ARIZONA SUPREME COURT

BRUSH & NIB STUDIO LC, et al., Plaintiffs/Appellants/ Cross-Appellees, v. CITY OF PHOENIX, Defendant/Appellee/ Cross-Appellant.	)	Supreme Court No. CV-18-0176-PR Court of Appeals, Division One Case No. 1-CA-CV-16-0602 Maricopa County Superior Court No. CV2016-052251

AMICUS CURIAE BRIEF OF CERTAIN ARIZONA LEGISLATORS[1] IN SUPPORT OF APPELLANTS

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[1] Counsel affirmatively states that all parties have consented in writing to the filing of this brief.

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DISCLOSURE OF SPONSORS AND SPONSORS' INTERESTS

Amici are twenty-six (26) Legislators serving in Arizona's House and Senate. They are listed in the appendix to this brief. *See* Appx. 1. As members of a coordinate branch of Arizona's government, Amici are interested in the robust protection of free speech in Arizona.

Amici are also interested in this Court's application of Arizona's Free Exercise of Religion Act (hereafter "FERA"), which prohibits government from "substantially burden[ing] a person's exercise of religion" unless doing so can survive strict scrutiny. A.R.S. § 41-1493.01(C). The Court of Appeal's (hereafter "COA") analysis of FERA raises concerns about interpreting this carefully crafted statute and its interplay with Constitutionally protected rights like free speech.

The COA noted in its opinion, that this case may be one of first impression in the Arizona courts. *See Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426, 434 ¶ 10 (Ariz. Ct. App. 2018). Even so, this case addresses basic freedoms: whether public accommodation laws may coerce speakers to convey messages contrary to their faith, and whether accommodation statutes could be interpreted so all Arizonans, of every walk of life, may participate and freely express themselves with the least amount of government intrusion upon individual rights.

Because Arizona's Legislators will continue to grapple with balancing questions of free speech, the freedom of religious exercise, and access to the

market by buyers and sellers, they are interested in the outcome of this matter. To provide Arizonans with the most robust protections of individual freedom possible, Amici believe it is important for this Court to adopt the strong protections of speech and religious exercise urged by Appellant Brush & Nib Studio, LC and its owners (hereafter, "Brush & Nib")

ARGUMENT

Government cannot compel the creation of speech or compel its distribution contrary to the speaker's will.

Given this freedom, Arizona courts have long upheld the public's right to participate in society without fear of discrimination, as noted in the opinion below. Op. ¶6. But the decision below does not increase the number of willing sellers and willing buyers in the marketplace; instead, it narrows the constitutional protections for artists who sell their work and suggests persons like Plaintiffs should just "discontinue selling custom wedding-related merchandise…" in response. ¶49. Amici believe that accepting government-compelled creation of custom artwork cannot be the price of entry to the marketplace.

Instead, these Amici believe citizens of Arizona would give the greatest possible protection to speech while balancing the delicate issues raised in situations like this one. The United States Supreme Court itself recently urged other courts and policy makers to "further elaborat[e]" on the important issues at stake in these cases. *Masterpiece Cakeshop*, 138 S. Ct. at 1723-24, 1732.

The Court then granted, vacated, and remanded *Washington v. Arlene's Flowers, Inc.* 389 P.3d 543 (Wash. 2017), *vacated and remanded*, 138 S. Ct. 2761 (2018), a case that had decided that a florists' designs were not speech. The lower Court takes a similar shortcut to avoid analyzing the speech claim of Appellant Brush & Nib. Without denigrating the interests of buyers in finding custom goods and services, artists seeking to make a living also have dignity interests. Because the lower Court reached its conclusion by narrowing rights of speech and religion by artists in the marketplace, we ask this Court to correct those errors.

I. The COA's analysis of Free Speech contradicts the controlling of *Coleman* and *Wooley*.

The First Amendment "secures the right to proselytize religious, political, and ideological causes." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). It must also must "guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Id*. When *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015), and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) promised "proper protection" for religious and philosophical objections to gay marriage, they mean a First Amendment that allows them to refuse to create or carry a government message contrary to their objections. *See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,

515 U.S. 557 (1995) (holding that public accommodation law violated First Amendment rights). The lower Court failed to give Brush & Nib this proper protection due under the Free Speech clauses of the United States and Arizona constitutions.

In short, this failure is rooted in the COA's suggestion that Sect. 18-4(B) only regulates "conduct," that the relevant conduct was the sale of customer-directed merchandise, and such speech is not protected. All three conclusions are wrong under Arizona and federal law.

A. Freedom of Speech protects speech, including speech made along with other conduct.

First, Arizona and Federal law do not depend on the "speech/conduct" dichotomy proposed by the lower court. It is true that laws may make a course of conduct illegal even if the conduct were "initiated, evidence or carried out by means of language." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017), *quoting Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). But the First Amendment still does not allow regulation of how sellers may communicate, even if the speech arises out of some course of conduct. *See eg., Expressions Hair Design, above* ("in regulating the communication of prices rather than prices themselves [a law] regulates speech"). Words and artistic works do not become less protected by calling them conduct.

As a result, the act of inking a picture or words on the skin is protected free speech. *Coleman v. City of Mesa*, 230 Ariz. 352, 284 P.3d 863 (2012). The act of deciding who makes up a parade is speech. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). The "subtle shaping of thought" by artistic expression in film and art is speech. *Joseph Burstyn v. Wilson,* 343 U.S. 495, 504 (1952.) The act of putting the government's message on a car license plate is speech, if it requires a driver to turn his vehicle into a tiny, mobile billboard for the state's motto. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). All of these could be described with reference to 'conduct,' but they receive full Free Speech protection because they include protected words and artistic creations.

As a result, there is no meaningful distinction between a government requirement to put a message on the back of a car, and Phoenix's requirement that Brush & Nib put a message on the front of a card. Government cannot compel Brush & Nib to create dozens of little billboards, whether arranged on tables or mailed to guests, holding out Phoenix's message of marriage, if that message goes against Brush & Nib's philosophical and religious objections to it.

In contrast, the COA suggests *Coleman*, *supra*, which found tattoos to be speech, did not "approve using the First Amendment as a shield to protect a business owner's decision to discriminate against customers based on sexual orientation." *Brush & Nib*, 418 P.3d at 437 ¶ 21. But no Free Speech precedent suggests words or artistic works can shift from protected speech to unprotected

"conduct" simply because the speaker draws a distinction that the government rejects. As a matter of first principles, "the point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (emphasis added). *See also Joseph Burstyn v. Wilson,* 343 U.S. 495, 504 (1952) (holding state cannot prohibit films that subject religion to "contempt, mockery, scorn [or] ridicule"). If this Court decides speech becomes unprotected conduct based on the goals of the third-parties or the government, there will be no freedom of speech at all. "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-2 (1943).

Similarly, even if the desire to refrain from speaking could involve "conduct," free speech does not allow unfettered regulation of that conduct. At ¶24 of its opinion, the COA says Section 18-4(B) survives because "[i]ts main purpose is to prohibit discrimination and thus Section 18-4(B) regulates conduct not speech."

Again, a noble "main purpose" is not some kind of First Amendment kryptonite. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995) struck down a statute "forbidding acts of discrimination toward certain classes." That ordinance, too, was arguably focused on conduct; but it made no difference to the free speech analysis. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to

interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." The COA's "main purpose" test is not compatible with *Hurley*.

Above all, the First Amendment protects "the right to speak and the right to refrain" as two sides of the same "individual freedom of mind." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This freedom applies even if the speech or refusal could be considered part of "conduct." And "conduct" is not a talisman against First Amendment analysis, nor is the intention of the speaker or the government relevant. The COA failed to apply state and federal free speech law correctly; in a way that leaves Brush & Nib's artistic speech with less-than-proper protection.

B. Free Speech protection covers the decision to create speech, and does not depend on the sale of messages.

A theme in the COA's analysis is that Brush & Nib merely seeks to refrain from selling "merchandise." Op. at 27 ("…the conduct at issue is…the conduct of selling or refusing to sell merchandise…"). "Merchandise" are goods that are bought and sold.[1] So the Court's analysis begins at the point Brush & Nib have already created custom designs celebrating a particular wedding. This focus on

[1] *See* BLACK'S LAW DICTIONARY 1076 (9th ed. 2009) "1. In general, a moveable object involved in trade or traffic; that which is passed from one person to another by purchase and sale…."

the point of *sale* ignores the relevant question of the point of *creation*.

But Free Speech analysis has nothing to do with whether artistic works will be up for sale. Books, newspapers and magazines can be sold for profit; it "does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). *See also Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (holding limits on violent criminal's book royalties presumptively unreasonable); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (violent video games protected).

Instead, the COA should have asked whether the government is interfering with an artist's decision to create artworks and other speech. The COA treats Brush & Nib's refusal to create custom, celebratory artwork the same as if Brush & Nib refused to sell knick-knacks imported by the boatload and put out on shelves for sale to the public. But the decision to buy and then sell a knick-knack is different from Brush & Nib's decision to invest artistic energy into a custom piece for a particular wedding. Compelling an artistic work intrudes into the freedom of mind protected by the First Amendment. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

If the COA's analysis were to stand, no commercially viable artwork could ever be given full First Amendment protection. Thankfully, the Supreme

Court has repeatedly held that free speech fully protects the creation of art like Brush & Nib's works. *See Joseph Burstyn v. Wilson,* 343 U.S. 495, 504 (1952).

C. Brush & Nib's is a small business whose messages are identified with individuals, and not a large institution hosting competing messages as in *Rumsfeld.*

The COA's citation of *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.,* 547 U.S. 47, 51(2006) is also inapplicable. *See Brush & Nib*, 418 P.3d 426, 437 ¶ 21. *Rumsfeld* held that Congress could require large, nonprofit universities to allow military recruiters on the same terms as the schools allowed other recruiters. In allowing on-campus recruiting, schools are hosting multiple, independent, competing messages already. Recruiters are not speaking the school's message; they are giving their own messages, jousting for talent. And the schools do not necessarily endorse all of the recruiters' contradictory messages. The school's host recruiting fairs so that students can efficiently hear more of the competing messages. The Supreme Court allowed that the required access for military recruiters might result in a university making truthful speech about these events, like emails announcing the presence of recruiters on campus. But the school's message about recruiting would not change in any discernable way.

Several cases involving large institutions and competing voices align with *Rumsfeld.* A public university cannot exclude a disfavored viewpoint in awarding student activity fee grants. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 841–42 (1995). A shopping center with dozens of

stores competing for 25,0000 daily customers could have to open its sidewalks for petitions. *PruneYard v. Robbins*, 447 U.S. 74 (1980). *Rumsfeld*, *Rosenberger, and PruneYard* involved competing voices hosted by large institutions.

By contrast, the situation here differs on both counts. Weddings are not a cacophony of competing voices like a recruiting fair or cable network. The fear that a wedding *might* turn into a competition drives a healthy crop of romantic comedies. The appearance of a rival suitor or disapproving parent at "speak now or forever hold your peace" is not welcome. In this sense, weddings are far more like parades than competitions; Brush & Nib rightly understand that it is not being asked to *just* give its own message about the wedding, or *just* the message of the new spouses. Brush & Nib is expected to join with all the others at the wedding, by giving a creative, artistic message of celebration. To put it in the parade context of *Hurley*, this situation is akin to being commandeered to build a float in a parade because of the local government's priorities.

Likewise, Brush & Nib is not a recruiting fair, a public university or a shopping center. It is a small business. Its owners put their own hands into their work, and that work is more closely associated with their persons. *PruneYard* is explicitly limited to large organizations; it disclaims application to "the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment." *PruneYard,* 447 U.S. at 78.

D. The COA's Opinion leaves small business open to compelled, deeply offensive compelled speech.

Finally, the COA's standard leaves Arizona small businesses open to disturbing abuse. If customers can direct small businesses to make the same messages, creative small businesses may find their consciences burdened or violated.

In addition, the meaning of words changes with context, so that the same words become offensive in a different context. If businesses are really required to sell the same words to everyone, Arizona small businesses must ask:

- May a Muslim artist agree to design a creative "Worship God Here" signs for his mosque, and refuse to create a work with the same message for a church or synagogue?
- May a Christian artist create a "God bless your marriage" poster without agreeing to make messages of blessing to every marriage, even those he believes are outside his faith?
- May a Jewish printer make materials for a synagogue's High holiday services, without designing similar materials to a Christian "Messianic" congregation that also celebrates those holidays but teaches doctrine with which he agrees?
- Does a feminist artist (or model) have to take commissions from organizations that do not promote her views of gender?
- Does an atheist videographer have to accept a commission to produce short films celebrating the a local "Pastor of the Year" award winner

if he also produces short films celebrating a local "Humanitarian of the Year" award?

Because such practitioners are open for business and they serve the public generally, these requests would no doubt violate their closely held convictions and Arizona's accommodations law would come into play.

II. This Court should review the COA's applied substantial burden analysis under Arizona's free exercise of religion statute.

Finally, your Amici are concerned about COA's review of Arizona's Free Exercise of Religion Act ("FERA"), A.R.S. § 41-1493.07 (2017). The COA acknowledges that FERA operates in parallel to the federal Religious Freedom Restoration Act of 1993, and that federal law should be instructive. It is hard to reconcile the Court's FERA analysis with relevant RFRA precedent. Both acts limit any "substantial burden" of a person's religious exercise, unless the government shows a compelling interest and offers "the least restrictive means" of achieving a compelling interest.

First, the COA's analysis of "substantial burden" stops at *Sherbert v Verner,* 374 U.S. 398, 404 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972), which both predate FERA and RFRA by decades. These cases are the correct place to start the analysis, but the COA does not apply them correctly. For example, one of *Yoder*'s prongs asks whether criminal sanctions are possible. But the COA never mentions that Sec. 18-4(B) could saddle Brush & Nib with three years of jailtime for every week of noncompliance.

Similarly, the Supreme Court has also issued more recent guidance about substantial burden. The Supreme Court held in 2014 that penalties of $2,000 per employee per year are "surely substantial" for RFRA purposes. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2776, (2014). *Yoder* found a substantial burden over a $5 fine. Section 18-4(B) carries a penalty of up to $2,500 in fines, six months' imprisonment, probation for three years, or any combination thereof for each *day* of violation. ROA-30 ¶ 109. At a yearly rate, fines could be over $900,000. The COA does not even address the size of the potential fines in its opinion. The COA's application of *Yoder* and *Sherbert* seems to differ from the controlling precedents.

Instead, the COA substitutes its own religious judgment for Plaintiffs, and concludes that nothing in Section 18-4(B) requires Plaintiffs to act contrary to their beliefs or penalize their faith. It concludes Phoenix's ordinance merely makes it "less satisfying" to practice their faith, but not based on anything Appellants have said. But if courts can deny that *jail time* is a burden, there's little limit on the government intrusion into religious practice.

What is more, the lower court also ignores *Hobby Lobby* in its "least restrictive means" analysis. FERA requires the government to use "the least restrictive means" to achieve its compelling interests. According to the Supreme Court of the United States: "The least-restrictive-means standard is exceptionally demanding…. RFRA requires the Government to demonstrate that application of a substantial burden to the person ... is the least restrictive

means of furthering a compelling governmental interest." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2780 (2014) (cleaned up). Despite several suggestions by Appellants Brush & Nib of least restrictive or more tailored provisions that would meet Phoenix's claimed interests, *see* Pl. Br. at 59-60, the COA says Phoenix's interest in "diminishing social stigma" can be accomplished only by blanket prohibitions. But, of course, Phoenix does have significant exemptions – it exempts bona fide religious organizations. It also says disability discrimination is acceptable if modifications that "create an undue burden or are otherwise not easily accomplished …without significant difficulty or expense;" and "that would fundamentally alter the nature of the good or services." But it is not clear why Phoenix cannot offer similar exceptions to for-profit business owners who are religious, any more than "bona fide" religious nonprofits. And it is not clear why, if disability discrimination does not require public accommodations to suffer "significant difficulty," and such exceptions do not undermine the Government's interests in reducing social stigma, that sexual orientation discrimination could be subject to similar exceptions. But, again, the burden should be on *Phoenix* to prove that it is using ***the*** least restrictive means. The COA flipped the burden of proof under FERA and RFRA, without interrogating Phoenix's proffered goals or policies.

CONCLUSION

Because the COA's decision undermines freedom of speech and religious exercise, and because it provides Amici with little guidance to consider important policy questions in accommodation law, this Court should reverse the Court below, and enter judgment for Plaintiff/Appellants Brush & Nib Studio, LC and its owners.

Respectfully submitted this 20th day of December 2018.

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APPENDIX I

SENATORS:	HOUSE REPRESENTATIVES:
Senator Karen Fann	Representative Paul Boyer
Senator Sine Kerr	Representative Noel Campbell
Senator Steve Yarbrough	Representative Vince Leach
Senator Sylvia Allen	Representative David Livingston
Senator Rick Gray	Representative Mark Finchem
Senator Nancy Barto	Representative Kevin Payne
Senator John Kavanagh	Representative Drew John
Senator Steve Smith	Representative Kelly Townsend
Senator Kimberly Yee	Representative Michelle Udall
Senator David Farnsworth	Representative Travis Grantham
Senator Warren Petersen	Representative Jay Lawrence
Senator Sonny Borrelli	Representative Rusty Bowers
	Representative Ben Toma
	Representative Elect, Bret Roberts