free to develop its own standard for review of Arizona's constitutional provisions without being tethered to federal First Amendment analysis. Indeed, the majority of First Amendment caselaw that has been developed did not exist at the time Arizona's Constitution was adopted by the people, and Arizona specifically declined to adopt the language of the First Amendment. *See* Goff at 658-59.

Instead, when interpreting the provisions of Article II, Section 6 and Article XX, Paragraph 1, the starting point for analysis should be the text of those provisions. *See State v. Holle*, 240 Ariz. 300, 302, 379 P.3d 197, 199 (2016), cert. denied, 137 S. Ct. 1446, 197 L. Ed. 2d 650 (2017) (noting a statute's text is the most reliable indicator of intent). The text of both provisions is clear an unambiguous, and they convey broad liberties:

> Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.
>
> and
>
> Perfect toleration of religious sentiment shall be secured to every inhabitant of this state, and no inhabitant of this state shall ever be

> molested in person or property on account of his or her mode of religious worship, or lack of the same.

If a state action infringes on a person's right to "freely speak, write, and publish" or if it does not exhibit "[p]erfect toleration" of a person's "religious sentiment," then such action should be considered presumptively unconstitutional under Article II, Section 6 and Article XX, Paragraph 1. If state action infringes on these liberties, strict scrutiny should apply.

This approach recognizes that "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160, 83 S. Ct. 554, 563, 9 L. Ed. 2d 644 (1963). State action that infringes on individual liberties guaranteed under the Arizona Constitution may be justified under certain circumstances. To determine whether an infringement on liberties is justified, the court should determine whether the action is "narrowly tailored to serve compelling state interests." *See Graham v. Tamburri*, 240 Ariz. 126, 130, 377 P.3d 323, 327 (2016).

III. A textual approach would not require this Court to overrule existing precedent.

The framework suggested above is straightforward. It gives force to the statement that the Arizona Constitution provides greater protections to free speech and free exercise than does the Federal Constitution. It is also consistent with the rulings that this Court has made in previous cases in which it has considered the

application of Article II, Section 6.[4] This approach, therefore, does not require this Court to overrule any of its precedent. Rather, it provides a disciplined, systematic approach to Article II, Section 6 and Article XX, Paragraph 1 analysis which has formerly been lacking in the jurisprudential analysis.[5]

In *Mountain States*, for example, the Court determined that "time, place, and manner" restrictions on speech "must be drawn with narrow specificity." *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 358, 773 P.2d 455, 463 (1989). This Court contrasted this approach with that taken by the United States Supreme Court, which had articulated a three-part test for determining whether a time, place, and manner restriction is reasonable: is the regulation content neutral, does it serve a significant governmental interest, and does it leave open ample alternate channels for communication. *Id., citing Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817 (1976). This Court held that "when dealing with regulations that affect speech," the state must regulate "with narrow specificity so as to affect as little as possible the ability

[4] Because the Court has not yet analyzed any case under Article XX, Paragraph 1 on its own terms a reversal of precedent is likewise not required.

[5] An early case to analyze Article II, Section 6 is *Phoenix Newspapers, Inc. v. Superior Court in & for Maricopa Cty.*, where this Court found that a newspaper would not be prohibited from printing material disclosed in open court. 101 Ariz. 257, 259, 418 P.2d 594, 596 (1966). Some years later, in *Phoenix Newspapers, Inc. v. Jennings* this Court held that Article II, Section 6 and Section 11 gave the public the right to attend criminal trials even though this right was not within the First Amendment. 107 Ariz. 557, 490 P.2d 563 (1971).

of the sender and receiver to communicate." *Id.*[6] That analysis is consistent with the approach suggested here.

IV. The textual standard applied to this case requires the application of strict scrutiny to Phoenix City Code § 18–4(B)(2)–(3).

In this context of this case, application of the textual standard requires a reversal of the Court of Appeals' decision.

The custom artwork that Appellants create for weddings and other occasions, including painting, calligraphy, and hand-lettering, implicate their ability to write freely. Appellants write words on their custom designs, and Phoenix City Code § 18–4(B)(2)–(3) (the "Phoenix Ordinance") would compel Appellants to write. State action that compels a person to write things with which they disagree clearly interferes with that person's ability to "freely write" and therefore presumptively violates Article II, Section 6.

Similarly, Appellant's objection to creating custom artwork for same-sex weddings arises from sincere religious belief. *Brush & Nib Studio, LC v. City of Phoenix*, 244 Ariz. 59, 418 P.3d 426, 444 (Ct. App. 2018) (noting that the City of Phoenix does not dispute that Appellants are motivated by sincere religious belief).

[6] After *Mountain States*, *State v. Stummer* was the next Arizona Supreme Court case to analyze Article II, Section 6. 219 Ariz. 136 (2008). Striking down a regulation on the hours that an adult book store could remain open, this Court affirmed that the Arizona Constitution provides greater protection to free speech than does the First Amendment. In a narrowly drawn ruling, the Court describes this restriction as one involving "content-based secondary effects regulation" of speech and analyzed the regulation under an intermediate standard of scrutiny. *Id.* at 144. After the Court's analysis, however, it is unclear whether the standard developed by the Court would call for a different conclusion than the federal standard, and the Court's analysis on this point is likely dicta.

The question then becomes whether forcing Appellants to create custom artwork offensive to their particular religious beliefs secures "perfect toleration" of their "religious sentiment." Clearly not. "Perfect" toleration would forbid the state from forcing religious devotees to perform actions contrary to their beliefs. For example, it would obviously not be "perfectly tolerant" of religious sentiment for the state government to force a Muslim to draw a picture of Muhammed. Similarly, it is not perfectly tolerant of Appellants' religious sentiment for the state to force them to create wedding art that celebrates same-sex marriage when they have an undisputedly religious-based objection. Both actions force religious adherents to act in ways that run contrary to their beliefs. The Phoenix Ordinance thus violates the plain language of Article XX, Paragraph 1.

As presumptively violative of Article II, Section 6 and Article XX, Paragraph 1, the Phoenix Ordinance would therefore be subject to strict scrutiny.

CONCLUSION

This Court should use this case as an opportunity to adopt a textual approach to analyzing the free speech and religious liberty guarantees of the Arizona Constitution that gives effect to its unique language over and apart from that of the Federal Constitution. In applying a textual approach, the Court of Appeals' decision should be reversed.

RESPECTFULLY SUBMITTED this 20th day of December, 2018,

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