ARIZONA COURT OF APPEALS

DIVISION ONE

BRUSH & NIB STUDIO, LC, a limited liability company; BREANNA KOSKI; and JOANNA DUKA,	)	No. 1 CA-CV 16-0602
Plaintiffs/Appellants,	)	Maricopa County Superior Court No. CV2016-052251
v.	)	
CITY OF PHOENIX,	)	
Defendant/Appellee.	)	

APPELLANTS' OPENING BRIEF

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INTRODUCTION

When commissioned artists create paintings and write words, they engage in protected speech — speech the government cannot compel or censor. This protection only increases when the government censors art motivated by religious beliefs or compels art forbidden by religious beliefs. These fundamental principles of artistic and religious freedom are at stake in this appeal.

Joanna Duka and Breanna Koski are Christian artists who own and operate a Phoenix art studio called Brush & Nib Studio, LC. ROA-30[1] ¶¶ 4-5, 7-8, 16, 56. They believe that God gave them their skills to create artwork using hand-painting, hand-lettering, and calligraphy and that they must honor God — their ultimate standard of beauty — with those artistic talents. ROA-30 ¶¶ 4-5, 16, 56-63. They also believe that they must only create artwork consistent with their Christian beliefs and that they should share with the public their religious beliefs and how those beliefs affect what artwork they can create. ROA-30 ¶¶ 62-75, 111, 144-150. Because of their desire to speak and create art consistent with these beliefs, they are now in the crosshairs of Phoenix City Code § 18-4(B).

This law makes it unlawful for public accommodations to either (1) decline to provide accommodations to people on the basis of specified classifications,

[1] "ROA" refers to the record on appeal and the number immediately following the hyphen refers to the document number on the Electronic Index of Record.

including sexual orientation, or to (2) publish speech which states or implies that services will be declined or that a person would be "unwelcome, objectionable, unacceptable, undesirable or not solicited" because of those specified classifications. § 18-4(B)(1)-(3). This law should not impact Joanna and Breanna's religious expression because they decide what art to create based on its message, not any prospective client's personal characteristics, i.e., they do not discriminate based on sexual orientation. ROA-30 ¶¶ 76-78; ROA-68 at 60:19-61:4. But Phoenix misapplies the law to Joanna and Breanna in a manner that (1) bans them from publishing a religiously motivated statement expressing their religious beliefs and how those beliefs impact what art they create and (2) compels them to create art celebrating and promoting same-sex marriage in violation of their Christian beliefs about marriage. ROA-30 ¶¶ 110-111.

This application tramples Joanna and Breanna's right to speak, to not speak, and to exercise their religion as protected by the Arizona Constitution's Free Speech Clause and the Arizona Free Exercise of Religion Act (FERA). But the Superior Court refused to remedy these injustices. It instead concluded that Joanna and Breanna's "creation of custom lettering or artwork…does not constitute expressive speech" and that publishing a religiously motivated statement and declining to create artwork contradicting one's core religious beliefs does not involve "religious activity" under the law. App. 24-25.

The lower court's ruling is both dangerous and unbounded. It allows the government to compel or censor *any* commissioned speech, from forcing an atheist marketer to create a commercial for a church rally to compelling a gay graphics designer to create book-jacket art for a Jewish rabbi's book criticizing homosexuality. Thus, in addition to harming Joanna and Breanna, the Superior Court's decision imperils the freedom for all Arizonans to choose the speech they promote and the speech they avoid. To stop this result, Joanna and Breanna respectfully ask this Court to order the Superior Court to grant the preliminary injunction requested below.

STATEMENT OF THE CASE

Plaintiffs/Appellants Joanna Duka, Breanna Koski, and their art studio, Brush & Nib Studio, LC, filed a pre-enforcement action challenging Phoenix City Code § 18-4(B)(1)-(3).[2] They also filed a preliminary injunction motion seeking as-applied relief only. First, they argued that Phoenix's application of § 18-4(B) to them violates the Free Speech Clause of Article II, § 6 of the Arizona Constitution by (1) banning them from publishing a statement of their religious beliefs and how those beliefs impact the art they can create and (2) compelling them to create artwork expressing messages celebrating and promoting same-sex marriage.

[2] For simplicity's sake, this brief refers to all Plaintiffs/Appellants collectively as either "Brush & Nib" or "Joanna and Breanna."

ROA-5 at 3-11. Second, Joanna and Breanna argued that applying § 18-4(B) to ban their religiously motivated speech and to force them to design and create art that violates their religious beliefs violates their rights under the Arizona Free Exercise of Religion Act (FERA), Ariz. Rev. Stat. § 41-1493.01(A). ROA-5 at 11-12.

After expedited discovery and a hearing, the Superior Court denied the preliminary injunction motion, erroneously concluding that § 18-4(B) does not prohibit speech, compel speech, or implicate protected religious activity. App. 19-20, 25-26. Joanna and Breanna now appeal that order, which this Court has jurisdiction to review under Arizona Revised Statute § 12-2101(A)(5)(b).

STATEMENT OF FACTS

Joanna Duka and Breanna Koski are Christian artists. ROA-30 ¶¶ 7-8, 56. In early 2015, only several months after meeting at their church's Bible study, they started Brush & Nib Studio, LC. ROA-30 ¶¶ 10, 12-15. Brush & Nib is an upscale, for-profit art studio in Phoenix that creates custom artwork for weddings, home décor, special occasions, and a multitude of other purposes. ROA-30 ¶¶ 5, 16. It promotes its artwork and artistic services to, and accepts orders from, the general public. ROA-30 ¶¶ 14-15, 17. And like most other art studios in its field, Brush & Nib ships artwork to clients across the country. ROA-30 ¶¶ 83-85.

As the only ones who work at Brush & Nib, Joanna and Breanna create all of Brush & Nib's artwork and use their hand-painting, hand-lettering, and calligraphy skills to create artwork that reflects their personal techniques, tastes, and inspirations. ROA-30 ¶¶ 4, 16, 31. Most of the custom artwork they create incorporates both hand paintings and hand-written words. *See* ROA-30 ¶ 27.

I. Joanna and Breanna's religious beliefs inspire and guide their artistic pursuits and all other aspects of their lives and vocations.

As Christians, Joanna and Breanna believe that God called and equipped them to be artists, that they must glorify God with their artistic talents and artwork, and that they cannot do anything in their art business that violates their religious beliefs or dishonors God. ROA-30 ¶¶ 57-60. As Brush & Nib's operating agreement explains, Joanna and Breanna believe "that Jesus Christ has authority over their entire lives, and that Jesus requires them to live their entire lives — vocations included — in an authentic manner consistent with the doctrines of their faith." App. 38; ROA-68 at 50:9-25. For example, Joanna and Breanna believe that they must create art that reflects and promotes goodness, truth, and beauty. ROA-30 ¶¶ 60-63; ROA-68 at 50:12-20, 51:1-4. To create artwork condoning or promoting anything dishonorable to God would violate their religious beliefs. ROA-30 ¶¶ 64-66, 89.

II. Joanna and Breanna desire to publically express their religious beliefs and the impact of those beliefs on their artistic pursuits.

Through their art and their internet platforms, Joanna and Breanna seek to communicate messages that reflect and promote their beliefs about art, God, beauty, truth, and goodness. App. 39; ROA-36 ¶¶ 268-270; ROA-68 at 32:8-12. For example, in an Instagram posting of a type that is "[f]airly typical" for them, Joanna and Breanna presented to the public an image of their artwork containing a scripture passage with the goal of bringing hope to a world with "a lot of discouragement and hopelessness." ROA-68 at 32:19-34:8; ROA-76 Ex. 6.

To fulfill their religious obligations, Joanna and Breanna wish to publish a statement on Brush & Nib's website informing prospective patrons of the religious inspiration behind their art, their religious beliefs about art and marriage, and how their beliefs impact the artwork they create and their artistic message. ROA-30 ¶¶ 72-75, 146-150; ROA-68 at 72:8-18; App. 35-36.[3] Publishing this statement that dispels false assumptions about what art they can create will also further their religious duty to be upfront, honest, and respectful with their clients. ROA-30 ¶¶ 72-73, 143-144; ROA-68 at 72:8-15.

[3] App. 35-36 is the statement Joanna and Breanna wish to publish. The statement includes a hyperlink to an article discussing marriage, which is reflected in ROA-76 Ex. 24.

The statement explains that God is Joanna and Breanna's "artistic inspiration" and "the ultimate source and meaning of true beauty." App. 35. It further expounds that Joanna and Breanna's "vision of the beautiful…impacts everything [they] do" and "what [they] can't do." *Id.* Thus, it provides that they cannot "create any artwork that violates [their] vision as defined by [their] religious and artistic beliefs and identity," such as art "that demeans others, endorses racism, incites violence, contradicts [their] Christian faith, or promotes any marriage except marriage between one man and one woman," such as same-sex marriage. App. 35, 39-40. Joanna and Breanna's position on that last subject stems from their adherence to the longstanding Christian belief that God created marriage to be a covenant between a man and a woman that reflects His glory and Christ's love for His church. ROA-68 at 53:13-15; ROA-30 ¶ 67; ROA-76 Ex. 24; App. 35-36.

III. Joanna and Breanna's decisions about what custom artwork to create focus on the message of the artwork, not the characteristics of their patrons.

Joanna and Breanna believe that God created everyone in His image and that everyone should be treated with equal dignity and respect. ROA-68 at 56:7-9; ROA-30 ¶ 71. Consistent with these beliefs, Joanna and Breanna do not consider a client's sexual orientation in determining whether to accept a request for

commissioned artwork.[4] ROA-68 at 61:2-4; ROA-30 ¶¶ 76-78. Rather, they assess the *message* that they will send through the custom artwork and whether that message is one they can convey without violating their artistic and religious beliefs. ROA-68 at 60:19-61:1; ROA-30 ¶¶ 60-66, 78.

It is this message of the requested artwork — as opposed to the status of the person requesting the artwork — that prevents Joanna and Breanna from designing and creating custom artwork for same-sex marriages. ROA-30 ¶¶ 76-78. For when Joanna and Breanna create custom artwork for a wedding, they convey "celebratory, affirming, and promotional messages" about the marriage and wedding ceremony that is the subject of their art. ROA-30 ¶ 68; ROA-68 at 89:10-12. As Joanna testified, "when we create a custom piece of art, we are celebrating that event or that marriage along with our clients. And so we as Christians can only celebrate and participate in a marriage that is in line with what God says marriage is." ROA-68 at 57:2-6.

[4] Moreover, Joanna and Breanna will sell their pre-made works of art — which are available for purchase on their online "Etsy" store and which they make without a particular event or client in mind — to anyone for any event. ROA-30 ¶ 78; ROA-36 ¶¶ 74-78; ROA-68 at 26:19-25, 86:9-13.

IV. Joanna and Breanna collaborate with clients and then imagine and create custom artwork that expresses Joanna and Breanna's message.

Joanna and Breanna design and craft their custom artwork with a client's specific event in mind, using the client's event as the raw material for their expressive creations. ROA-68 at 26:19-25, 37:1-4. With a specific client, event, and message in mind, Joanna and Breanna pour their vision, heart, and soul into their artistry to create the perfect artistic work that conveys their own artistic vision. ROA-68 at 98:10-13; ROA-36 ¶¶ 227-228; ROA-39 ¶¶ 57-58; ROA-30 ¶ 39.

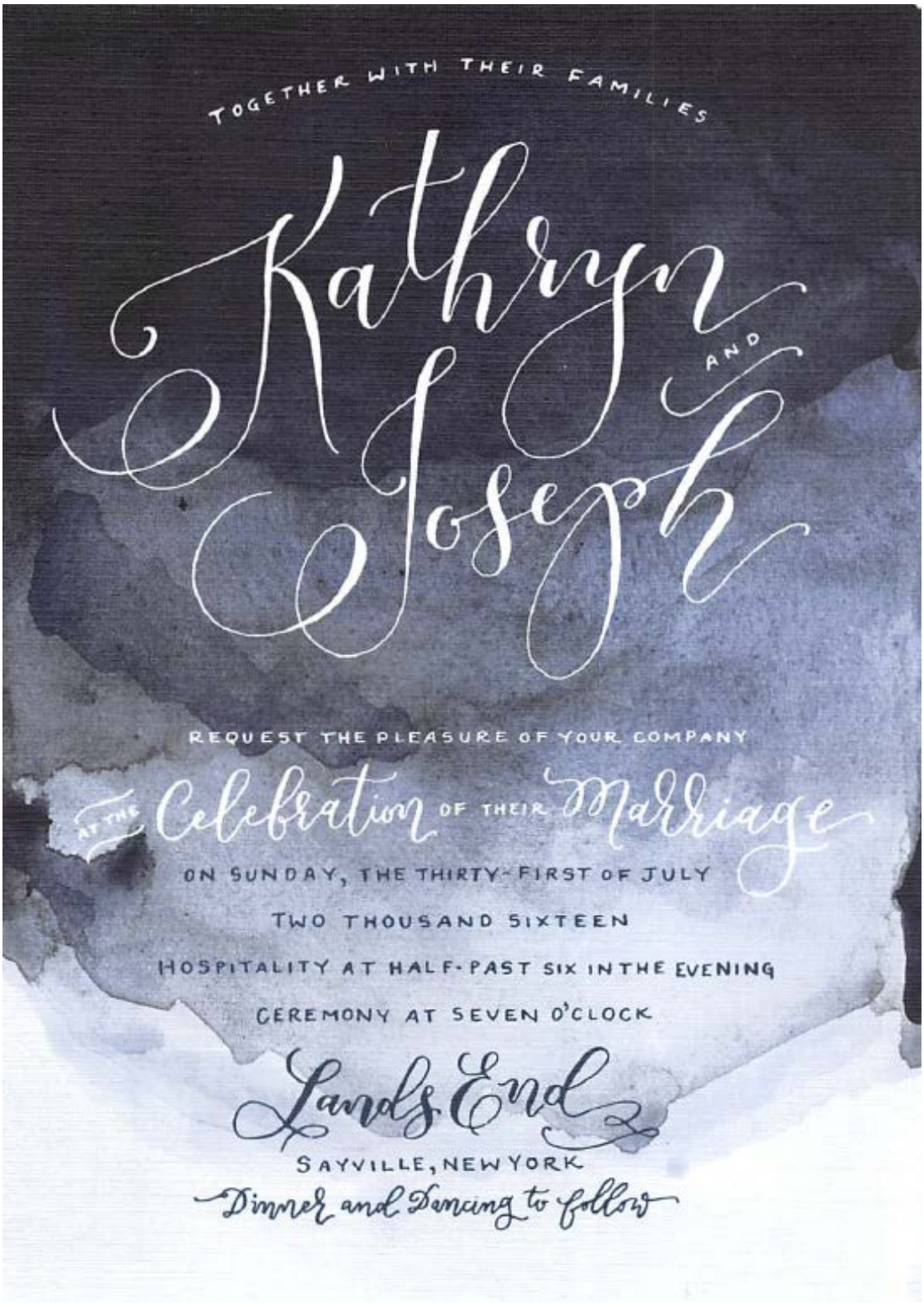
Of all the artwork Joanna and Breanna create, wedding artwork is their favorite form of artistic expression as well as their primary outlet for custom artwork. ROA-68 at 26:10-13. Joanna and Breanna offer custom wedding artwork for a variety of uses, such as invitation suites, "save-the-dates," wedding programs, wedding vows, marriage certificates, and wedding signs. ROA-36 ¶¶ 60-61.

Before putting brush and nib (a specialized pen tip) to paper for their wedding artwork, Joanna and Breanna consult with their patrons to ascertain the practical details of the wedding — such as the date and venue — as well as the styles, colors, and desired feel of the wedding celebration. ROA-68 at 36:10-21, 22:14-20. These details affect what they create. ROA-30 ¶ 36. Moreover, Joanna and Breanna often advise their clients about optimal artistic schemes and word usage. ROA-30 ¶¶ 34-35. In fact, although clients usually have a general idea of

what they want, they rely heavily on Joanna and Breanna's artistic judgment and talent. ROA-30 ¶ 33.

Joanna and Breanna — without client involvement — collaborate together, considering colors, lettering styles, painted designs, and other artistic elements as well as how those elements can be used to create artwork with the appropriate aesthetic and message distinctive of their style. ROA-68 at 37:22-38:1, 38:6-12; ROA-30 ¶¶ 40-42. They then breathe life into their designs by creating sketched or painted drafts, making adjustments, and then creating final proofs reflecting their artistic vision. ROA-68 at 38:2-5.

Consideration of the wedding invitation included on the following page helps illustrate how Joanna and Breanna transform raw information into art.


TOGETHER WITH THEIR FAMILIES
Kathryn
AND
Joseph
REQUEST THE PLEASURE OF YOUR COMPANY
AT THE Celebration OF THEIR Marriage
ON SUNDAY, THE THIRTY-FIRST OF JULY
TWO THOUSAND SIXTEEN
HOSPITALITY AT HALF-PAST SIX IN THE EVENING
CEREMONY AT SEVEN O'CLOCK
Lands End
SAYVILLE, NEW YORK
Dinner and Dancing to follow

While a picture of artwork cannot do it justice, Joanna and Breanna created this invitation for a wedding scheduled at an outdoor, waterfront venue.[5] ROA-68 at 40:13-41:5; App. 45-46. Blue was the main color for the wedding, and the bride liked artistic, abstract works with romantic flairs. *Id.* Joanna and Breanna took that raw information and transformed it into artwork with an "abstract dark blue background bearing shades of blue" that "mimics the water in the ocean" and a lettering style that is "very romantic" and "more laid back." ROA-68 at 40:21-22, 41:6-12.

In going through their intricate design process, Joanna and Breanna's artistic decisions for wedding invitations are driven in part by their belief that the "invitation is about celebrating [the] wedding." ROA-68 at 42:5-8. In fact, all of their custom wedding invitations include language that celebrates the wedding and marriage. ROA-68 at 42:5-14. For example, Joanna and Breanna created the invitation above to communicate to invitees that the happy couple request "the pleasure of your company at the celebration of their marriage," ROA-68 at 40:13-22, 41:16-42:8, and another invitation encouraging the couple's invitees "to share in the joy of their marriage," ROA-68 at 45:13-46:8; ROA-76 Ex. 10.

[5] Additional pictures of Joanna and Breanna's artwork can be viewed at Brush & Nib's Instagram account available here: https://www.instagram.com/brushandnib.

Knowing that a wedding invitation is often the first communication friends and family receive about an upcoming marriage, Joanna and Breanna design their invitations so the recipients will "be excited for [the] wedding" and will "get an idea of the style of what the couple has planned." ROA-68 at 44:1-4. Indeed, Joanna and Breanna's custom wedding creations always "convey messages about a particular engaged couple, their upcoming marriage…and the celebration of that marriage." ROA-30 ¶ 22.

Not only do Joanna and Breanna convey messages through their custom works, but they are — and wish to be — identified as the authors of those messages. ROA-36 ¶¶ 200-211. As many know, wedding attendees commonly ask who is responsible for the wedding art. ROA-30 ¶ 53; ROA-36 ¶¶ 204. For those who do not ask, Joanna and Breanna include a self-identifying mark on their custom works as a general practice that identifies themselves as the owners, authors, and speakers of the art and its message. ROA-30 ¶¶ 50-52. Since February 2016, they have placed a self-identifying mark on every wedding invitation and that mark includes Brush & Nib's website address. ROA-30 ¶¶ 50, 54; ROA-68 at 44:7-23; App. 46.

Given their focus on their artistic message, the contract clients sign explains that Joanna and Breanna control how they create their artwork and reserve the right to decline any commissioned art communicating messages that violate their beliefs.

ROA-30 ¶ 48; ROA-36 ¶ 182; App. 43-44. The contract further explains that clients only hire Joanna and Breanna as independent contractors, that clients do not own the designs Joanna and Breanna create, and that Joanna and Breanna reserve their ownership and copyright interests in the designs and artwork they create. ROA-30 ¶ 49; App. 42-44.

V. Phoenix law bans Joanna and Breanna's desired speech and compels artistic expression that violates Joanna and Breanna's religious beliefs.

As a Phoenix business, Brush & Nib is subject to Phoenix City Code § 18-4(B), which prohibits places of public accommodation from discriminating based on sexual orientation. § 18-4(B)(1)-(3); App. 15, 18 n.2 (noting that Brush & Nib is "a place of public accommodation as defined by" § 18-3). Even though Joanna and Breanna do not consider the sexual orientation of their prospective clients, and instead consider whether their beliefs allow them to promote the message of requested custom artwork, ROA-30 ¶¶ 76-78; ROA-68 at 60:19-61:4, Phoenix considers it illegal sexual-orientation discrimination under § 18-4(B) for them to (1) publish their desired statement about their religious beliefs and how those beliefs impact the art they are able to create or (2) decline commissions to create custom artwork celebrating same-sex marriage in violation of their beliefs, App. 17-18, 29-32.

Regarding the publication issue, Phoenix affirmed in written discovery its position that Joanna and Breanna will violate § 18-4(B) if they publish their

desired statement on Brush & Nib's website. App. 17-18, 29-30. After asserting that the statement violates § 18-4(B) by explaining that Joanna and Breanna "won't create any custom art, such as wedding invitations, for same-sex wedding ceremonies," Phoenix took issue with other parts of the statement, including affirmations like "[w]e believe that God created marriage as a life-long union exclusively for one man and one woman." App. 30. In contrast, Phoenix acknowledged that businesses are permitted to publish their beliefs *supporting* same-sex marriage. ROA-30 ¶¶ 166, 168-169; ROA-70 ¶ 168.

Phoenix also asserted that it is illegal for Joanna and Breanna to decline a request to create custom artwork promoting same-sex marriage. *See* App. 30-32, 37 ¶ 563. Phoenix maintained this position even though Joanna and Breanna would explain to any requestor that they "would happily consider creating artwork for you for a different project." App. 37 ¶ 563. Joanna and Breanna's intended response even refers the prospective client to a website listing Arizona artists who create artwork for same-sex wedding ceremonies. *Id.*

Thus, under Phoenix's view of the law, Joanna and Breanna cannot publish their desired statement or decline to create custom artwork promoting same-sex marriage without violating § 18-4(B), which carries a penalty of up to $2,500 in fines, six months' imprisonment, probation for three years, or any combination thereof for *each day* they violate it. ROA-30 ¶ 109. Phoenix City Code § 18-4(B)

is the only reason Joanna and Breanna have not published their religiously motivated statement and have not responded with their desired message to a request they received asking them to create custom artwork for a same-sex wedding. ROA-30 ¶¶ 132-133, 152, 164-165; ROA-36 ¶¶ 368-370, 399, 445-447. Because of this ongoing violation of their religious and artistic freedoms, and the criminal penalties they could face if they exercised their rights, Joanna and Breanna sought a preliminary injunction and now appeal the denial of that injunction.

STATEMENT OF THE ISSUES

1. Is commissioned artwork containing hand-drawn paintings and hand-written words protected speech under Article II, Section 6 of the Arizona Constitution?

2. Does Phoenix violate Article II, Section 6 of the Arizona Constitution by barring commissioned artists and a for-profit art studio from explaining on the studio's website their artistic and religious beliefs about marriage and how those beliefs impact what art they are willing to create?

3. Does Phoenix compel speech in violation of Article II, Section 6 of the Arizona Constitution by forcing commissioned artists and a for-profit

art studio to design and create custom artwork that those artists find objectionable?

4. Does Phoenix violate Arizona's Free Exercise of Religion Act by using the threat of criminal fines and jail time to prevent commissioned artists and a for-profit art studio from explaining on the studio's website their religious beliefs about marriage and how those beliefs impact what art they are willing to create?

5. Does Phoenix violate Arizona's Free Exercise of Religion Act by using the threat of criminal fines and jail time to force commissioned artists and a for-profit art studio to design and create artwork that violates the artists' religious beliefs?

6. Should a preliminary injunction issue?

ARGUMENT

With each passing day, Phoenix prevents Joanna and Breanna from publishing a statement explaining their artistic and religious beliefs on their studio's website. Phoenix also uses the threat of severe penalties to force Joanna and Breanna to design and create artwork expressing messages forbidden by their religious beliefs. To alleviate this irreparable harm, Joanna and Breanna ask this Court to instruct the Superior Court to issue a preliminary injunction.

To obtain a preliminary injunction, Joanna and Breanna must establish that (1) their claims will likely succeed, (2) that they will possibly suffer irreparable harm without an injunction, (3) that the balance of hardships favors them, and (4) that public policy favors an injunction. *Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12 ¶ 12 (Ct. App. 2009). To succeed, Joanna and Breanna can show either (a) probable success and possible irreparable harm or (b) the presence of serious questions going to the merits and a balance of hardships sharply favoring them. *Id.* at 12 ¶¶ 12-13. Joanna and Breanna can satisfy either test.[6]

I. Joanna and Breanna are likely to succeed on the merits because applying § 18-4(B) to them censors speech based on content and viewpoint and compels artistic expression.

Phoenix City Code § 18-4(B) violates Joanna and Breanna's right to speak and refrain from speaking guaranteed by the Arizona Constitution's Free Speech

[6] This Court reviews a superior court's "decision to deny a preliminary injunction for an abuse of discretion." *McNally v. Sun Lakes Homeowners Ass'n #1, Inc.*, 241 Ariz. 1, 2 ¶ 11 (Ct. App. 2016). A court abuses its discretion when it commits an error of law. *Id*. Whether a court committed an error of law is reviewed de novo. *Id*. While this appeal does not raise questions of fact, if it did, instead of the typical "clearly erroneous" review, *see id.*, this Court should review those questions by conducting an "independent review" of the record because of the constitutional question involved, *see Dombey v. Phx. Newspapers, Inc.*, 150 Ariz. 476, 482 (1986).

Clause.[7] That clause provides that "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Ariz. Const. art. II, § 6.

Arizona's Free Speech Clause provides even more protection than the First Amendment. *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354-56 (1989) (applying "the broader freedom of speech clause of the Arizona Constitution" rather than the First Amendment). Because of this broader protection, a violation of the First Amendment "necessarily implies" a violation of Arizona's Constitution. *Coleman v. City of Mesa*, 230 Ariz. 352, 361 n.5 (2012). And Phoenix has violated Arizona's Free Speech Clause by silencing Joanna and Breanna's protected speech — their desired website statement — and by compelling their protected speech — the forced design and creation of artwork with paintings and artistically-lettered words.

A. Joanna and Breanna's words, artwork, artistic process, and artistic business are constitutionally protected pure speech under *Coleman v. City of Mesa*.

Joanna and Breanna want to post a statement with words on their website, design and create art with beautiful words and paintings, and engage in the business of creating and selling their art. Each of these activities constitutes pure

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[7] This Court reviews the as-applied constitutionality of § 18-4(B) de novo. *See State v. Evenson*, 201 Ariz. 209, 212 ¶ 12 (Ct. App. 2001).

speech under the Arizona Free Speech Clause as the Arizona Supreme Court already held in *Coleman*.

Coleman involved a claim by tattooists that Mesa violated their free-speech rights by denying them a permit to operate a tattoo parlor. *Id.* at 355 ¶ 1. In analyzing this challenge, *Coleman* recognized two types of protected speech: (1) "pure speech" that refers "not only to *written* or spoken *words*, but also to other media (such as *painting*, music, and film) that predominantly serve to express thoughts, emotions, or ideas" and (2) "conduct with an expressive component." *Id.* at 356-57 ¶¶ 18-19 (emphasis added). Crucially, *Coleman* considered written words and paintings — the very forms of expression involved here — to be pure speech. *Id.* at 358 ¶ 18.

Coleman also found tattoos, which are "generally composed of words, realistic or abstract symbols, or some combination" thereof, to be pure speech. *Id.* at 359 ¶¶ 23-24. *Coleman* also noted that tattoos "can express a broad range of messages, and they may be purely decorative or serve religious, political, or social purposes." *Id.* at 359 ¶ 24. That perfectly describes Joanna and Breanna's desired website statement and artwork as well. Thus, *Coleman*'s conclusion that tattoos are protected speech applies equally to Joanna and Breanna's words and paintings — a conclusion that is unexceptional. *See, e.g.*, *Kaplan v. California*, 413 U.S. 115, 119 (1973) (noting that "paintings" and "the printed word have First Amendment

protection"); *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015) (treating words and paintings as pure speech entitled to First Amendment protection); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010) (same); *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (holding "that the First Amendment protects an artist's original paintings").

In a startling move though, the Superior Court below rejected the judicial consensus that words and paintings are pure speech in concluding that Joanna and Breanna's "creation of custom lettering or artwork…does not constitute expressive speech." App. 24. But the Superior Court could only reach this conclusion by ignoring *Coleman* — a decision it failed to cite even once despite counsel's emphasis of its importance. *See, e.g.*, ROA-68 at 113:24-114:1.

Instead of treating Joanna and Breanna's words and paintings as pure speech under *Coleman*, the Superior Court analyzed whether they were symbolic or expressive conduct. App. 21-22. But Joanna and Breanna never invoked symbolic or expressive conduct arguments below; they urged their art to be deemed pure speech. Because *Coleman* is binding, the Superior Court's conclusion must be wrong. Joanna and Breanna's words and paintings are pure speech. Any other conclusion would eviscerate *Coleman* and endanger the freedom to communicate through words and paintings.

Not only are Joanna and Breanna's words and paintings pure speech, but so is their process of creating this pure speech. *Coleman* once again explains why. Case law "has not distinguished 'between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded.'" *Coleman*, 230 Ariz. at 359 ¶ 26 (quoting *Anderson*, 621 F.3d at 1061). For this reason, "the art of writing is no less protected than the book it produces; nor is painting less an act of free speech than the painting that results." *Id.* That is because the process of "writing or painting" is "inextricably intertwined with the purely expressive product" that results from the process. *Anderson*, 621 F.3d. at 1062.

The same language and logic applies to Joanna and Breanna's process of writing words and drawing paintings. Indeed, if the process of creating tattoos is pure speech as *Coleman* held, Joanna and Breanna's process of writing words and drawing paintings must be pure speech as well.

Finally, Joanna and Breanna's business of creating pure speech is also constitutionally protected. Once again, *Coleman* mandates this conclusion for it held that "the business of tattooing is constitutionally protected" because "tattooing is protected speech." 230 Ariz. at 360 ¶ 31. *Coleman* reached that conclusion for a simple reason: "The degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away." *See id.*

(alteration in original) (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988)). Under the same logic, Joanna and Breanna's right to free speech is not diminished simply because they sell their art. Free speech protects the professional and amateur artist alike.

Thus, the principle of *Coleman* is that when the end product is pure speech, both the process of creating the speech and the business of creating the speech constitute pure speech. *See id.* at 359 ¶ 26, 360 ¶ 31; *see also Anderson*, 621 F.3d at 1062 (indicating that "the process of writing words down on a paper [and] painting a picture...are purely expressive activities" and that even the "business of tattooing qualifies as purely expressive activity" because it is "intertwined with the process" of creating tattoos). But the Superior Court ignored this critical principle and repeatedly described Joanna and Breanna's artwork and artistic process as mere conduct. *See, e.g.*, App. 20 (claiming Phoenix law regulated "the *conduct* of refusing to sell and the *conduct* of publishing that refusal to sell" (emphasis added)).

On this score, *Coleman* is right and the Superior Court is wrong. If the government can divide and conquer, labelling the creation and sale of speech as conduct, then the government would have free rein to ban, compel, or choke out any speech it wants. "Laws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United v. Fed. Election Comm'n*,

558 U.S. 310, 336 (2010). For example, "[a] regulation limiting the creation of art curtails expression as effectively as a regulation limiting its display." *Buehrle*, 813 F.3d at 977. This is why laws purporting to regulate only the businesses or processes that create pure speech — but not the speech itself — cannot escape scrutiny. For if the process and business of creating speech is less protected than the speech itself, the government could effectively prevent "the exhibition of art" by "proceed[ing] upstream and dam[ming] the source," *id.*, separate "Picasso from his brushes and canvas," *Anderson*, 621 F.3d at 1062, and leave "Beethoven without the benefit of strings and woodwinds," *id.* The government could also effectively compel speech by claiming to only compel a speaker to engage in the "process" or "business" of creating speech.

Under such circumstances, freedom of expression would be a hollow promise. This is evidenced by the Superior Court's decision saying that Phoenix neither "prohibits free speech or compels undesired speech," but simply prohibits Joanna and Breanna's "conduct of publishing" their desired statement and "conduct of refusing to sell" their artistic talent for the creation of custom art. App. 20. To avoid such results and protect commissioned artists from governmental coercion and censorship of their speech, this Court should follow *Coleman* and protect the entire expressive process from creation to sale.

B. Phoenix City Code § 18-4(B)(3) bans Joanna and Breanna's website statement on the basis of its content and viewpoint.

Phoenix regulates Joanna and Breanna's speech by banning their desired website statement because of its content and viewpoint. This attack on speech appears on the face of § 18-4(B)(3) which bans "any…*communication*" that "implies" a "service shall be refused or restricted because of…sexual orientation" or that a person would be "unwelcome, objectionable, unacceptable, undesirable or not solicited" because of sexual orientation. § 18-4(B)(3) (emphasis added). Moreover, Phoenix admitted that it interprets this ordinance to prohibit Joanna and Breanna from posting their desired website statement. App. 30. And Phoenix does so because of the content of this statement. *Id.*

This is a content-based restriction on speech because it bans speech about some subjects — certain protected classes — but allows speech on other subjects (like people's political beliefs) not identified as a protected class. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."). Because § 18-4(B)(3) is content-based, this law is "presumptively unconstitutional" and subject to strict scrutiny. *See id.* at 2226-27; *accord State v. Evenson*, 201 Ariz. 209, 212-13 ¶ 13 (Ct. App. 2001).

Even worse than regulating speech based on its content, Phoenix's law also inflicts viewpoint discrimination — an "egregious form of content discrimination"

— that bans "particular views taken by speakers on a subject" while allowing other views on the same subject. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). For example, owners of a Phoenix art studio like Brush & Nib can publish a statement on their studio website supporting same-sex marriage and expressing a desire to create artwork celebrating same-sex marriage. *See* ROA-30 ¶¶ 166, 168-169; ROA-70 ¶ 168. But Joanna and Breanna cannot publish their desired statement explaining their religious beliefs in support of marriage between one man and one woman or explaining why they cannot create artwork celebrating same-sex marriage. ROA-30 ¶¶ 102, 111; App. 30, 35-36. This allowance of one viewpoint and banning of another on the same topic is classic viewpoint discrimination. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) (finding restriction on fighting words based just on race, color, creed, religion, and gender to be viewpoint-based).

Phoenix cannot skirt strict scrutiny as the Superior Court did by analogizing Joanna and Breanna's website statement to a sign saying "White Applicants Only" on a business door. App. 23 (relying on *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) for this point). This analogy fails because that sign is speech incidental to *illegal conduct* (race-based hiring practices). In other words, the sign itself effectuates illegal conduct by rejecting prospective applicants of certain races before they even apply. *See Rumsfeld*, 547

U.S. at 62 (noting that, in certain circumstances, illegal conduct is in part "carried out by means of language" and that fact does not exempt the conduct from regulation). In contrast, Joanna and Breanna's statement is not incidental to any illegal conduct. Rather, it addresses their religious beliefs and explains their desire to not create artwork conveying objectionable messages—regardless of the status of the requestor. Put simply, it is directly connected to effectuating their constitutional right to create art of their choosing. *See* § I.C., *infra*. Joanna and Breanna's statement is therefore not analogous to a "White Applicants Only" sign but to a sign saying a parade will not accept pro-same-sex-marriage banners. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574-75 (1995) (noting that parade organizers have the right to decline to allow a gay and lesbian group to march behind that group's banner). Because Joanna and Breanna, like parade organizers, have a constitutional right to not speak (whether via parades or artwork), they also have a right to explain how they will exercise that right.

C. Phoenix City Code § 18-4(B)(1)-(2) compels Joanna and Breanna's speech.

Just as the Phoenix law bans speech, it also compels speech and is therefore unlawful *per se* or, at a minimum, subject to strict scrutiny. *See Hurley*, 515 U.S. at 575 (stating that "the choice of a speaker not to propound a particular point of view...is presumed to lie beyond the government's power to control"); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 19 (1986) (plurality) (applying strict

scrutiny to a law compelling speech). This steep obstacle to speech coercion is warranted because the bedrock principle of free speech "includes both the right to speak freely and the right to refrain from speaking." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Indeed, protecting against government-compelled expression is necessary to protect "the sphere of intellect" and "individual freedom of mind" from government intrusion. *Id.* at 714-15. Without such protection, governments could co-opt individuals' minds, words, and art to be "instrument[s] for fostering public adherence to an ideological point of view [those individuals] find[] unacceptable." *Id.* at 715.

1. Generally permissible public accommodation laws banning discrimination can impermissibly compel speech.

Over time, the scope of public accommodation laws has expanded, increasing "the potential for conflict" between such laws and constitutional freedoms. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656-57, 656 n.2 (2000). When these conflicts arise, courts may encounter government officials applying laws in a way that unconstitutionally compels speech even though the laws themselves are generally valid. *Hurley* illustrates this principle.

Hurley involved a Massachusetts public accommodation law banning discrimination on the basis of sexual orientation. *Hurley*, 515 U.S. at 561. The Court observed that — unlike the censorship of § 18-4(B)(3) — the law in *Hurley* did "not, on its face, target speech." *Id.* at 572. It further noted that "[p]rovisions

like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate" the First Amendment. *Id.*

Despite these caveats, the Court took issue with the "peculiar way" the state courts applied the law — namely, to force a parade organizer to allow an organization "to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals." *Id.* at 561, 572-73. The Court held that this peculiar application of the law violated "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573.

Case after case has recognized this principle that anti-discrimination laws sometimes apply in a "peculiar way" that violates free speech. *See, e.g.*, *Dale*, 530 U.S. at 659 (concluding that the First Amendment prohibited application of New Jersey's sexual orientation public accommodation law to compel an organization to accept members who would affect its expressive purpose); *Claybrooks v. Am. Broad. Cos.*, 898 F. Supp. 2d 986, 989-90, 1000 (M.D. Tenn. 2012) (rejecting claims that the producers of a television show engaged in illegal racial discrimination in their casting decisions because "the First Amendment protects the producers' right unilaterally to control their own creative content"); *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56, 59 (N.D. Ohio 1995) (barring

application of a Cleveland law prohibiting sex discrimination to force Islamic ministers to address a mixed-gender audience because that would necessarily change "the content and character of the speech"); *Hands On Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rights Comm'n*, No. 14-CI 04474 at 7-13 (Fayette Cir. Ct. Apr. 27, 2015)[8] (holding that a public accommodation law could not compel a print shop to print t-shirts for a gay-pride festival).

The case now before the Court is just another example like those above where the government seeks to apply a public accommodation law in a "peculiar way" that is impermissible. Given that "the Supreme Court has expressly found that the First Amendment can trump the application of antidiscrimination laws to protected speech," *Claybrooks*, 898 F. Supp. 2d at 993, there is nothing exceptional or dangerous about recognizing that Phoenix has applied § 18-4(B) to violate Joanna and Breanna's free-speech rights. Rather, to turn a blind eye to unconstitutional applications for fear of undercutting a generally valid law is both exceptional and dangerous. *Cf. Coleman*, 230 Ariz. at 357 ¶ 17 (noting that the fact that a law "may also apply to non-protected activities does not insulate it from constitutional challenge when applied to protected speech").

[8] Available at http://perma.cc/75FY-Z77D (last visited Feb. 23, 2017).

2. Phoenix compels Joanna and Breanna to speak by forcing them to imagine, create, and distribute objectionable artwork.

The guarantee of "freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quoting *Rumsfeld*, 547 U.S. at 61). As such, courts for decades have stopped the government from compelling people "to utter what is not in [their] mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943); *see, e.g.*, *id.* at 626, 642 (stopping local authorities from compelling school children to engage in a flag salute and pledge); *Wooley*, 430 U.S. at 706-07, 717 (prohibiting New Hampshire from punishing people for covering the state motto "Live Free or Die" on their vehicle's license plate, noting that people must have the "right to decline to foster" any "religious, political, and ideological causes"); *Hurley*, 515 U.S. at 560-61, 573 (protecting parade organizers' "autonomy to choose the content of [their] own message"); *Pac. Gas & Elec.*, 475 U.S. at 20-21 (forbidding California from requiring a business to include a third party's expression in its billing envelope); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (forbidding application of a Florida statute to require a newspaper to print an article submitted to it even if printing the article would create no additional costs and would not force the newspaper to forgo publishing other articles).

In each of these cases, the protected speakers did not create the speech involved. The students in *Barnette* were forced to say a pledge given them, the drivers in *Wooley* were forced to carry a state-provided license plate on their car, and the parade organizers in *Hurley* were forced to let a group march with them. Yet even these intrusions on the freedom of mind were too severe to be permitted. The same must be true here where the intrusion is far more egregious.

Phoenix does not merely seek to make Joanna and Breanna a passive courier of its message, but seeks to commandeer their very minds and bodies to envision, design, create, and convey its message. It does this via § 18-4(B)(1)-(2), which prohibits places of public accommodation like Brush & Nib from declining to provide any accommodations or privileges to any person "based on" sexual orientation. Because Joanna and Breanna create custom artwork celebrating marriages between one man and one woman, Phoenix interprets § 18-4(B)(1)-(2) as requiring them to create custom artwork celebrating same-sex marriages. App. 30-31; App. 17-18.

Nor is this some hands-off process that Phoenix compels. Joanna and Breanna create all of their custom wedding artwork with a particular wedding in mind. ROA-30 ¶¶ 19, 21. In doing so, they collaborate with their clients, collaborate with each other, and then infuse unique elements into their custom artwork based on the particular wedding. ROA-36 ¶¶ 73, 142-145. Joanna and

Breanna's process of envisioning and creating expression is a very personal one and involves the investment of their artistic visions, hearts, and souls. ROA-68 at 98:10-15; ROA-39 ¶¶ 57-59; ROA-36 ¶¶ 227-229. And all of their custom wedding artwork conveys messages about a particular couple and the celebration of their marriage — oftentimes with words explicitly encouraging celebration of the marriage. ROA-30 ¶¶ 22-23; ROA-68 at 41:16-42:14; App. 45, 48-49; ROA-76 Ex. 10.

Phoenix seeks to foist this very personal and involved expressive process on Joanna and Breanna to produce artwork promoting a ritual (same-sex wedding ceremony) and a union diametrically opposed to their religious beliefs. For example, Phoenix would force Joanna and Breanna to create works like wedding invitations, wedding programs, decorative signs, marriage certificates, and even marriage vows for same-sex marriages. ROA-76 Ex. 2; App. 30-32; ROA-68 at 23:20-27:22. In so doing, Phoenix would force Joanna and Breanna not just to hand-paint designs promoting the objectionable event — that is bad enough — but to hand-write words that would:

- request people to provide "the pleasure of [their] company at the celebration of" a same-sex marriage;
- encourage people to "share in the joy of" a same-sex marriage; and

- explain that "God has joined together" a same-sex couple as "one flesh" in a marital union.[9]

It is hard to fathom a more flagrant violation of one's freedom of mind than to force someone diametrically opposed to the above ideas — as Joanna and Breanna are — to create messages from scratch supporting those ideas and to convey them to others.

If this violation of Joanna and Breanna's rights is allowed to continue unchecked, the implications are stark, especially since public accommodation laws can continue to expand, and government policy can change with the winds of popular opinion. Even as currently written, § 18-4(B)(1)-(2) could be used to compel:

- an Orthodox Jewish woman who sings at special occasions to sing at an Easter Sunday service celebrating the resurrection of Jesus Christ;
- a lesbian musician who plays background music at fundraisers to perform at a fundraiser for the Westboro Baptist Church; and
- a gay web designer to create a website for a Mormon who wishes to provide online resources explaining the religious underpinnings of Mormon opposition to same-sex marriage.

[9] *See* App. 45, 47; ROA-76 Ex. 10; ROA-68 at 40:13-42:14, 45:13-46:5, 47:8-48:3.

These are results no one wants. And they are results the Arizona Free Speech Clause forbids. Yet these injurious results — government compulsion of artwork that violates artists' core values — are what the Superior Court's decision imposes on Joanna and Breanna.

3. Phoenix cannot compel access to Joanna and Breanna's artwork just because a client commissioned it.

Because Phoenix law compels Joanna and Breanna to create artwork conveying messages they object to, this law unconstitutionally compels speech. And this conclusion does not change just because Joanna and Breanna receive a commission for their art. There is no commissioned-speech exception to compelled-speech jurisprudence. *See Anderson*, 621 F.3d at 1062 (rejecting a theory that would deny First Amendment protections to painting by commission). Yet the Superior Court created such an exception when it reasoned that Phoenix could compel Joanna and Breanna to speak because people will attribute the messages of their artwork to their patrons' events, not to them, simply because their patrons paid them to speak. App. 24. This perceived endorsement theory is incorrect legally and practically.

Because this case involves pure speech (words and paintings), third-party perceptions are irrelevant. Indeed, the message understood by third parties is only relevant under the *Spence* test, which does not apply when pure speech is

involved.[10] *See Coleman*, 230 Ariz. at 358 ¶ 19. Thus, the state cannot force a newspaper to print someone else's editorial whether readers think the newspaper agrees with the editorial or not. *Tornillo*, 418 U.S. at 243-46. And the state cannot force individuals to display a state's motto on their car's license plate, whether observers think the car owners agree with that motto or not. *See Wooley*, 430 U.S. at 721 (Rehnquist, J., dissenting) (criticizing majority because the car owner was not put "in the position of either apparently…or actually 'asserting as true' the message" objected to). *See also Frudden v. Pilling*, 742 F.3d 1199, 1204-05 (9th Cir. 2014) (rejecting argument that bystanders had to think speaker affirmed message to state compelled speech claim).

This point also explains why disclaimers do not remedy compelled-speech problems. *See Pac. Gas & Elec.*, 475 U.S. at 15 n.11 (noting that a "disclaimer" that "serves only to avoid giving readers [a] mistaken impression" about who is responsible for the content they are receiving does not remedy compelled speech). A disclaimer saying the speaker disagrees with a message does not remove the harm of compelling the speaker to speak the message. Rather, compelling speech

[10] To gain speech protections, "conduct with an expressive component" — as opposed to pure speech — must satisfy the *Spence* test, which requires (1) "[a]n intent to convey a particularized message" and (2) that "'the likelihood [is] great that the message [will] be understood' by viewers." *Coleman*, 230 Ariz. at 358 ¶ 19 (alterations in original) (quoting *Spence v. Washington*, 418 U.S. 405, 409-11 (1974)).

because speakers can disclaim would result in an impermissible regime wherein the government "require[s] speakers to affirm in one breath that which they deny in the next." *See id.* at 16. In such cases, the speaker's freedom of mind is still compromised. *See Hurley*, 515 U.S. at 576 ("[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.").

This conclusion makes good sense too because the alternative would allow the government to compel commissioned speakers to accept *any* client request — no matter how offensive — such as requests to paint swastikas or write leaflets praising a sordid political agenda. The problems would be limitless. Instead, standard free-speech principles acknowledging the interests of authors and creators in their commissioned works should prevail. *See Coleman*, 230 Ariz. at 359 ¶¶ 25-26 (noting that a tattoo reflects the expression of the tattooist and the client); *see also Anderson*, 621 F.3d at 1062 ("As with all collaborative creative processes, both the tattooist and the person receiving the tattoo are engaged in expressive activity.").

Aside from the legal infirmities with relying on third-party perceptions, observers actually associate speech with its author and creator, not just its requestor. No one attributes the Sistine Chapel's ceiling artwork to Pope Julius II

because he commissioned it. They attribute it to Michelangelo. This logic applies with particular force to Joanna and Breanna because wedding attendees commonly ask who made the wedding art, and Joanna and Breanna even include a self-identifying mark on their custom wedding artwork. ROA-30 ¶¶ 50, 52-54; ROA-36 ¶¶ 200-206; ROA-68 at 44:7-23. Under the facts of this case, the element of attribution — though legally irrelevant — is undeniably in Joanna and Breanna's favor because people will attribute their art to them.

4. The Superior Court errantly analogized *Rumsfeld*'s decision allowing compelled access to an empty room to compelling access to artists' custom creation of art.

To justify its decision allowing Phoenix to compel Joanna and Breanna to create art, the Superior Court relied heavily on *Rumsfeld*, *see* App. 22-23, a readily distinguishable case. In *Rumsfeld*, the government demanded access to law schools' empty rooms for military recruiters. *See* 547 U.S. at 52. But empty rooms are not inherently expressive. Thus, the government could compel access to the rooms because granting access to the rooms was not "inherently expressive" and "the schools [were] not speaking" by providing that access. *See id.* at 64. Instead, the schools were simply allowing "expressive activities by others on [their] property." *Id.* at 65. But Joanna and Breanna's artwork, as an inherently expressive medium, is incomparable to non-expressive empty rooms. Compelling access to the former compels speech. Compelling access to the latter compels conduct. *See*

id. at 60 (stating that the law generally "regulated conduct, not speech" because it "affects what law schools must *do*...not what they may or may not *say*").[11]

In this respect, *Rumsfeld* actually bolsters Joanna and Breanna's argument because *Rumsfeld* surveyed prior compelled speech cases to illustrate the proper methodology for assessing compelled speech claims. That proper methodology focuses on the expressive nature of what governments mandate access to. *See id.* at 63-64 (noting that "[t]he expressive nature of a parade was central to our holding in *Hurley*" but "[a] law school's recruiting services lack the expressive quality of a parade"). Once this methodology is applied to what Phoenix compels access to here — Joanna and Breanna's artwork — the outcome becomes clear: their artwork shares "the expressive quality of a parade, a newsletter, or the editorial page of a newspaper," not an empty room, and therefore Phoenix cannot compel access to that artwork. *See id.* at 64.

Rumsfeld would have been more akin to the present matter had the government demanded that the law schools create posters promoting the very thing they objected to: the military's policy barring homosexuals from service. *See id.* at 52 & n.1. But the law schools were not required to create any expression regarding

[11] Although the government could also require law schools to send e-mails or post notices providing facts, such as the room number where recruiters were meeting students, the Court held that this compelled speech was "plainly incidental" to the conduct of granting access to the law school rooms. *See Rumsfeld*, 547 U.S. at 62.

that policy. Such compulsion would have impermissibly "interfer[ed] with a speaker's desired message" because the law schools opposed that policy. *Cf. id.* at 52, 64. Yet that is the type of compulsion involved here, wherein Phoenix interferes with Joanna and Breanna's desired message explaining God's design for marriage by requiring them to create artwork celebrating a different conception of marriage.

Beyond these critical distinctions is *Rumsfeld*'s backdrop: Congress's war powers. The *Rumsfeld* Court noted that "'judicial deference...is at its apogee' when Congress legislates under its authority to raise and support armies." *Id.* at 58 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)). Such heightened deference when Congress acts to defend the nation hardly applies when a city acts to defend access to custom artwork. For all these reasons, *Rumsfeld* does not justify the Superior Court's decision.

5. Phoenix cannot compel access to Joanna and Breanna's artwork just because courts in other jurisdictions have mistaken speech for conduct and contradicted *Coleman v. City of Mesa*.

Phoenix cannot compel Joanna and Breanna's speech just because some courts — unconstrained by the Arizona Supreme Court's methodology for identifying protected speech — have ruled against those who object to creating expression promoting same-sex marriage. Nevertheless, the Superior Court heavily relied on two such cases. App. 24. One involved wedding cakes. *See Craig v.*

Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. Ct. App. 2015), *cert. denied*, 2016 WL 1645027 (Colo. Apr. 25, 2016), *petition for cert. filed*, (U.S. July 25, 2016) (No. 16-111). The other, wedding photography. *See Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013). Then just recently, the Washington State Supreme Court ruled against a florist who objected to designing floral arrangements celebrating same-sex marriage. *See Washington v. Arlene's Flowers*, No. 91615-2, 2017 WL 629181 (Wash. Feb. 16, 2017).

All three of these cases, unbound by *Coleman*, separated the expressive products (the floral arrangements, wedding cakes, and wedding photographs) from the process and business of creating speech. Based on that misguided analysis, these cases essentially concluded that the challenged application of the public accommodation laws regulated *conduct, not speech*. *See, e.g.*, *Arlene's Flowers*, 2017 WL 629181, at *10-11 (stating that creating and selling floral arrangements is not "inherently expressive" and is instead "unprotected conduct"); *Elane Photography*, 309 P.3d at 68 (stating that "[w]hile photography may be expressive, the operation of a photography business is not"); *Masterpiece Cakeshop*, 370 P.3d at 283, 285 (holding that the case involved "compelled conduct" that was "not sufficiently expressive to warrant First Amendment protections").

Coleman and many other courts have already rejected this separation of the expressive product from the process and business of creating it. *See, e.g.*, § I.A,

supra; *Anderson*, 621 F.3d at 1062-63 (stating that the "tattooing process" and "the business of tattooing qualifies as purely expressive activity rather than conduct"); *Buehrle*, 813 F.3d at 975-77 (joining *Anderson* in holding that "the act of tattooing is sheltered by the First Amendment" as "protected artistic expression" and rejecting "decisions drawing a distinction between the process of creating a tattoo and the tattoo itself"). And for good reasons too, as Joanna and Breanna have explained above. *See* § I.A, *supra*.

Moreover, *Coleman* already addressed the specific type of expression involved here — "words" and "painting[s]" — and concluded that they are "pure speech" and that the process and business of creating pure speech are protected speech.[12] *Coleman*, 230 Ariz. at 358 ¶¶ 18-19, 359 ¶ 26, 360 ¶ 31; *see also* § I.A, *supra*. That is where this Court's analysis must begin and end in determining whether Joanna and Breanna deserve free-speech protection. In this respect, out-of-state cases that address the question of compelled conduct, rather than pure speech, are both irrelevant and unpersuasive. In Arizona, *Coleman* is binding precedent

[12] Notably, even some of the non-binding decisions suggested a different analysis had they involved words, as this case does. *See, e.g.*, *Masterpiece*, 370 P.3d at 288 (explaining that a wedding cake could implicate First Amendment speech protections in certain contexts, but that the court did not need to reach the issue because the facts did not include discussion of "any possible written inscriptions" on the cake); *Arlene's Flowers*, 2017 WL 629181, at *10 n.13 (noting the protection *Anderson* provided for tattoos, which involve words and other "forms of pure expression," but concluding that "floral arrangements do not implicate any similar concerns").

and unambiguously held that words and paintings, and the process of creating them, are protected speech. For purposes of this appeal, that is all that matters.

II. Joanna and Breanna are likely to succeed on the merits because § 18-4(B) requires them to create artwork that violates their religious beliefs and bans them from expressing their religiously motivated messages.

The Arizona Free Exercise of Religion Act (FERA) provides that the "[f]ree exercise of religion is a fundamental right that applies" even when the law at issue is "facially neutral." Ariz. Rev. Stat. § 41-1493.01(A). Under FERA, Phoenix can only substantially burden Joanna and Breanna's right to freely exercise their religion if it demonstrates that doing so furthers "a compelling governmental interest" in the "least restrictive means." § 41-1493.01(C); *State v. Hardesty*, 222 Ariz. 363, 366 ¶ 10 (2009).

Questions regarding the proper scope and application of FERA are reviewed de novo. *See Hardesty*, 222 Ariz. at 365 ¶ 7. "FERA parallels RFRA" (the federal Religious Freedom Restoration Act of 1993), which "also protects free exercise rights" but "does not apply to the states." *Id.* at 365 ¶ 8. Because "RFRA is substantially identical to FERA," the U.S. Supreme Court's "interpretation of RFRA…provides persuasive authority" in applying FERA. *Id.* at 367 n.7.

To prove a FERA claim, Joanna and Breanna need only to show that (1) their activity is motivated by a religious belief (2) that is sincerely held and (3) that

§ 18-4(B) substantially burdens the exercise of that belief. *Id.* at 365 ¶ 8, 366 ¶ 10. Joanna and Breanna easily meet this three-part test.

A. Joanna and Breanna's desire to publish their statement and refrain from creating artwork celebrating same-sex marriages is motivated by their religious beliefs.

Joanna and Breanna are religiously motivated and obligated to explain their religious beliefs about art and marriage and to explain how those beliefs affect what they can and cannot create, yet § 18-4(B)(3) makes it illegal for them to do so. ROA-30 ¶¶ 72-75, 143-144, 146-150; ROA-68 at 72:8-18; App. 17-18, 29-30, 35-36. Joanna and Breanna also believe that when creating custom artwork they must honor God with the artistic talents He has given them. ROA-68 at 98:10-12; ROA-36 ¶¶ 232-234; ROA-39 ¶¶ 62-64; ROA-30 ¶¶ 59-60. It would violate their religious beliefs to invest so personally in imagining and creating custom artwork to celebrate and promote any marriage outside of God's design for marriage as an institution between one man and one woman. ROA-30 ¶¶ 67-69. Yet that is exactly what § 18-4(B)(1)-(2) requires. App. 17-18, 30-32.

Neither the Superior Court nor Phoenix disputed that Joanna and Breanna are motivated by their religious beliefs to create certain art, to explain that art, and to avoid creating certain art. ROA-47 at 11-14; App. 25-26. That alone satisfies the first element of a FERA claim — that an "action or refusal to act is motivated by a religious belief." *Hardesty*, 222 Ariz. at 366 ¶ 10. But the Superior Court ignored

this test and rejected any FERA claim on the theory that this case "does not involve religious activity as contemplated by the Free Exercise Clause."[13] App. 25. The court is mistaken. As the binding test from *Hardesty* shows, FERA covers *any activity* motivated by a claimant's religious belief.

By failing to ask the proper question under FERA, the Superior Court articulated a dangerously narrow view of FERA's scope. Although the court correctly noted that religious exercise includes "[p]roselytizing, preaching, and prayer," its opinion implies that FERA extends only to those stereotypical forms of religious exercise. App. 25-26. This cramped view of religious freedom conflicts with a long line of cases.

For example, the U.S. Supreme Court recently ruled in favor of Hobby Lobby, a for-profit company that used RFRA to challenge a government mandate requiring it to provide insurance covering abortafacients. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759, 2765 (2014). The Court concluded that the mandate substantially burdened Hobby Lobby's religious-exercise rights because its owners "believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point." *Id.* at 2759, 2775. In so holding, the Court explained that the protected

[13] This brief treats the Superior Court's references to the "Free Exercise Clause" as references to FERA because the preliminary injunction motion did not raise any constitutional free-exercise claims.

scope of religious exercise "involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" *Id.* at 2770 (quoting *Emp't Div. Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990)); *see also Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972) (finding that the law imposed a religious burden by forcing Amish parents to send children to school against their beliefs). It also explained that "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within" the scope of the "exercise of religion."[14] *Hobby Lobby*, 134 S. Ct. at 2770.

As *Hobby Lobby* shows, protected religious exercise includes more than preaching and praying and embraces business decisions motivated or required by religious beliefs. This logic applies squarely to Joanna and Breanna's ability to post a religiously motivated "profession" of their religious beliefs on their website and their ability to abstain from creating artwork when it would violate their religious beliefs to create it.

Because Joanna and Breanna's desired acts are motivated by religion, they satisfy the first element of a FERA claim. And this conclusion does not change just because the Superior Court seems to have viewed Joanna and Breanna's beliefs as silly. *See* App. 24 (concluding that it "is absurd to think that the

[14] Joanna and Breanna as individuals, and Brush & Nib as a company, seek relief under FERA. *See Hobby Lobby*, 134 S. Ct. at 2768 (recognizing that RFRA protects "the free-exercise rights of closely-held corporations").

fabricator of a wedding invitation for a same-sex couple has endorsed same-sex marriage"). Indeed, FERA claims do not turn on whether a court agrees with or views religious beliefs as insignificant or incoherent.

As the *Hobby Lobby* Court explained, the Supreme Court has routinely rejected government arguments that "in effect tell the plaintiffs that their beliefs are flawed." 134 S. Ct. at 2778; *see also Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). Rather, the proper question is whether the government action "imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*." *Hobby Lobby*, 134 S. Ct. at 2778. For this reason, the Court explained "it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function…is to determine' whether the line drawn reflects 'an honest conviction,' and there is no dispute that it does." *Id.* at 2779 (citation omitted) (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)). Courts have followed this principle again and again, declining to question the soundness of claimant's religious beliefs. *See, e.g.*, *Thomas*, 450 U.S. at 715 (refusing to question an adherent's belief that manufacturing steel for weapons violated his

beliefs because "it is not for us to say that the line he drew was an unreasonable one").

Because Joanna and Breanna's religious beliefs motivate them to publish their desired statement and to decline to create certain art, they satisfy the first element of FERA. The Superior Court erred in concluding otherwise based on its narrow view of protected religious liberty and its apparent rejection of the propriety of Joanna and Breanna's religious beliefs.

B. Joanna and Breanna sincerely hold their religious beliefs.

Joanna and Breanna explained their beliefs to the Superior Court. *See*, *e.g.*, ROA-5 at 11-12, ROA-68 at 49:18-57:6, ROA-39 ¶¶ 43-97, 152-172; ROA-36 ¶¶ 213-267; 394-419. Neither the Superior Court nor Phoenix questioned their sincerity and there is no basis to do so now. In fact, their beliefs about marriage are common. *Cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (recognizing that the belief in marriage between one man and one woman "long has been held — and continues to be held — in good faith by reasonable and sincere people," and that religious people "may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned"). Thus, Joanna and Breanna satisfy the sincerity element of their FERA claim. *See Hardesty*, 222 Ariz. at 366 ¶ 10.

C. Section 18-4(B)'s threats of jail time, fines, and probation substantially burden Joanna and Breanna's religious exercise.

To satisfy the final element for a FERA claim, Joanna and Breanna must also show that § 18-4(B) "substantially burdens" their religious exercise. *Hardesty*, 222 Ariz. at 366 ¶ 10. The "substantially burdens" standard is not a high bar. It only requires that the burden imposed by § 18-4(B) be more than merely "trivial, technical or de minimis." *See* Ariz. Rev. Stat. § 41-1493.01(E).

Whether § 18-4(B) substantially burdens religious exercise turns on the severity of the penalties Joanna and Breanna will face if they adhere to their religious beliefs. The substantial burden inquiry does not assess how substantial a particular belief is to an adherent. *See Hobby Lobby*, 134 S. Ct. at 2779 ("Because the contraceptive mandate forces them to pay an enormous sum of money…if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs."); *Thomas*, 450 U.S. at 719 (stating that a law substantially burdens religion when it imposes "substantial pressure on an adherent to modify his behavior and to violate his beliefs").[15]

[15] Although *Thomas* came before RFRA, RFRA incorporated pre-RFRA cases that define a substantial burden. *See* 42 U.S.C. § 2000bb(B)(1). Furthermore, although *Thomas* notes that a law substantially burdens religion when it imposes "substantial pressure" on someone to change her religious beliefs, FERA is more lenient, requiring only that the burden — or the pressure — be more than "trivial, technical or de minimis." *See* Ariz. Rev. Stat. § 41-1493.01(E).

Here, § 18-4(B) threatens to impose severe criminal penalties on Joanna and Breanna unless they violate their beliefs. These penalties include as much as $2,500 in fines, six months in jail, and three years of probation *for each day* that they violate the law. *See* Phoenix City Code §§ 18-7(A), 1-5, 18-5(C); ROA-30 ¶¶ 104-111. These penalties far exceed the "trivial, technical or de minimis" threshold set by FERA. *See* Ariz. Rev. Stat. § 41-1493.01(E). Moreover, courts have found a substantial burden when the coercive pressure is much less than the potential criminal penalties at issue here. *See, e.g.*, *Yoder*, 406 U.S. at 208 (finding that a $5 criminal fine creates a substantial burden).

This substantial burden imposed by the penalties of § 18-4(B) is even more pronounced considering the extreme and personal nature of the law's assault on Joanna and Breanna's religious exercise. The Superior Court dismissively mischaracterized Joanna and Breanna's religious objection as merely an objection to "the printing of two male names or the printing of two female names" on wedding invitations. App. 26. However, Joanna and Breanna's artwork involves so much more than affixing names to generic cardstock. ROA-30 ¶¶ 22, 37; ROA-68 at 40:23-44:4, 44:24-45:5, 88:23-89:2; ROA-36 ¶ 81. Their design and creation process are extremely personal and involve them pouring themselves into creating unique, customized artwork that celebrates and promotes a particular couple's

marriage. ROA-68 at 98:10-13; ROA-36 ¶¶ 227-228; ROA-39 ¶¶ 57-58; ROA-30 ¶¶ 19-22, 68.

Joanna and Breanna seek to ensure that this personal process resulting in artistic expression does not involve the promotion of objectionable messages. ROA-68 at 60:19-61:4. And religious adherents should not be forced to affirm or profess messages that violate their sincere religious convictions. To say, as the Superior Court did, that the compelled public celebration of same-sex marriage "is not a burden" on religious exercise, App. 26, is like saying requiring Jehovah's Witnesses to salute a flag "is not a burden" on their religious beliefs because it only requires mindless vocalization of certain words. That argument did not work in *Barnette* and it does not work here either. Indeed, in *Barnette*, the Court concluded that the compelled pledge and salute impermissibly "require[d] affirmation of a belief and an attitude of mind" regardless of whether the law required students to become "unwilling converts" who must recant "contrary convictions" or simply required that they "simulate assent by words without belief and by a gesture barren of meaning." 319 U.S. at 633.

Nor is the burden on Joanna and Breanna limited to creating invitations for a same-sex wedding, for that is not all they create for weddings. Consider, for example, the custom chalkboard sign pictured on the following page:

Joanna created this custom sign for use at a wedding. It contains a Bible verse from Mark — a verse that Joanna views as containing "foundational scripture about marriage and God's design for marriage." ROA-68 at 47:8-48:8; App. 47. Under § 18-4(B)(1)-(2), Joanna and Breanna would have to create such a sign for same-sex weddings because they do so for opposite-sex weddings. And in so doing, Joanna and Breanna would have to apply what they view as God's words

about marriage to "something that God does not call marriage." ROA-68 at 59:4-60:1. So Phoenix's compulsion goes far beyond rotely writing names on a page. It forces Joanna and Breanna to publicly contradict their religious beliefs about God and marriage, and to use their hearts, souls, talents, and Holy Scriptures to do so.

This level of government intrusion is appalling. Coupled with the threat of severe penalties — including jail time — this onerous burden on Joanna and Breanna's exercise of their religious beliefs clearly satisfies FERA's third and final prong.

III. Joanna and Breanna are likely to succeed because Phoenix cannot demonstrate that applying § 18-4(B) to compel and squelch their speech serves a compelling interest in the least restrictive manner.

As the analysis above shows, § 18-4(B) compels Joanna and Breanna's speech, restricts their speech based on content and viewpoint, and substantially burdens their religious exercise. Accordingly, § 18-4(B) must overcome strict scrutiny, "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997); *see also Pac. Gas & Elec.*, 475 U.S. at 19 (requiring law compelling speech to overcome strict scrutiny); *Evenson*, 201 Ariz. at 212 ¶ 13 (Ct. App. 2001) (stating that content-based restrictions on speech are subject to strict scrutiny); *Reed*, 135 S. Ct. at 2228 (stating that content-based laws are subject to strict scrutiny "regardless of the government's benign motive" or

"content-neutral justification"); Ariz. Rev. Stat. § 41-1493.01(C) (imposing strict scrutiny on laws that substantially burden religion).

Under strict scrutiny, § 18-4(B) is "presumed unconstitutional." *See Ruiz v. Hull*, 191 Ariz. 441, 457 ¶ 62 (1998). Phoenix can only rebut this presumption by demonstrating that § 18-4(B) "is drawn with narrow specificity to meet a compelling state interest." *Id.* The necessary "narrow specificity" is absent unless the government shows it has used "the least restrictive means" to accomplish a compelling interest. *See Hardesty*, 222 Ariz. at 366 ¶ 11.

A. Phoenix has no compelling interest in forcing Joanna and Breanna to create artwork and silencing their religious expression.

In attempting to demonstrate a compelling interest, it is not enough for Phoenix to speak in generalities about the importance of eliminating discrimination. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2779 (noting that while the government asserted interests "couched in very broad terms, such as promoting 'public health' and 'gender equality," RFRA "contemplates a 'more focused' inquiry" that requires courts "to 'loo[k] beyond broadly formulated interests'" (citations omitted) (alteration in original)). This principle is especially important in this case because Joanna and Breanna do not discriminate against anyone on the basis of their sexual orientation.

Joanna and Breanna will create custom artwork regardless of a patron's sexual orientation; they simply cannot create artwork conveying a message that violates their religious beliefs. ROA-36 ¶¶ 264-267; ROA-39 ¶¶ 94-97. They care about the message their art sends, not the status their clients possess. But even though Joanna and Breanna will serve everyone, Phoenix seeks to apply § 18-4(B) to them in a manner that tramples their freedom of speech and religion, showing that its "rule mandates orthodoxy, not anti-discrimination." *See Ward v. Polite*, 667 F.3d 727, 731, 735 (6th Cir. 2012) (evaluating a charge of discrimination against a counseling student who would "work with all clients" but sought to refer homosexual clients "if the conversation required her to affirm their sexual practices"); *see also World Peace Movement v. Newspaper Agency Corp.*, 879 P.2d 253, 257 (Utah 1994) (holding that a newspaper did not violate an anti-discrimination law by declining to print a religious advertisement because "it was the message itself that [the newspaper] rejected, not its proponents"). Far from being a compelling interest, mandating orthodoxy is a goal repulsive to a freedom-loving people. Indeed, "[i]f there is any fixed star in our constitutional constellation, it is that no official…can prescribe what shall be orthodox…or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642.

As with the public accommodation law in *Hurley*, Phoenix's law lacks a "legitimate end" when applied in such a manner that "require[s] speakers to

modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Hurley*, 515 U.S. at 578; *see also Dale*, 530 U.S. at 656 (holding that a public accommodation law banning sexual-orientation discrimination did not serve a compelling interest when applied in a manner that violated associational freedom). Yet forcing Joanna and Breanna to modify their speech to make their message consistent with Phoenix's is precisely what § 18-4(B) requires here. That goal is not legitimate, much less compelling. *See Hurley*, 515 U.S. at 578. Rather, it is, as it was in *Hurley*, a "decidedly fatal objective." *Id.* at 579.

Furthermore, the question is not just whether Phoenix has a compelling interest. It is whether it has a compelling interest in making *Joanna and Breanna* design and create custom artwork celebrating same-sex marriage and banning *Joanna and Breanna* from expressing their religious beliefs and how those beliefs impact the art they are able to create. *See, e.g.*, Ariz. Rev. Stat. § 41-1493.01(C); *Hobby Lobby*, 134 S. Ct. at 2779 (observing that the court must look beyond broadly formulated interests to the marginal interest in enforcing the law against the particular claimants); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (requiring the government "to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' — the particular claimant whose sincere exercise of religion is

being substantially burdened (quoting 42 U.S.C. § 2000bb-1(b))); *Yoder*, 406 U.S. at 221, 236 (recognizing that the government had a "paramount" interest in education, but concluding that it must "show with more particularity how its admittedly strong interest…would be adversely affected by granting an exemption to the Amish").

Phoenix has simply failed to demonstrate a problem that requires it to coerce Joanna and Breanna to speak unwanted messages. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (requiring "an 'actual problem' in need of solving" and stating that "the curtailment of free speech must be actually necessary to the solution"); *Thomas*, 450 U.S. at 718-19 (noting the lack of "evidence in the record" indicating that providing a religious accommodation to those who need one would create the widespread issues the government said it had a compelling interest to avoid). In fact, Phoenix admitted to the Superior Court that it was not until 2013 that it decided to ban sexual-orientation discrimination in places of public accommodation and that Arizona and the majority of states have not seen the need to do so. ROA-47 at 3. Not surprisingly, in the years since Phoenix passed a law that addressed what appeared to be a non-existent problem, it has not received a single complaint of sexual-orientation discrimination by a place of public accommodation that actually violated § 18-4(B). ROA-30 ¶ 122.

If there were an "actual problem" in Phoenix relating to the ability of same-sex couples to obtain custom artwork to celebrate and promote their marriages, *Brown*, 564 U.S. at 799, it would be apparent through a barrage of sexual-orientation discrimination complaints, not the complete absence of valid ones. This is a fatal problem for Phoenix because it bears the burden of demonstrating a compelling government interest in forcing Joanna and Breanna to create artwork conveying messages that violate their beliefs and in banning them from speaking the messages motivated by their beliefs. *See Ruiz*, 191 Ariz. at 457 ¶ 62; *Hardesty*, 222 Ariz. at 366 ¶ 10.

When it comes to the speech ban found in § 18-4(B)(3), Phoenix's troubles are just as great. Phoenix has no legitimate interest in censoring the expression of ideas that may make certain people feel "unwelcome," "objectionable," "unacceptable," "undesirable," or "not solicited." *See* § 18-4(B)(3); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (stating that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). Moreover, the fact that § 18 does not ban similar speech in the employment context further demonstrates that banning Joanna and Breanna's speech is unnecessary. *See Reed*, 135 S. Ct. at 2232 (explaining that a law "cannot be regarded as protecting an interest of the highest order…when it leaves

appreciable damage to that supposedly vital interest unprohibited" (quotation omitted)).

Because Phoenix has not demonstrated a problem that must be solved, has not demonstrated that solving the problem is a compelling interest, and has not demonstrated that trampling the rights of *Joanna and Breanna* specifically is necessary to solve a compelling problem, it has failed to satisfy the compelling-interest prong of the strict scrutiny test.

B. Phoenix cannot show that the only way it can accomplish any legitimate end is by forcing Joanna and Breanna to create artwork and to avoid their religious expression.

In addition to needing to show that § 18-4(B) serves a compelling interest, Phoenix must also show that § 18-4(B) serves that compelling interest by the least restrictive means practically available. *Kenyon v. Hammer*, 142 Ariz. 69, 86-87 (1984); *see also Hobby Lobby*, 134 S. Ct. at 2780 (stating that the government must show a lack of "other means of achieving its desired goal without imposing a substantial burden on the exercise of religion"). Phoenix cannot meet this burden because Phoenix has many other alternatives available to accomplish its goals.

For example, to avoid infringing on speech rights, Phoenix could track the federal public accommodations law by narrowing its definition of public accommodations to include only businesses like restaurants, hotels, and stadiums that do not typically create expression. *See* 42 U.S.C. § 2000a. Alternatively,

Phoenix could explicitly not apply § 18-4(B) to the small subset of businesses — such as newspapers, photographers, publicists, speechwriters, and artists — that provide expressive services and that may have message-based objections to certain work.

In the employment context, where the government's interest in access is arguably higher, the federal government took a similar approach, adding an exception to Title VII for hiring decisions that are "reasonably necessary for the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). This allows expressive businesses to control their message through their hiring practices. *See* 29 C.F.R. § 1604.2(a)(2) (interpreting the exception to Title VII as allowing production studios to make sex-based classifications when "necessary for the purpose of authenticity or genuineness," such as in the selection of "an actor or actress").

If Phoenix is worried that not applying § 18-4(B) to expressive businesses could create an issue relating to the accessibility of commissioned art — even though there is no evidence to support such a concern — Phoenix could publicize a list of artists that will create consistent with Phoenix's views. *Cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (criticizing a ban on displaying liquor prices because "educational campaigns" explaining the problems of drinking "might prove to be more effective"). In fact, this approach may improve the

public's access to excellent service over Phoenix's current approach, because coercing expressive professionals to create objectionable expression will likely diminish the quality of their artistic output.

In sum, Phoenix lacks a compelling interest, and it has not shown that its many alternative means of pursuing any legitimate interests are inadequate. Thus, § 18-4(B) cannot survive strict scrutiny.

IV. Joanna and Breanna are suffering irreparable harm that will be remedied by a preliminary injunction restoring their rights in furtherance of the public interest and without imposing any harm on Phoenix.

As demonstrated above, Joanna and Breanna are likely to succeed on their claims. They can also satisfy the other three requirements for a preliminary injunction. *See Ariz. Ass'n of Providers*, 223 Ariz. at 12 ¶¶ 12-13 (setting forth the standard).

First, Joanna and Breanna can show irreparable harm because the loss of critical rights is "not remediable by damages." *See Shoen v. Shoen*, 167 Ariz. 58, 63 (Ct. App. 1990); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (stating that a free-speech violation caused irreparable harm); *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996) (stating that a RFRA violation caused irreparable harm).

Next, Joanna and Breanna can show the balance of hardships favors them over Phoenix because "the government does not have 'an interest in the enforcement of an unconstitutional law.'" *See ACLU v. Ashcroft*, 322 F.3d 240,

247 (3d Cir. 2003) (quoting *ACLU v. Reno*, 31 F. Supp. 2d 473, 497-98 (E.D. Penn. 1999)). The scales particularly favor Joanna and Breanna because they only seek as-applied relief. So Phoenix cannot complain that an injunction will cause any widespread problems.

Finally, Joanna and Breanna can show the public interest favors an injunction because "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002)). Indeed, the public will be served by knowing that Arizona courts have once again protected the constitutional and statutory rights of citizens to speak and exercise their religion.

CONCLUSION

Joanna and Breanna simply desire to live, speak, and create art in accordance with their religious beliefs. For Phoenix, that is too much to ask. With each passing day, Phoenix is silencing Joanna and Breanna from expressing their religious messages on their own website. Just as egregiously, Phoenix seeks to violate the sacred space of two artists' minds and souls by forcing them to beautify and celebrate something they oppose. Given these severe and ongoing violations of their rights and potential criminal penalties for failing to comply with Phoenix's demands, Joanna and Breanna need immediate relief. They respectfully

request that this Court reverse the Superior Court's order and instruct the Superior Court to grant an as-applied preliminary injunction providing the relief specified in the proposed order accompanying the original preliminary injunction motion. *See* ROA-5.

NOTICE UNDER RULE 21(A)

Pursuant to Arizona Rule of Civil Appellate Procedure 21(a), Plaintiffs/Appellants hereby notify the Court and Defendant/Appellee that they claim attorneys' fees and costs incurred in this appeal in accordance with Arizona Revised Statutes §§ 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).

CERTIFICATE OF COMPLIANCE

This certificate of compliance concerns a brief and is submitted pursuant to Arizona Rule of Civil Appellate Procedure 14(a)(5). The undersigned certifies that this brief to which this certificate is attached uses type of at least 14 points, is double-spaced, and contains 13,942 words.

The document to which this Certificate is attached does not exceed the word limit that is set by Rule 14.

Respectfully submitted this 8th day of March, 2017.

By: /s/ Jonathan A. Scruggs

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