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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

BRUSH & NIB STUDIO, LC, a limited liability corporation; BREANNA KOSKI; and JOANNA DUKA, Plaintiffs, v. CITY OF PHOENIX, Defendant.	Case No. CV2016-052251 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT** **[ORAL ARGUMENT REQUESTED]** (Assigned to the Honorable Karen Mullins)

TABLE OF CONTENTS

Table of Authorities

Cases:

State Constitutional Provisions:

Statutes/Ordinances/Rules/Regulations:

Introduction and Motion

Plaintiffs Brush & Nib Studio, LC, Breanna Koski, and Joanna Duka (collectively, "Joanna and Breanna") move this Court to grant summary judgment on all claims in their Second Amended Verified Complaint. To support this motion, Joanna and Breanna rely on the argument below, their Statement of Facts Supporting Summary Judgment and the documents cited therein, all documents previously filed with this Court, and any oral argument allowed by this Court.

Argument

This Court "shall grant" a motion for summary judgment if "there is no genuine dispute as to any material fact" and if Joanna and Breanna are "entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Joanna and Breanna satisfy this standard.

I. Phoenix City Code § 18-4(B)(1)-(3) deserves strict scrutiny for infringing the rights to free speech and expressive association under the Arizona Constitution.

The Arizona Constitution's Speech 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. This language differs from and offers more protection than the First Amendment. *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354-55, 773 P.2d 455, 459-60 (1989). Specifically, this language explicitly protects the process for creating speech ("write") and for disseminating speech ("publish"), not just the right to speak. Based on this textual distinction, Arizona's Speech Clause should be interpreted to protect the right to create and publish even more stringently than the First Amendment. But at the very least, Arizona's Speech Clause protects speech to the same degree as the First Amendment. *See Coleman v. City of Mesa*, 230 Ariz. 352, 361 n.5, 284 P.3d 863, 872 n.5 (2012) (noting that a First Amendment violation "necessarily

implies" an Arizona Speech Clause violation). That alone condemns § 18-4(B)(1)-(2) as-applied to Joanna and Breanna and § 18-4(B)(3) both facially and as-applied.

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

In *Coleman*, the Arizona Supreme Court recognized two types of protected speech: (1) "pure speech" and (2) "conduct with an expressive component." 230 Ariz. at 357-58. When an activity is "pure speech," it is automatically entitled to full constitutional protection. *See id.* at 358. But when an activity is "conduct with an expressive component," courts apply the *Spence* test to determine whether the conduct deserves constitutional protection. *Id.* at 357-58. That is, courts ask whether the conduct "is 'sufficiently imbued with elements of communication'" such that "there is '[a]n intent to convey a particularized message' and 'the likelihood [is] great that the message [will] be understood' by viewers." *Id.* at 358 (quoting *Spence v. Washington*, 418 U.S. 405, 409-11 (1974) (alterations in original).

Although this Court believed that Joanna and Breanna argued at the preliminary injunction stage that their artwork is expressive conduct (Prelim. Inj. Order at 10-11), that is not their argument. This case only involves pure speech — which automatically deserves full constitutional protection regardless of its perceived degree of expressiveness — not conduct that must be evaluated for its degree of expressiveness. *See Coleman*, 230 Ariz. at 357-58.

Because *Coleman* stated that "painting[s]" and "written or spoken" words are pure speech, not "conduct with an expressive component," *Coleman* dictates that this case involves pure speech — not conduct. *See id.* This is evident when considering what § 18-4(B) regulates here. When applied to Joanna and Breanna, § 18-4(B)(1)-(2) forces them to create artwork consisting of written words

and/or paintings expressing messages that violate their religious beliefs and bars them from using written or spoken words to decline to create such artwork. Facts[1] ¶¶ 23-28, 61-63, 86, 92, 95-96, 104, 108. Likewise, Phoenix interprets § 18-4(B)(3) to ban Joanna and Breanna from publishing words expressing their religious beliefs and how those beliefs affect what artwork they can create. Facts ¶¶ 65-70, 93-96. And *Coleman*'s instruction that artwork and words are protected speech 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"); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010) (stating that words and paintings are protected speech).

The conclusion that this case only involves pure speech does not change because Joanna and Breanna act — putting pen to paper — when creating artwork and words. 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 (quoting *Anderson*, 621 F.3d at 1061). Thus, "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.* Similarly, just as "the business of tattooing is constitutionally protected" because "tattooing is protected speech," the business of selling custom artwork must be protected because the artwork itself is protected speech. *Id.* at 360 ("The degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away." (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988))).

[1] "Facts" refers to "Plaintiffs' Statement of Facts Supporting Summary Judgment."

In ruling on Joanna and Breanna's preliminary injunction motion, however, this Court stated that nothing about § 18-4(B) "prohibits free speech or compels undesired speech" because it "prohibits only the conduct of refusing to sell and the conduct of publishing that refusal to sell," and only compels "the sale of goods and services." Prelim. Inj. Order at 9. But because Joanna and Breanna sell and create custom artwork (pure speech) and wish to publish written words (pure speech), the activity of publishing, selling, or declining to sell cannot be analyzed as conduct rather than speech. As *Coleman* indicated, when an end product is pure speech, both the process and business of creating the speech are protected speech. *See* 230 Ariz. at 359-60. Absent this critical principle, the government could ban or compel speech while avoiding scrutiny by banning or compelling the steps that result in speech. *See, e.g., Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015) (noting that "[a] regulation limiting the creation of art curtails expression as effectively as a regulation limiting its display" and that "[t]he government need not ban a protected activity such as the exhibition of art if it can simply proceed upstream and dam the source").

Therefore, to adhere to *Coleman*'s binding precedent and avoid a principle that would grant the government broad power to trample the free-speech rights of Arizonans, laws compelling or banning the process or business of creating pure speech must be analyzed as laws compelling or banning speech itself. Because the end products in this case — Joanna and Breanna's custom artwork and the statement they wish to publish — are pure speech, the expressive steps Joanna and Breanna must take to effectuate their speech must be protected as well. *See Coleman*, 230 Ariz. at 358-60. In this respect, *Coleman* dictates that Joanna and Breanna's desired statements,

their artwork, and their process and business of creating and selling art are all protected as pure speech. *See id.*; Pls.' MPI § I.A.1-3; Pls.' MPI Reply I.A-D.[2]

B. Section 18-4(B)(1)-(2) compels Joanna and Breanna to speak and to expressively associate against their will.

Phoenix applies § 18-4(B)(1)-(2) to force Joanna and Breanna to collaborate and create artwork celebrating same-sex marriage in violation of their religious beliefs. Facts ¶¶ 20, 23-28, 32-43, 61-63, 86, 92, 95-96, 104, 108. This requirement violates Joanna and Breanna's right to speak messages of their choosing (compelled speech) and to collaborate with others of their choosing when speaking (compelled expressive association).

1. *Section 18-4(B)(1)-(2) unlawfully compels Joanna and Breanna's speech.*

The right 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). But Phoenix interprets § 18-4(B)(1)-(2) to require Joanna and Breanna to speak by creating artwork conveying messages supporting same-sex marriage. Facts ¶¶ 23-28, 61-63, 92, 95-96, 104, 108. This artwork can even include hand-written words requesting people to provide "the pleasure of [their] company at the celebration of" a same-sex marriage, encouraging people to "share in the joy of" a same-sex marriage, and explaining that "God has joined together" a same-sex couple as "one flesh" in a marital union. Facts ¶¶ 26, 74, 92. Thus, Phoenix alters both the substance and meaning of Joanna and Breanna's speech, compelling Joanna and Breanna to place messages in their art that they consider objectionable. Such compulsion of speech is unlawful *per se* or, at a minimum, subject to strict

[2] Plaintiffs preliminary injunction motion ("Pls.' MPI") and reply brief in support ("Pls.' MPI Reply") address some of the same legal matters as this summary judgment motion. Therefore, Plaintiffs incorporate all arguments from those documents into this summary judgment motion.

scrutiny. *See Hurley v. Irish–Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 575 (1995) (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 compelled speech problem does not disappear simply because Phoenix uses a public accommodation law to compel speech. In *Hurley*, the U.S. Supreme Court held that a public accommodation law much like § 18-4(B)(1)-(2) impermissibly compelled the speech of parade organizers. 515 U.S. at 559-61. Although the law in *Hurley* regulated conduct on its face, *Hurley* concluded that the law compelled speech as-applied because it was applied "in a peculiar way," i.e. to speech. *Id.* at 572. In the same way, even though § 18-4(B)(1)-(2) may regulate conduct on its face, it regulates and compels speech when applied to Joanna and Breanna's art.

This conclusion is unaffected by *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006). That case addressed a law compelling conduct (access to empty rooms for military recruiters) and emails "plainly incidental" to that conduct. *Id.* at 61-65. Given the non-expressive nature of empty rooms, the government could compel access to them because granting such access was not "inherently expressive" and "the schools [were] not speaking" by providing that access. *See id.* at 64. Rather, the schools were just allowing "expressive activities by others on [their] property." *Id.* at 65. And the government could only compel the emails because they accomplished what the government could legally compel anyway — room access. *Rumsfeld* would have turned out differently if it involved a law requiring the law schools to speak favorably of the military's "Don't Ask, Don't Tell" policy, which is very similar to what Phoenix has done here.

Joanna and Breanna's art is not like the rooms or the incidental emails at issue in *Rumsfeld*. Artwork is an inherently-expressive medium, more akin to the parade in *Hurley* and the tattoos in *Coleman*. That alters the calculus. *See id.* at 63-64 (explaining that "[t]he expressive nature of a parade was central to our holding in *Hurley*" but that "[a] law school's recruiting services lack the expressive quality of a parade"). Compelling access to Joanna and Breanna's inherently-expressive artwork, which is not incidental to any conduct that Phoenix can compel, is compelled speech. *See Hurley*, 515 U.S. at 573 (noting that applying a public accommodation law to a parade declared the "sponsors' speech itself to be the public accommodation...[and therefore] violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message"); s*ee also Claybrooks v Am. Broad. Cos.*, 898 F. Supp. 2d 986 (M.D. Tenn. 2012) (holding that a federal anti-discrimination law could not compel a for-profit television studio to cast actors of a particular race to promote a message of social acceptance of interracial relationships); *Hands on Originals, Inc. v. Human Rights Comm'n,*[3] No. 14-CI-04474 (Fayette Cir. Ct. Apr. 27, 2015) (enjoining a public accommodation law from compelling a print shop to print t-shirts bearing objectionable messages for the Gay and Lesbian Services Organization's Pride Festival). Whereas, compelled access to empty rooms is compelled conduct. *See Rumsfeld*, 547 U.S. at 60 (stating that the law in *Rumsfeld* generally "regulated conduct, not speech" because it "affects what law schools must *do*...not what they may or may not *say*").

2. *Section 18-4(B)(1)-(2) interferes with Joanna and Breanna's right to expressive association.*

Implicit in the right to free speech is the "corresponding right to associate with others in a wide

[3] The *Hands on Originals* opinion is available at https://perma.cc/75FY-Z77D.

variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). And just as the right to speak entails the right to not speak, freedom to associate entails the right "not to associate." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (quotation omitted). Section 18-4(B)(1)-(2) infringes this right by compelling Joanna and Breanna to collaborate in creating and conveying objectionable messages.

This collaboration occurs because Joanna and Breanna collaborate with clients and use their clients' events as raw material to express Joanna and Breanna's artistic vision and message — a classic case of expressive association between artist and patron. Facts ¶¶ 20, 32-43; *see Dale*, 530 U.S. at 648 (noting that only "some form of expression" with others is required to raise a free association claim). While Joanna and Breanna are happy to create and sell art to anyone in the LGBT community, they cannot collaborate with anyone — straight or gay — to create objectionable artwork. Facts ¶¶ 71-76. Yet this is exactly what § 18-4(B)(1)-(2) requires. It forces Joanna and Breanna to collaborate with clients in creating art with messages that they consider objectionable and thereby violates Joanna and Breanna's expressive association rights. Facts ¶¶ 20, 23-28, 32-43, 61-63, 86, 92, 95-96, 104, 108.

Boy Scouts of America v. Dale illustrates this point. There, the U.S. Supreme Court recognized that applying a public accommodation law to force the Boy Scouts to associate with a gay scoutmaster would send the conflicting message that "homosexual conduct [is] a legitimate form of behavior." *Dale*, 530 U.S. at 653. Here, the attack on expressive association is even clearer. Not only does Phoenix require Joanna and Breanna to associate with messages Joanna and Breanna find objectionable, but Phoenix actually requires Joanna and Breanna to collaborate with others in creating those objectionable messages. This compelled artistic collaboration "affects in

a significant way" Joanna and Breanna's ability to convey their own message and to create their own artwork promoting the beauty of one-man/one-woman marriage. *See id.* at 648; Facts ¶¶ 59-63. Indeed, it forces Joanna and Breanna "to propound a point of view contrary to [their] beliefs" and to sacrifice the opportunity to collaborate with those who share Joanna and Breanna's goal of promoting one-man/one-woman marriage. *Dale*, 530 U.S. at 654; Facts ¶¶ 25-28, 39-40, 59-63, 78-79, 92, 110. Phoenix can only do this if it overcomes strict scrutiny. *See Dale*, 530 U.S. at 648 (applying strict scrutiny to a law compelling expressive association).

C. Section 18-4(B)(3) infringes Joanna and Breanna's and third parties' rights by imposing a content-based, viewpoint-based, and overbroad restriction on speech with vague terms that grant officials unbridled discretion.

Like § 18-4(B)(1)-(2), § 18-4(B)(3) also violates Arizona's Speech Clause. But this latter provision violates the right to free speech both facially and as-applied to Joanna and Breanna.

1. *Section 18-4(B)(3) bans speech based on content and viewpoint and contains vague terms that grant government officials unbridled discretion.*

Section 18-4(B)(3) facially restricts speech by banning expressive businesses and their owners from "directly or indirectly" displaying, circulating, or publicizing any communication that "states or implies" that 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. Phoenix views this law as prohibiting Joanna and Breanna from posting on their website their desired statement explaining their religious beliefs about marriage and how those beliefs impact the art they can create. Facts ¶¶ 67-70, 93-96.

This is a content-based restriction on speech because it bans certain speech relating to certain subjects — namely, classifications the law specifies as protected, such as sexual orientation —

but does not ban speech on other subjects. *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."). Moreover, § 18-4(B)(3) inflicts viewpoint discrimination by banning "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) (noting that viewpoint discrimination is "an egregious form of content discrimination"). For instance, Joanna and Breanna cannot publish a statement explaining their belief that marriage is an institution between one man and one woman and that their religious beliefs prevent them from creating artwork celebrating same-sex marriage. Facts ¶¶ 67-70, 93-96. But another Phoenix business can publish a statement explaining its belief that marriage is an institution that includes same-sex couples and that it wishes to create artwork celebrating same-sex marriages. Facts ¶¶ 116-119.

The impermissible suppression of speech based on the message expressed is also implicated by the inclusion of vague terms in § 18-4(B)(3), which is discussed further in § IV.A below. The vague terms give officials unbridled discretion to engage in "arbitrary and discriminatory enforcement" of § 18-4(B)(3), thereby allowing for viewpoint-based suppression of speech. *State v. Steiger*, 162 Ariz. 138, 142-43, 781 P.2d 616, 620-21 (Ct. App. 1989). This chills speech by leaving people to guess what speech officials will target with their unbridled discretion. *See id.*

Because § 18-4(B)(3) regulates the content and viewpoint of speech facially and as applied to Joanna and Breanna, it must survive strict scrutiny. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (applying strict scrutiny to facially enjoin content and viewpoint-based ordinance); *accord State v. Evenson*, 201 Ariz. 209, 212-13, 33 P.3d 780, 783-84 (Ct. App. 2001).

2. *Section 18-4(B)(3) is overbroad.*

To protect itself and third parties, Joanna and Breanna challenge § 18-4(B)(3) facially for overbreadth. A law is facially overbroad if a substantial number of its applications are unconstitutional judged in relation to the law's plainly legitimate sweep. *See State v. Weinstein*, 182 Ariz. 564, 565-67, 898 P.2d 513, 514-516 (Ct. App. 1995). Section 18-4(B)(3) fails this test because any social, political, or religious message critical of a protected class could imply that class members are "unwelcome," "objectionable," "unacceptable," "undesirable," or "not solicited." Indeed, courts have found similar language overbroad in other contexts for this reason. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (invalidating school policy that banned "any unwelcome verbal…conduct which offends…because of" protected characteristics); *Armstrong v. D.C. Pub. Library*, 154 F. Supp. 2d 67, 77-80 (D.D.C. 2001) (invalidating regulation denying library access to patrons with an "objectionable" appearance).

Even beyond banning criticism, § 18-4(B)(3) bans constitutionally-protected praise. For instance, extoling a religion as the only true religion would imply that adherents of other faiths are "unacceptable" or "undesirable" because of their religious beliefs. Such overbreadth also violates the right to free speech. *See Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 578 (6th Cir. 2013) (refusing to interpret Fair Housing publication ban to prohibit statements that "'discourage' an ordinary reader of a particular protected class…[because] using 'discourage' could create First Amendment concerns by creating an overly broad restriction on speech"). Moreover, § 18-4(B)(3) is not limited to speech regarding non-expressive activities. It restricts the ability of expressive businesses, such as speech writers, musicians, and newspapers, to communicate according to their beliefs, to solicit the types of opportunities for communication

they desire, and to decline to speak and create speech that violates their beliefs.

For these reasons, this Court should facially invalidate § 18-4(B)(3) as an overbroad law that chills Joanna and Breanna's speech and the protected speech of third parties not before this Court.

II. Phoenix City Code § 18-4(B)(1)-(3) deserves strict scrutiny for infringing the right to free exercise under the Arizona Free Exercise of Religion Act.

The Arizona Free Exercise of Religion Act ("FERA") imposes strict scrutiny on any law that substantially burdens the exercise of religion. A.R.S. § 41-1493.01(C). The only requirements to trigger FERA's protection are that (1) any activity or refusal to act is motivated by a religious belief (2) that is sincerely held and (3) that the government is substantially burdening the exercise of that religious belief. *See State v. Hardesty*, 222 Ariz. 363, 366, 214 P.3d 1004, 1007 (2009). Joanna and Breanna satisfy these elements vis-à-vis § 18-4(B)(1)-(3).

Regarding the first and second elements, Joanna and Breanna sincerely believe that God ordained marriage as an institution between one man and one woman and that creating custom artwork for a same-sex wedding ceremony would violate their religious beliefs. Facts ¶¶ 61-63. Thus, they are religiously motivated to decline to create custom artwork for same-sex wedding ceremonies. Facts ¶ 63. Joanna and Breanna also sincerely believe that, in order to carry out their religious beliefs that they must love others, be upfront and honest with their clients, and honor God, they have a religious obligation to publicly explain their religious beliefs about art and marriage and how those beliefs affect what they are able to create. Facts ¶¶ 64-69. Therefore, Joanna and Breanna are religiously motivated to publish a particular statement on Brush & Nib's website providing such an explanation. Facts ¶ 68-69.

These activities fall within FERA's scope because these activities are religiously motivated.

Although this Court implied at the preliminary injunction stage that FERA only covers stereotypical religious activity such as proselytizing, preaching, and praying (Prelim. Inj. Order at 14-15), FERA cannot be so limited. According to the Arizona Supreme Court, FERA covers any "action or refusal to act...motivated by a religious belief" that is sincerely held. *See Hardesty*, 222 Ariz. at 366. This plainly encompasses Joanna and Breanna's religious motivations to refrain from creating certain artwork and to post a statement on Brush & Nib's website. Indeed, the scope of protected religious exercise extends beyond "belief and profession" to "'the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons'" and even to "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770 (2014) (quoting *Emp't Div. Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990)).[4] Moreover, even though Joanna and Breanna's religious beliefs may be perplexing to some, "it is not for [courts] to say that their religious beliefs are mistaken or insubstantial." *See id.* at 2779. Thus, Joanna and Breanna satisfy the first two elements to gain protection under FERA.

Regarding the final element relating to a substantial burden, the proper inquiry focuses on the severity of the penalties Joanna and Breanna will face under § 18-4(B) if they adhere to their religious beliefs, *not* how substantial the beliefs are that § 18-4(B) impacts. *See, e.g., id.* ("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

[4] Although *Hobby Lobby* addressed the federal Religious Freedom Restoration Act of 1993 (RFRA), the decision provides "persuasive authority" in applying FERA because "RFRA is substantially identical to FERA." *Hardesty*, 222 Ariz. at 367 n.7.

imposes a substantial burden on those beliefs."). And the burden of those penalties need only be more than merely "trivial, technical or de minimis" to constitute a substantial burden. *See* Ariz. Rev. Stat. § 41-1493.01(E). This low threshold is easily exceeded considering that Joanna and Breanna face penalties of up to $2,500 in fines, six months in jail, and three years of probation for each day that they act consistent with their religious beliefs in a way Phoenix views as violating § 18-4(B). S*ee* Phoenix City Code §§ 1-5, 18-5(C), 18-7(A); Facts ¶ 102. Moreover, courts have found a substantial burden when religious adherents face far less of a burden than the criminal penalties threatened here. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972) (finding that a $5 criminal fine creates a substantial burden).

This Court, however, previously found that § 18-4(B) is not "even an incidental burden" on Joanna and Breanna's religious exercise and supported this conclusion by stating that this case boils down to an objection to writing the names of same-sex couples on wedding invitations. Prelim. Inj. Order at 14-15. This is incorrect as a legal matter because it ignores the extent of the law's penalties and focuses elsewhere. It is also incorrect factually. Joanna and Breanna invest their artistic vision, heart, and soul into their custom wedding invitations, using a customized artistic process to create wedding invitations that convey messages of celebration of the marriage described in the invitation and encourage the celebration of that marriage. Facts ¶¶ 23-28, 31-43, 62. Moreover, because Joanna and Breanna create much more than wedding invitations, Phoenix's law would also require them to create signs with Bible verses, marriage certificates, and wedding vows endorsing same-sex weddings. Facts ¶¶ 23, 25, 36, 40, 62, 74, 92, 95-96. By forcing Joanna and Breanna to personally invest themselves in writing words and expressing concepts through art that they consider objectionable, Phoenix egregiously assaults core conscience rights. *W. Va.*

State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (stating that officials cannot "prescribe what shall be orthodox...or force citizens to confess by word or act their faith therein").

Therefore, because § 18-4(B)(1)-(3) substantially burdens the exercise of sincerely held religious beliefs, it is subject to strict scrutiny under FERA. *See Hardesty*, 222 Ariz. at 366.

III. Phoenix City Code § 18-4(B)(1)-(3) deserves strict scrutiny for infringing the right to free exercise under the Arizona Constitution.

As described in § II above, § 18-4(B)(1)-(3) substantially burdens religious exercise. This burden not only triggers strict scrutiny under FERA, but it also triggers strict scrutiny under Arizona's Free Exercise Clause — Ariz. Const. art. XX, § 1.

According to this Clause, "[p]erfect toleration of religious sentiment shall be secured to every inhabitant of [Arizona], and no inhabitant…shall ever be molested in person or property on account of his or her mode of religious worship…." Ariz. Const. art. XX, § 1. Although few cases have interpreted this provision, the Arizona Court of Appeals has interpreted it to impose strict scrutiny on laws that burden religion, even on neutral laws of general applicability. *See Barlow v. Blackburn*, 165 Ariz. 351, 356-357, 798 P.2d 1360, 1365-66 (Ct. App. 1990) (applying strict scrutiny to state and federal religious-exercise claims). This conclusion makes sense because Arizona's Free Exercise Clause uses stronger language than the federal Free Exercise Clause. Because of this stronger text, this Court should also interpret Arizona's Free Exercise Clause as imposing strict scrutiny on laws like § 18-4(B) that burden religion. *Cf. Hardesty*, 222 Ariz. at 365 n.6 (implying that Arizona's Constitution provides greater religious liberty than the U.S. Constitution).

In addition to deserving strict scrutiny for burdening religion, § 18-4(B)(1)-(3) also deserves

strict scrutiny for burdening religion in a way that is neither neutral nor generally applicable. This lack of neutrality and general applicability triggers strict scrutiny even under the lower standard found in the federal Free Exercise Clause. *Smith*, 494 U.S. at 879. And § 18-4(B)(1)-(3) fails this standard because it is not generally applicable. The law exempts "bona fide religious organizations." Phoenix City Code § 18-4(B)(4)(a). Meanwhile, it simultaneously compels Joanna and Breanna to engage in speech that violates their sincere religious beliefs and prohibits them from engaging in their religiously-motivated expression. *See* Facts ¶¶ 59-70, 92-96, 104, 108, 110. Likewise, Phoenix has already gone beyond § 18-4(B)'s text and exempted ministers from performing ministerial services. Facts ¶ 104. There is simply no legitimate reason to exempt some religious believers who operate a business (ministers) but not others with the exact same beliefs who operate a business. Differential treatment like this due to written and unwritten exemptions is "of paramount concern when a law has the incidental effect of burdening religious practice," as the law does here. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542 (1993); § II, *supra*; Pls.' MPI § I.B; Pls.' MPI Reply § II.

Moving from general applicability to neutrality, § 18-4(B)(1)-(3) falters because of the many exemptions described above. By exempting most religious organizations from the law's provisions on marital status, sexual orientation, and gender identity — but not the other protected classifications — and by exempting ministers from performing ministerial services, Phoenix recognized that the question of what constitutes marriage (and other important issues involving human sexuality) remains a central religious question for many. Yet Phoenix only protected some religious believers and not others. This selectivity creates a special disability on the basis of religious views about same-sex marriage and removes § 18-4(B) from the realm of neutrality. *See*

Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004) (stating that a "neutral" law cannot "target religiously motivated conduct either on its face or as applied in practice").

Even setting aside these neutrality and general applicability problems, § 18-4(B) also deserves strict scrutiny for burdening religion in conjunction with the other constitutional rights described in this motion. In doing so, § 18-4(B) violates the hybrid rights doctrine, which imposes strict scrutiny on any law that burdens religious exercise intertwined with the exercise of other constitutional rights. *See Smith*, 494 U.S. at 881. This violation of the hybrid rights doctrine provides yet another reason why § 18-4(B) violates Arizona's Free Exercise Clause and triggers strict scrutiny.

IV. Phoenix City Code § 18-4(B)(1)-(3) deserves strict scrutiny for violating the right to due process under the Arizona Constitution.

Article II, § 4 of the Arizona Constitution gives every Arizona citizen the right to due process. "The federal and state due process clauses contain nearly identical language and protect the same interests." *State v. Casey*, 205 Ariz. 359, 362, 71 P.3d 351, 354 (2003). Thus, Arizona courts give "great weight" to the U.S. Supreme Court's interpretation of the federal Due Process Clause. *Id*.

A. Section 18-4(B)(3) is vague facially and as applied to Joanna and Breanna.

A criminal law like § 18-4(B)(3) "must not only be definite, but also not encourage arbitrary and discriminatory enforcement." *Steiger*, 162 Ariz. at 142. This requirement ensures that citizens have actual notice of what is prohibited and officials have sufficient guidelines to ensure they cannot use the law to "pursue their personal predilections" in enforcing the law. *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). Moreover, when a criminal law regulates speech, as § 18-4(B)(3) does, the law must have an even "greater degree of specificity" to provide

sufficient due process. *Id.*

Despite these requirements, § 18-4(B)(3) contains a host of vague terms that do not give citizens sufficient notice of what violates the law and do not give officials sufficient guidance to bridle their discretion. By failing to define what it means for a communication to imply that someone is "unwelcome," objectionable," "unacceptable," "undesirable," or "not solicited," Phoenix officials can play favorites, labeling viewpoints they dislike as unwelcoming while branding viewpoints they like as welcoming or neutral. This lack of guidance is unacceptable, raising "substantial 'dangers of arbitrary and discriminatory application'" and inhibiting free-speech rights by denying people of ordinary intelligence the ability to determine "what [is] permitted and what [is] prohibited."[5] *State v. Western*, 168 Ariz. 169, 171-72, 812 P.2d 987, 989-90 (1991) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)).

The controversial topic of marriage exemplifies this point. Would a homosexual citizen consider the message "God created marriage as an institution between one man and one woman" to imply that they are unwelcome or unacceptable? No one can say for sure because different people will react to that message differently. That vagueness in turn gives Phoenix officials unbridled discretion to censor speech they dislike while turning a blind eye to speech they approve, thereby concealing impermissible content and viewpoint discrimination behind a veil of ambiguity. This vagueness and unbridled discretion leaves the public guessing as to what they

[5] This vagueness that gives Phoenix authorities unbridled discretion to ban the speech they dislike while allowing the speech they approve of exacerbates the issue of viewpoint discrimination discussed in § I.C.1, *supra*. *See City of Lakewood*, 486 U.S. at 763 (noting that the danger of content and viewpoint censorship "is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official").

may and may not say and therefore chills protected speech.

For these reasons, § 18-4(B)(3) significantly jeopardizes the protected speech of Joanna and Breanna and of parties not before this Court and should be invalidated facially and as applied to Joanna and Breanna for violating due process and for chilling protected speech.

B. Section 18-4(B)(1)-(2) violates Joanna and Breanna's right to engage in their desired occupation without relinquishing their other rights.

As applied, § 18-4(B)(1)-(2) violates Joanna and Breanna's liberty interest in engaging "in any of the common occupations of life…[i.e.] to worship God according to the dictates of [their] own conscience[s], and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972) (quotation and alteration omitted). By requiring Joanna and Breanna to create custom artwork celebrating same-sex marriage in violation of their religious beliefs, § 18-4(B)(1)-(2) forecloses Joanna and Breanna's "right to earn a livelihood and to continue in employment unmolested." *Truax v. Raich*, 239 U.S. 33, 38 (1915). Yet the right to own and operate a business is unquestionably a "privilege[] long recognized…as essential to the orderly pursuit of happiness by free men." *Roth*, 408 U.S. at 572; *cf. Hobby Lobby*, 134 S. Ct. at 2783 (noting concern about excluding certain religious people "from full participation in the economic life of the Nation"). Indeed, the U.S. Supreme Court has long held that the "right…to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts" of the Due Process Clause. *Greene v. McElroy*, 360 U.S. 474, 492 (1959). Because § 18-4(B)(1)-(2) forces Joanna and Breanna to choose between adhering to their religious beliefs — a non-negotiable — and operating their business, this law violates their due process rights. *Cf. Hobby*

Lobby, 134 S. Ct. at 2785 (Kennedy, J., concurring) (explaining that "freedom means" that all citizens have "the right to express [their religious] beliefs and to establish [their] religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community").

V. Phoenix City Code § 18-4(B)(1)-(3) deserves strict scrutiny for violating the right to equal protection under the Arizona Constitution.

Arizona's Equal Protection Clause applies the same way that the federal Equal Protection Clause does. *Coleman*, 230 Ariz. at 361-62 (applying the "the same standard" for both Clauses). Therefore, like its federal cousin, Arizona's Equal Protection Clause directs all persons who are similarly-situated to be treated alike under similar circumstances. *State v. Nguyen*, 185 Ariz. 151, 153, 912 P.2d 1380, 1382 (Ct. App. 1996). Distinctions among similarly-situated groups that affect fundamental rights "are given the most exacting scrutiny," *Clark v. Jeter*, 486 U.S. 456, 461 (1988), and discriminatory intent is presumed, *see Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) ("[W]e have treated as presumptively invidious those classifications that…impinge upon the exercise of a 'fundamental right.'"). Because Phoenix applies § 18-4(B)(1)-(3) to impinge on Joanna and Breanna's fundamental rights, *see supra* §§ I-IV (detailing these rights), this Court should presume discriminatory intent here.

This presumption is appropriate because Phoenix interprets and applies § 18-4(B)(1)-(3) to favor artists who support same-sex marriage and punish those who oppose it. For example, Phoenix allows artists who support same-sex marriage to operate their businesses in accordance with their beliefs, Facts ¶¶ 115-119, but Phoenix uses § 18-4(B)(1)-(2) to impose criminal penalties on artists who disagree with same-sex marriage and who operate their business in accordance with that belief, Facts ¶¶ 92, 102, 104. The only difference is the artist's particular

viewpoint and belief. Likewise, Phoenix allows artists to publish messages supporting same-sex marriage and expressing a desire to help clients celebrate same-sex marriage, Facts ¶¶ 115-119, but Phoenix uses § 18-4(B) to silence artists who wish to express disapproval of same-sex marriage or to decline to create art promoting same-sex marriage, Facts ¶¶ 92-94. Once again, the only difference is the substance of the views taken and acted upon. The net result is that Phoenix artists can operate, speak, and create similar types of art in similar ways yet Phoenix only targets the supporter of opposite-sex marriage. This distinction means Phoenix has enforced § 18-4(B)(1)-(3) to give privileges — like the ability to operate a business and to express beliefs — to those whose views Phoenix favors while denying the same privileges to similar artists whose views Phoenix disfavors. Such unequal treatment of similarly-situated artists strips Joanna and Breanna of their most fundamental rights and therefore triggers strict scrutiny.

VI. Phoenix City Code § 18-4(B)(1)-(3) deserves strict scrutiny for conditioning benefits on Joanna and Breanna relinquishing their constitutional rights.

Phoenix interprets § 18-4(B)(1)-(3) in a way that forces Joanna and Breanna to forgo their free speech, free association, free exercise, due process, and equal protection rights if they wish to operate in Phoenix. *Supra* §§ I-V. That violates the unconstitutional conditions doctrine and must overcome strict scrutiny. *See Greene*, 360 U.S. at 492 (noting that the "right…to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts" of the Due Process Clause); *Elrod v. Burns*, 427 U.S. 347, 363 (1976) (applying strict scrutiny to a law conditioning employment on forgoing First Amendment rights).

Section 18-4(B)(1)-(3) operates as an unconstitutional condition because it forces Joanna and Breanna to choose between closing their business, forgoing their constitutional rights, and

suffering severe criminal penalties. Joanna and Breanna must either follow the law or follow their faith, lose their business or lose their freedoms. The government can never force such a choice on its citizens, much less use criminal penalties to do so. *See Elrod*, 427 U.S. at 358 n.11 (explaining that the unconstitutional conditions doctrine applies "however slight the inducement…to forsake [constitutional] rights"). Yet this is precisely what Phoenix's law does. It uses criminal penalties to deter Joanna and Breanna from exercising their rights. Unless Joanna and Breanna obtain judicial relief, they will be chilled from running their business while exercising their freedoms for fear that Phoenix will punish them for declining to create custom artwork celebrating same-sex marriage in violation of their beliefs and for publishing the statement motivated by their religious beliefs. Facts ¶¶ 59-70, 92-96, 104, 108, 110. That cannot stand.

In the same vein, § 18-4(B)(1)-(3) conditions Joanna and Breanna's right to speak its particular message (artwork promoting opposite-sex marriage and a particular definition of beauty) on inclusion of other viewpoints. *Id.* But the government may not dilute speech "by forcing the inclusion of all views on" a given topic. *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 572 (7th Cir. 2001) (citing *Hurley*, 515 U.S. at 575-76). Yet Phoenix has done this anyway — conditioning Joanna and Breanna's right to operate a business on their agreement to create unwanted expression about same-sex marriage. *Cf. Hobby Lobby*, 134 S. Ct. at 2783 (expressing concern that the Affordable Care Act would "effectively exclude [some religious] people from full participation in the economic life of the Nation"). This attempt to force Joanna and Breanna to design and create artwork celebrating same-sex marriage in violation of their religious beliefs — something that Phoenix cannot do directly — runs afoul of the unconstitutional conditions doctrine. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (explaining that the government cannot deny a benefit to

"produce a result [it] could not command directly" (quotation omitted)).

VII. Phoenix City Code § 18-4(B)(1)-(3) fails strict scrutiny.

Because § 18-4(B)(1)-(3) violates the rights described above, this law must satisfy strict scrutiny, "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997). This test requires Phoenix to show that § 18-4(B)(1)-(3) is narrowly tailored to satisfy a compelling interest. *Ruiz v. Hull*, 191 Ariz. 441, 457, 957 P.2d 984, 1000 (1998). Phoenix cannot carry this burden. *See* Pls.' MPI § I.C.; Pls.' MPI Reply § III.

As for compelling interest, Phoenix cannot invoke abstract interests to justify its law. *See Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011) (requiring "an 'actual problem' in need of solving…and the curtailment of [a fundamental right] must be actually necessary to the solution…"). Phoenix cannot baldly assert "discrimination" and then rest. The question is not whether Phoenix has a compelling reason to prevent discrimination in the abstract; the question is whether Phoenix must silence and coerce *Joanna and Breanna* specifically to stop actual, ongoing, and widespread discrimination. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (noting that strict scrutiny "look[s] beyond broadly formulated interests" to the "application of the challenged law 'to the person'—the particular claimant whose" rights are being infringed). The answer to this question is no.

Not only has Phoenix failed to demonstrate a widespread problem of sexual-orientation discrimination, Facts ¶ 103, 105, or that trampling Joanna and Breanna's rights is necessary to resolve any issue, but Joanna and Breanna never discriminate. Joanna and Breanna serve *all people* regardless of sexual orientation. Facts ¶ 72. They just cannot use their artistic talents to create certain *messages*. Facts ¶¶ 58-63, 72. Thus, Joanna and Breanna care about their speech,

not their clients' sexual orientation. Facts ¶¶ 72-76. That is not discrimination. *See World Peace Movement v. Newspaper Agency Corp.*, 879 P.2d 253, 258 (Utah 1994) (holding that a newspaper did not violate a public accommodation law by declining to print a religious advertisement because "it was the message itself that [the newspaper] rejected, not its proponents"). Unable to invoke discrimination, the only interest Phoenix actually achieves is censoring and compelling Joanna and Breanna's speech. But ensuring that speech conforms to the government's predilections is not a compelling interest. *See Hurley*, 515 U.S. at 579 (invalidating a public accommodation law for compelling speech because the law "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one").

Moreover, Phoenix has no legitimate interest in censoring ideas that may make people feel "unwelcome," "objectionable," "unacceptable," "undesirable," or "not solicited." § 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"). Furthermore, § 18 has no such provision restricting the speech of businesses when making employment decisions. But if Phoenix does not need to restrict the speech of businesses to stop employment discrimination, then certainly Phoenix does not need to restrict the speech of businesses to stop discrimination in the provision of services. *See Reed*, 135 S. Ct. at 2232 (explaining 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)).

As for narrow tailoring, § 18-4(B)(1)-(3) fails this requirement too because Phoenix has many alternative ways to accomplish its goals without violating Joanna and Breanna's rights. *See Kenyon v. Hammer*, 142 Ariz. 69, 86-87, 688 P.2d 961, 978-79 (1984) (noting that government

must use least restrictive means practically available). For one, Phoenix could narrow its law to activities that do not include expression. Federal housing and employment laws do precisely this. *See* 42 U.S.C. § 2000e-3 (only banning statements "relating to employment"); 42 U.S.C. § 3604(c) (only banning statements "with respect to the sale or rental of a dwelling"). Second, Phoenix could not apply § 18-4(B) to the narrow category of businesses — such as artists, speechwriters, and photographers — that provide expressive services and may have message-based objections to certain projects. The federal government took a similar approach in the employment context, creating room for hiring decisions that are "reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). Federal officials have interpreted this provision to allow expressive businesses to choose what message they convey through their hiring practices. *See* 29 C.F.R. § 1604.2 (interpreting the exception to Title VII to allow production studios to make sex classifications when "necessary for the purpose of authenticity or genuineness…e.g., [selecting] an actor or actress"). Third, Phoenix could track the federal public accommodation law and narrow its scope to businesses like restaurants, hotels, and stadiums that generally do not create expression. 42 U.S.C. § 2000a. Fourth, instead of forcing artists to create as Phoenix desires, Phoenix could publish a list informing the public of artists who will create consistent with Phoenix's views. Given these and other alternatives, Phoenix cannot demonstrate the narrow tailoring necessary to satisfy strict scrutiny.

Conclusion

For the reasons provided above and in Joanna and Breanna's preliminary injunction briefing, Joanna and Breanna ask this Court to grant summary judgment in their favor on all of their claims and to afford them the relief requested in the Second Amended Verified Complaint.

Respectfully submitted this 13th day of April, 2017.

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