ARIZONA SUPREME COURT

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

PLAINTIFFS/APPELLANTS/CROSS-APPELLEES' RESPONSE TO *AMICI CURIAE*

Kristen K. Waggoner (032382)
John J. Bursch (MI Bar No. P57679)*
Jeremy D. Tedesco (023497)
Jonathan A. Scruggs (030505)
Samuel D. Green (032586)
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, Arizona 85260
Telephone: (480) 444-0020
Facsimile: (480) 444-0028
kwaggoner@adflegal.org
jbursch@adflegal.org
jtedesco@adflegal.org
jscruggs@adflegal.org
sgreen@adflegal.org

Attorneys for Plaintiffs/Appellants/Cross-Appellees

*Admitted *pro hac vice*

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INTRODUCTION

Joanna Duka and Breanna Koski, the owners and artists of Brush & Nib Studio, love and serve everyone regardless of their status, including sexual orientation.[1] But they cannot create artwork expressing messages inconsistent with their Christian faith, which means they cannot create custom artwork celebrating same-sex weddings for anyone.

Phoenix insists it can use jail time and fines to coerce Joanna and Breanna to speak messages contrary to their beliefs. And *Amici* predict "a wholesale repudiation" of public-accommodations laws if this Court protects Joanna and Breanna's free-speech and religious-liberty rights. FAS 9.[2] They are wrong. Artists frequently exercise editorial judgment when deciding whether and what to create. And courts regularly protect the right of these speakers to do so. The only question is whether Joanna and Breanna have *less* freedom than the typical speaker when Joanna and Breanna speak about marriage. They do not.

Equally important, a ruling for Joanna and Breanna will not repudiate public-accommodations laws, since Joanna and Breanna do not challenge Phoenix

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

[2] This brief addresses the filings of *Amici Curiae* American Civil Liberties Union, et al. ("ACLU"); Americans United for Separation of Church and State, et al. ("Ams. United"); Bloom & Blueprint Event Co., LLC, et al. ("Bloom"); First Amendment Scholars ("FAS"); and Lambda Legal Defense and Education Fund, Inc. ("Lambda").

City Code § 18-4(B)'s facial validity, but only specific applications of that law to their artwork celebrating marriage, an inherently sacred event. The fact that a law can be facially valid, but impermissibly applied, allows Arizona's Attorney General—without endangering Arizona's public accommodations law—to join Joanna and Breanna in arguing that there is "no legitimate, let alone compelling, interest in coercing or prohibiting the speech at issue" here. Amici Curiae Br. of Ariz., et al. 18.

It is *Amici* who propose the dangerous, far-reaching rule: that the government can force authors, film producers, and artists to create custom content expressing messages that violate their core beliefs. This Court should reject this conscience-crushing approach, which is at odds with any reasonable notion of free speech or Arizona's Free Exercise of Religion Act (FERA).

ARGUMENT

I. Joanna and Breanna seek as-applied relief regarding their custom wedding artwork, all of which conveys messages about marriage.

Phoenix seeks to deny Joanna and Breanna the benefits of pre-enforcement lawsuits, arguing that "[a]ny disputes about particular wedding items should wait until a same-sex couple requests such an item ...." Phx. Suppl. Br. 3. In other words, Phoenix tries to force Joanna and Breanna to receive and decline requests for custom artwork celebrating a same-sex wedding, face Phoenix's prosecution, and hope their defense keeps them out of the City's jail.

Phoenix supports its unpalatable theory by accusing Joanna and Breanna of bringing a facial—not an as-applied—challenge to § 18-4(B). *Id.* at 1-3. *Amici* echo this point. ACLU 7 & n.5, 10-11. But this proposed approach—requiring Joanna and Breanna to risk fines and jail time before learning whether they can exercise their freedoms—is incorrect, unnecessary, and harmful.

First, Phoenix gets the law wrong. The very case Phoenix cites—*John Doe No. 1 v. Reed*—defined a facial challenge as one where "plaintiffs' claim and the relief that would follow ... reach beyond the particular circumstances of these plaintiffs." 561 U.S. 186, 194 (2010) (plaintiffs sought to enjoin public records law from applying to "all referendum petitions" instead of just plaintiffs' referendum petitions). In contrast, Joanna and Breanna only seek relief as to some of *their* custom artwork. Not every business. Not every art studio. Not even every art piece they create. Only their custom artwork celebrating marriage. By definition, this is an as-applied challenge. *Scherer v. U.S. Forest Serv.*, 653 F.3d 1241, 1245 (10th Cir. 2011) ("The nature of a challenge depends on how the *plaintiffs* elect to proceed—whether they seek to vindicate their own rights based on their own circumstances (as-applied) or whether they seek to invalidate an agency action based on how it affects them as well as other conceivable parties (facial).").

Second, Phoenix's approach is unnecessary and harmful to Joanna and Breanna. Because Joanna and Breanna challenge the law as-applied, they do not

have to win *all* their requested relief to obtain *any* relief. *Contra* Phx. Suppl. Br. 4 (arguing that Joanna and Breanna cannot prevail unless *all* their custom wedding artwork deserves protection). Neither Phoenix nor *Amici* cite any case to justify this all-or-nothing approach. If some of Joanna and Breanna's artwork deserves protection and some does not, this Court can tailor relief to fit "the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).[3]

Joanna and Breanna seek the freedom not to create custom artwork for same-sex weddings. They deserve that relief because all such artwork expresses a celebratory message about same-sex marriage in violation of their religious beliefs. ROA-30[4] ¶¶ 68-69. And Phoenix admits it requires Joanna and Breanna to create *all* custom artwork "for or supporting same-sex wedding ceremonies." ROA-111 at 27:1-8, 28:1-19. Phoenix has already interpreted its law to compel speech in similar contexts. ROA-111 at 30:1-10 (Amici.App.045[5]) (stating that Phoenix law prohibits declining to provide photography services for same-sex weddings).

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[3] For example, this Court could order relief protecting Joanna and Breanna from creating custom artwork "materially similar" to the wedding invitations and wedding sign in the record. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 460, 463-64 (2007).

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

[5] "Amici.App." refers to the appendix accompanying this brief.

There is no ambiguity about what Joanna and Breanna want to do or what Phoenix would compel. The record contains many examples of Joanna and Breanna's custom wedding artwork, such as a wedding sign and wedding invitations. *E.g.*, ROA-1 Ex. 8; ROA-76 Exs. 9, 11-12. And Phoenix admits it would require the Studio to create this exact or materially similar art for same-sex weddings. ROA-111 at 27:1-8, 28:1-19; App.Docket-20[6] at 52-53, 67-68; Phx. Resp. to Pet. for Review ("Pet. Resp.") 19-21.

To be sure, it may be impossible to foretell every detail someone may request for artwork to celebrate a same-sex wedding. But that does not mean Joanna and Breanna must proceed request by request, risking imprisonment while defending their freedom to control their artwork piece by piece by piece. "History repeats itself, but not at the level of specificity demanded by [Phoenix and *Amici*]." *Wis. Right to Life*, 551 U.S. at 460, 463-64 (entertaining pre-enforcement suit when plaintiff sought to run "materially similar" advertisements as those run in past while rejecting government's argument that plaintiffs must prove "every 'legally relevant' characteristic of an as-applied challenge—down to the last detail"—will recur in future). The hardship is simply too great to proceed this way. Indeed, "denying prompt judicial review would impose a substantial hardship on [Joanna

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

and Breanna], forcing them to choose between refraining from core political speech on the one hand, or engaging in that speech and risking costly Commission proceedings and criminal prosecution on the other." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167-68 (2014).

Rather than allowing that grave injury, granting relief now is particularly appropriate because additional facts will not "significantly advance [this Court's] ability to deal with the legal issues presented [or] aid … in their resolution." *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978). Given Phoenix's legal theory, concessions, and the developed record, this Court can and should resolve the legal question squarely presented here: whether Phoenix can compel Joanna and Breanna to create custom artwork—i.e., speech—celebrating same-sex weddings in violation of their religious beliefs. *Cf. Khodara Envtl., Inc. v. Blakey*, 376 F.3d 187, 198 (3d Cir. 2004) (declining to delay decision where the "crux of the issue on the merits" was "purely legal" after government made its "position on that issue ... perfectly clear" and the court would "not be in any better position to answer [that] question in the future"); *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 691-92 (2d Cir. 2013) (indication that "future speech will be 'materially similar' to" other described speech was "sufficiently precise," and forcing the plaintiff to "break the law" to "answer the constitutional question" creates a dilemma and "a significant hardship").

II. Phoenix impermissibly compels Joanna and Breanna's speech by forcing them to express messages that violate their convictions.

As prior briefing explains, Joanna and Breanna satisfy the three elements necessary to invoke the compelled-speech doctrine: (1) speech; (2) with a message the speaker objects to; (3) that the government compels. *E.g.*, Pls./Appellants/ Cross-Appellees' Suppl. Br. ("Pls.' Suppl. Br.") 3-13. Nevertheless, *Amici* raise a myriad of theories suggesting that the doctrine does not apply here. The arguments are flawed and would lead to troubling results.

A. Generally applicable laws are sometimes applied to unconstitutionally compel speech.

Amici assert that § 18-4(B) "is generally applicable, content-neutral, and regulates the conduct of commercial businesses." FAS 5. They also assert that no law like it has "been declared wholly unconstitutional in the way that [Joanna and Breanna] here seek." *Id.* But Joanna and Breanna do not question § 18-4(B)'s "general" validity or ask this Court to declare it "wholly unconstitutional." They merely challenge its peculiar application to their custom wedding artwork, which "qualif[ies] as speech" by Phoenix's own admission. App.Docket-20 at 47.

As the U.S. Supreme Court has held, heightened scrutiny applies to laws that "*generally* function[] as a regulation of conduct" where (1) "the conduct triggering" the law's application "consists of communicating a message," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010), or (2) the law applies in a

way that "alter[s]" speech's "expressive content," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572-73 (1995). Both scenarios apply here.

First, Joanna and Breanna's decision to communicate messages about opposite-sex marriage triggers Phoenix's application of § 18-4(B) to force them to convey messages about same-sex marriage. If they did not create artwork celebrating opposite-sex marriage, Phoenix would not force them to create artwork celebrating same-sex marriage. So the law's application here is triggered by content and applied in a content and viewpoint-based manner. App.Docket-55 at 5-6.

Second, § 18-4(B) applies to change the content of Joanna and Breanna's speech. *Hurley* also considered a public accommodations law that did "not, on its face, target speech or discriminate on the basis of its content"; its "focal point" was to "prohibit[] … the act of discriminating." *Hurley*, 515 U.S. at 572. But *Hurley* still held that the law's prohibition on sexual-orientation discrimination could not be applied to "alter the expressive content of" a public accommodation because that would "violate[] the fundamental rule ... that a speaker has the autonomy to choose the content of his own message." *Id.* at 572-73. The same is true here.

This does not mean that Joanna and Breanna can skirt all regulations. "[G]enerally applicable laws" may permissibly apply to expressive businesses in

many ways. *Coleman v. City of Mesa*, 230 Ariz. 352, 360 ¶ 31 (2012). But the fact that a law often applies "to non-protected activities does not insulate it from constitutional challenge when applied to protected speech." *Id.* at 357 ¶ 17.

For example, the Arizona law barring "the improper disposal of used needles" is not triggered by, and does not affect, the content of tattoos an artist creates. *Id.* at 356 ¶ 11. But the same cannot be said of a law requiring a feminist to tattoo "stop oppressing my sex" on men if she tattoos those words on women. Yet Phoenix and *Amici* would allow governments to compel exactly that.

In sum, Phoenix and its *Amici* seek a complete upending of this country's free-speech jurisprudence. But bureaucrats do not get a free pass to control speech whenever they wield generally applicable laws. *Hurley*, 515 U.S. at 572-73; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656, 659 (2000) (prohibiting "application of public accommodations law" because it infringed the Boy Scouts' "right to choose to send one message but not the other"); *Cohen v. California*, 403 U.S. 15, 16, 18-19, 26 (1971) (prohibiting application to speech of a generally applicable law); *Claybrooks v. Am. Broad. Cos.*, 898 F. Supp. 2d 986, 989-90, 993, 1000 (M.D. Tenn. 2012) (stopping application of anti-discrimination law to television-show casting because "the Supreme Court has expressly found that the First Amendment can trump the application of antidiscrimination laws to protected speech" and

because "the First Amendment protects the producers' right unilaterally to control their own creative content").

B. Unlike laws regulating conduct that incidentally affect expression, § 18-4(B)'s application to Joanna and Breanna's artwork regulates only speech in a direct and intrusive manner.

In an attempt to avoid *Hurley*, *Amici* try to distinguish it. They say *Hurley* prohibited the law's application "because, instead of regulating conduct with only an incidental effect on expression, it directly regulated nothing *but* expression ...." ACLU 9. But that description fits here perfectly. Just as in *Hurley*, Phoenix applies § 18-4(B) to directly regulate the content of Joanna and Breanna's speech—nothing more, nothing less. *Amici*'s arguments to the contrary, which mirror the reasoning of the lower court that *Hurley* rejected, are unavailing. *See Hurley*, 515 U.S. at 563, 572-73 (lower court held that the law "did not mandate inclusion" of the LGBT group in the parade, "but only prohibited discrimination based on sexual orientation" and thus the burden on speech "was only 'incidental' and 'no greater than necessary to ... eradicat[e] discrimination" (citations omitted)).

When applied directly to compel speech, laws do not impose *incidental* burdens. They "directly and immediately affect[]" speakers' rights. *Dale*, 530 U.S. at 659. That is why courts do not apply the *O'Brien* standard—a standard reserved for burdens on speech incidental to controlling conduct—but instead apply strict scrutiny when the government compels speech. *Compare id.* (declining to apply

O'Brien test and noting that *Hurley* applied "traditional First Amendment analysis" instead of applying *O'Brien*), *with* FAS 5 (advocating for *O'Brien* test).[7]

Nor did *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), silently overrule these cases. *Contra* ACLU 11. Joanna and Breanna have already distinguished *Rumsfeld* as involving conduct (hosting an event) and factual speech in emails incidental to that hosting. Pls.' Suppl. Br. 7-8; App.Docket-40 at 22-24 & 23 n.13. *Amici* do not rebut these distinctions. At most, *Amici* assert that the law schools in *Rumsfeld* did in fact disagree with the logistical messages in the required emails. FAS 13. But *Amici* do not explain their reasoning. Surely, *Rumsfeld* would have reached a different result if the law schools—which objected to the military's former "Don't Ask, Don't Tell" policy—stopped hosting recruiters but were compelled to send an e-mail saying "join a cocktail hour celebrating the military's commitment to diversity" if they sent one saying "join a cocktail hour celebrating Kirkland & Ellis' commitment to diversity." The context of compulsion matters.

C. *Hurley*'s protection against compelled speech applies to businesses.

Amici also argue that *Hurley* does not apply to businesses. ACLU 9-10. *Hurley* rejected this very argument. 515 U.S. at 573-74 (the right to be free from

[7] *O'Brien* is also inapplicable because Phoenix applies § 18-4(B) to regulate Joanna and Breanna's speech in a content-based manner. *Holder*, 561 U.S. at 27.

compelled speech is "enjoyed by business corporations generally," including "professional publishers"). Even Phoenix disclaims the ACLU's position. Arg. Tr. 27:9-17 (Amici.App.077) ("[O]ur position on Hurley is not that Hurley doesn't control simply because it's a for-profit/nonprofit. We're not making that distinction."). While Joanna and Breanna run a business, "[i]t is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 801 (1988); *accord, e.g., Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014) (applying *Hurley* to protect for-profit business from compelled speech).

D. Businesses can speak for both themselves and their clients while receiving protection regardless of third-party perceptions.

Amici next suggest that Joanna and Breanna cannot enjoy constitutional protections because they speak for their customers *only* and because third parties will not attribute the speech to Joanna and Breanna. Bloom 5-6. This argument falls short. And it contradicts Phoenix's admission that it cannot regulate certain aspects of Joanna and Breanna's artwork. App.Docket-20 at 47 (admitting that Phoenix "could not ban Brush & Nib from making its art, nor could it compel Brush & Nib to paint only carnations instead of roses").

Certain *Amici* consider it the "nature of business" to "put out a high-quality product" without regard for its communicative content. Bloom 6. That view is

likely shared by many businesses. After all, money talks, and it is hard to forego profit for principle. But that fact only undercuts *Amici*'s argument that Phoenix must compel Joanna and Breanna's speech. Most businesses will be delighted to profit by speaking the messages that Joanna and Breanna cannot.

And the fact that some businesses create expression regardless of content does not require Joanna and Breanna to do so. As a matter of law, when artists create expression for clients, they are also engaged in their own expression. *Coleman*, 230 Ariz. at 359-60 ¶¶ 25, 30 ("[T]he process of [creating artwork] is protected speech" even though artwork may reflect "the work of the ... artist" as well as the "self-expression of the [client]."); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010) ("As with all collaborative creative processes, both the tattooist and the person receiving the tattoo are engaged in expressive activity."); *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015) (rejecting the notion that "it is the customer's message being conveyed, not the tattoo artist's").

Phoenix even admits that Joanna and Breanna's clients "rely heavily on Joanna and Breanna's suggestions, judgment, talent, and discretion to imagine a plan and artistic vision for the requested work." ROA-111 at 13:14-18 (Amici. App.028). Oftentimes, Joanna and Breanna "provide advice about what text, phrasing, and words to use" and "propose their vision for what the requested work

should look like and convey." ROA-111 at 11:3-14 (Amici.App.026). So not only do Joanna and Breanna speak for themselves through their artwork, but they also influence their clients' messages as well. Their artwork is their own speech even while shared by their clients. *Riley*, 487 U.S. at 794 n.8 (a "fundraiser has an independent First Amendment interest in speech, even though payment is received" and it speaks "for the charity"); *Hurley*, 515 U.S. at 570 ("[A]n edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages ... [and] fall squarely within the core of First Amendment security ... as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper ....").

While *Amici* point to third-party perceptions, Bloom 6; FAS 12, their argument is flawed. Clients would think that Joanna and Breanna at least did not object to what they write, particularly because they put a self-identifying mark on their custom artwork and include their website address on their wedding invitations. ROA-111 at 15:6-11. More important, third-party perceptions do not remedy compelled speech. The government cannot compel freelance writers to ghost write books, or artists to ghost paint portraits, even if the writers and artists stayed anonymous so no one could think they were endorsing their creations. Likewise, the government cannot compel newspapers to publish editorials written under someone else's name, or car owners to display slogans on their government license

plate, even though no one would think these speakers agreed with the message. *Accord* App.Docket-14 at 35-38 (detailing why third-party perceptions are irrelevant and disclaimers cannot resolve the issue). This Court should emphatically reject a theory that would allow government to compel the speech of everyone from publishers and lawyers to internet companies and newspapers.

E. Joanna and Breanna serve everyone, regardless of status or conduct, but they cannot express certain messages for anyone.

Amici urge this Court to rule against Joanna and Breanna because courts have rejected certain distinctions between status and conduct. FAS 9-12. But Joanna and Breanna do not ask this Court to distinguish status from *conduct*. They ask it to distinguish, as many courts have done, a person's status from a *message*. *See Hurley*, 515 U.S. at 572-74 (noting that parade organizers did not object to "homosexuals as such," but simply declined to promote a message of LGBT "social acceptance"); *World Peace Movement v. Newspaper Agency Corp.*, 879 P.2d 253, 258 (Utah 1994) (declining to print a religious advertisement did not violate an anti-discrimination law because "it was the message itself that [the newspaper] rejected, not its proponents"). Even Phoenix recognizes the distinction; it just fails to apply it properly. Phx. Resp. to Amicus Brs. Re Pet. for Review 9 ("The Ordinance prohibits discrimination based on the *person*, not the *message*.").

Courts have noted that distinctions based on conduct may be used as a proxy for status-based discrimination. FAS 10 (citing cases). Such cases might have

relevance if Joanna and Breanna refused to create any artwork for anyone in a same-sex relationship or with a same-sex orientation. But that is not their stance. Joanna and Breanna gladly serve everyone. ROA-111 at 22:1-4; ROA-68 at 58:9-61:4 (Amici.App.010-013); ROA-30 ¶¶ 76-77. They just cannot create artwork expressing certain messages (i.e., messages demeaning others or celebrating same-sex marriage)—*regardless* of who requests it. ROA-68 at 59:6-61:4 (Amici. App.011-013); ROA-30 ¶¶ 68-69, 76-77; ROA-102 at App. 261-262.

Even if same-sex couples may be more likely to seek artwork celebrating same-sex marriage than others, the analysis does not change. *Hurley* recognized the right not to convey objectionable messages even when those messages relate to a status. *Hurley*, 515 U.S. at 574 (noting that the message was that "some Irish are gay, lesbian, or bisexual" and that those "sexual orientations have as much claim to unqualified social acceptance as heterosexuals").

And to the extent *Amici* argue that same-sex marriage overlaps with sexual orientation in such a way that objecting to *messages* cannot be separated from an objection to *status*, Phoenix has already admitted otherwise. Pet. Resp. 22 (admitting that Joanna and Breanna "could legitimately refuse" to create "an invitation that actually celebrated same-sex marriage (e.g., with marriage-equality words and symbols) ... because the refusal would be based on *message*" (emphasis added)). It just refuses to recognize that if Joanna and Breanna design an invitation

for an opposite-sex wedding that says "Jesus blesses this marriage," forcing them to design the same invitation for a same-sex couple would undeniably express a message celebrating same-sex marriage.

Phoenix's attempt to distinguish "marriage-equality words and symbols" (which it does not compel) from "celebratory phrases" for same-sex weddings (which it does compel) is unpersuasive. Pet. Resp. 21-22. Because words (to say nothing of artwork) have "emotive" and "cognitive force," courts do not "indulge the facile assumption" that governments can regulate "particular words without also running a substantial risk" of targeting "ideas" in the process. *Cohen*, 403 U.S. at 26. In forcing Joanna and Breanna to write "celebrate Tim and Ted's marriage," Phoenix requires them to convey that the union of people of the same sex is a *marriage* deserving *celebration* just as surely as if it compelled them to say "celebrate Tim and Ted's same-sex marriage" or "celebrate same-sex marriage."

Amici fear that accepting Joanna and Breanna's distinction between message and status would allow someone "to refuse to tattoo a gay person because" doing so "would create a different 'message' than giving the same tattoo to a straight person." FAS 11. No. Refusing to tattoo someone *because they are gay* is a status-based refusal to serve a customer. If Joanna and Breanna created tattoos, that is an objection they would never make. But they would object to tattooing "I love my

husband" on a man, even if they tattooed the same words on a woman. That is an objection based on *message*.

Similarly, a Muslim sign maker who refuses to make *any* sign for a Jewish man wearing a yarmulke engages in status-based discrimination. But the sign maker would make a message-based distinction if he would generally create signs for the Jewish man, but would not create a sign for him to display outside his synagogue saying "Worship the one true God here." Recognizing this status/message distinction, as other courts have done, allows the government to combat invidious status-based discrimination without compelling expression of objectionable messages. That strikes the right balance. *Amici* seek no balance; they want a wholesale public-accommodation exception to free-speech protection that would allow officials to compel a wide array of objectionable speech, even though such compulsion "is always demeaning" and more troubling than "law[s] demanding silence." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps, Council 31*, 138 S. Ct. 2448, 2464 (2018). This Court should reject that approach.

III. Phoenix substantially burdens religion under FERA by threatening jail time and fines if Joanna and Breanna speak consistent with their sincerely held religious beliefs.

Like Phoenix, *Amici* argue that Arizona's Free Exercise of Religion Act (FERA) does not apply here because § 18-4(B) does not substantially burden Joanna and Breanna's religious exercise. But Phoenix threatens six months of

imprisonment and $2,500 in criminal fines for *each day* the two artists speak their religiously motivated message or decline to violate their religious beliefs by creating custom artwork celebrating same-sex weddings. Such fines substantially burden religion. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775-76 (2014) (substantial burden to tax businesses $100 per day for each employee); *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972) ($5 criminal fine is a substantial burden). Surely imprisonment is a substantial burden as well.

So Phoenix and *Amici* instead suggest that the religious concern here is one of *complicity* in the sin of others, and that such concerns fall outside FERA's scope. This argument is incorrect, both factually and legally. Factually, Joanna and Breanna's argument is not that "a business sins by engaging in a commercial transaction with a 'sinful' customer." Lambda 19. Joanna and Breanna gladly serve everyone. ROA-30 ¶¶ 76-77. Instead, they believe that if *they* create custom artwork celebrating a same-sex wedding, then *they* affirmatively express a message about marriage that violates *their* religious convictions. ROA-30 ¶¶ 68-69; ROA-68 at 98:10-99:15 (Amici.App.014-015).

Legally, mere complicity, while not the issue here, implicates FERA. Phoenix and *Amici* contend that a business "must identify more than a tenuous connection between its actions and the third-party's alleged sin." Phx. Suppl. Br. 13; FAS 15. But the government lost this exact argument in *Hobby Lobby*. There,

the government argued that "the connection between what the objecting parties must do ... and the end that they find to be morally wrong ... is simply too attenuated" to impose a substantial burden. 134 S. Ct. at 2777. The Court rejected that position because it "dodges the question" whether the government "imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*." *Id.* at 2778. Instead, it asks a question "courts have no business addressing"—"whether the religious belief asserted ... is reasonable." *Id.*

Ultimately, as the government did in *Hobby Lobby*, Phoenix and *Amici* ask this Court to reject the *reasonableness* of Joanna and Breanna's religious beliefs—the sincerity of which are not in dispute. *Brush & Nib Studio, LC v. City of Phx.*, 244 Ariz. 59, 77 ¶ 48 (Ct. App. 2018). As *Amici* brazenly put it, Joanna and Breanna's "religious objections" to creating artwork celebrating same-sex marriage are "legally insubstantial" because such artwork is "too attenuated—that is, removed from a same-sex couple's decision to wed." FAS 15.

But asking judges trained in the law to divine which religious beliefs are *reasonable* or *legally substantial* is more than impractical. It is impermissible. *Hobby Lobby*, 134 S. Ct. at 2779 ("[I]t is not for [courts] to say that ... religious beliefs are mistaken or insubstantial ...."). Nor is the question relevant. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in

order to merit ... protection." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). Otherwise, religious people would only receive protection when fortunate enough to find themselves before a court that shares their beliefs.

The substantial burden analysis considers whether the applied pressure—through penalties imposed or benefits denied—substantially burdens Joanna and Breanna's religious beliefs as *they* define them. *Hobby Lobby*, 134 S. Ct. at 2778-79 (contraceptive mandate "clearly imposes a substantial burden" by forcing businesses "to pay an enormous sum of money ... if they insist on providing insurance coverage in accordance with their religious beliefs"); *Thomas*, 450 U.S. at 717-18 (conditioning an important benefit upon violating one's faith puts "substantial pressure on an adherent to ... violate his beliefs," resulting in a "substantial" infringement on religious exercise even when the law does not actually "*compel* a violation of conscience"). It does not consider the relative importance of the burdened belief within a hierarchy of beliefs. *Accord* A.R.S. § 41-1493(2) (protecting "the ability to act or refus[e] to act in a manner substantially motivated by a religious belief, *whether or not the exercise is compulsory or central* to a larger system of religious belief" (emphasis added)).

Amici argue that religious people will be their "own judge" if they can decide for themselves what violates their own religious beliefs. FAS 15. Not true. People cannot assert disingenuous beliefs as a pretext for getting their way.

Litigants must show that their religious belief is "sincerely held," that their action or inaction is motivated by that belief, and that the government substantially burdens that religious exercise. *State v. Hardesty*, 222 Ariz. 363, 366 ¶ 10 (2009).

Even when adherents make that showing, the government can still override the person's religious exercise if it shows that doing so is necessary to further a compelling government interest. *Id.* Admittedly, this is a high bar. Were it otherwise, "the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering [FERA] meaningless." *Hobby Lobby*, 134 S. Ct. at 2781 n.37. It could, for example, require supermarkets to "sell alcohol for the convenience of customers"—justifying it as a "regulation ... benefiting a third party"—and thereby prevent "Muslims with religious objections from owning supermarkets." *Id.* But if religious exercise inflicts harm that is sufficiently severe, the government can restrict it. Thus, *Amici*'s concern about harms that may flow from FERA's application to certain complicity-based claims is relevant to the case-by-case strict-scrutiny analysis, not whether the government substantially burdens someone's religious beliefs.

Remarkably, *Amici* say that the legislature, not the judiciary, should reconcile the issues in this case. FAS 15. But the legislature already has: by passing FERA. FERA "plainly contemplates that *courts* would recognize exceptions—that is how the law works." *Gonzales v. O Centro Espirita*

Beneficente Uniao do Vegetal, 546 U.S. 418, 434 (2006).[8] This Court should decline *Amici*'s invitation to abdicate that judicial duty.

IV. Strict scrutiny applies, it is fact specific, and Phoenix cannot show that it needs to control Joanna and Breanna's speech.

Amici fear that there is "no limiting principle" to Joanna and Breanna's argument. Lambda 19. But the limits are many. Strict scrutiny applies only in limited situations. And when it does, the outcomes vary with the circumstances. While Phoenix cannot satisfy strict scrutiny here, it surely can elsewhere.

A. Strict scrutiny applies to Phoenix's denial of Joanna and Breanna's free-exercise and free-speech rights.

Amici emphasize that while "religious and philosophical objections [to same-sex marriage] are protected, it is a *general rule* that such objections do not allow business owners ... to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." ACLU 20 (quoting *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018)) (emphasis added). True enough. But that general rule does not apply to the peculiar circumstances here.

[8] *Amici* argue that applying FERA violates the Establishment Clause. Ams. United 3. Phoenix has waived this issue by not asserting it below or developing it before this Court. Regardless, *Amici*'s primary cases are inapposite, since the laws considered there lacked the safety valve provided by strict scrutiny—which renders FERA permissible. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

First, most cases involve "innumerable goods and services that no one could argue implicate the First Amendment." *Masterpiece*, 138 S. Ct. at 1728. But this case involves speech and triggers strict scrutiny. App.Docket-55 at 4-7 (explaining that Phoenix's compulsion of Joanna and Breanna's speech is content and viewpoint based and deserves strict scrutiny). And second, most free-exercise challenges brought under the First Amendment to neutral and generally applicable laws do not trigger strict scrutiny. But this case does because of FERA. A.R.S. § 41-1493.01(A)-(C) (strict scrutiny applies to "facially neutral" laws of "general applicability" that substantially burden religion).

B. Phoenix cannot survive strict scrutiny because it failed to show that it must control Joanna and Breanna's speech.

Prior briefing explains Phoenix's inability to satisfy strict scrutiny in this case. *E.g.*, App.Docket-14 at 53-61; App.Docket-23 at 28-31; Pls.' Suppl. Br. at 17-19. Some of that briefing responds to *Amici*'s precise arguments on this subject. App.Docket-40 at 34-53. We do not rehash those arguments here.

C. Strict scrutiny's fact-specific analysis negates *Amici*'s fears of devastating consequences.

Amici raise an apocalyptic charge—that recognizing Joanna and Breanna's artistic and religious freedom could eventually leave people without food, shelter, and medical care and also invalidate application of every public accommodations

law. But this argument cannot apply to Joanna and Breanna's free-speech arguments, which only protect speech conveying objectionable messages.

Nor do the apocalyptic arguments apply to Joanna and Breanna's FERA claim. Such "objection[s]" are not to Joanna and Breanna's position but to FERA "itself." *Hobby Lobby*, 134 S. Ct. at 2784. And similar unsubstantiated arguments have already been rejected by the U.S. Supreme Court multiple times. *Id*. at 2784-85 (rejecting argument that applying RFRA as written "would open the prospect of ... religious exemptions from civic obligations of almost every conceivable kind" (citation omitted)); *Gonzales*, 546 U.S. at 431 (rejecting view that there is "no way to cabin religious exceptions once recognized").

Courts recognize "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules." *Gonzales*, 546 U.S. at 436; *Hardesty*, 222 Ariz. at 368-69 ¶ 23 (distinguishing claimant's desire to use controlled substances "whenever he pleases, including while driving," from an exception granted for "limited sacramental rites"). Strict scrutiny serves as a restraint. *Gonzales*, 546 U.S. at 439; *Hobby Lobby*, 134 S. Ct. at 2781 n.37. Because strict-scrutiny analysis varies with the facts, government can satisfy its heavy burden in some situations. *Gonzales*, 546 U.S. at 430-32. The government would likely

overcome strict scrutiny in most of the unlikely scenarios that *Amici* raise, but Phoenix cannot do so here.[9]

Multiple facts make this case unique. First, it does not involve discrimination. It involves declining to convey certain *messages* regardless of the requestor's status, not refusing to serve a class of people because of their *status*. *Amici*'s concern about people "being told 'we don't serve your kind here'" is not implicated. *Compare* Lambda 9, *and* Ams. United 4, *with Masterpiece*, 138 S. Ct. at 1728 (distinguishing baker that "refused to sell any goods or any cakes for gay weddings" from baker who "likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message").

This limiting fact applies to Joanna and Breanna's FERA claim too. After all, FERA requires Phoenix to justify "application" of its law "to the person." A.R.S. § 41-1493.01(C). And here the persons burdened are speakers. To be sure, FERA protects Joanna and Breanna whether or not they engage in protected speech. But Phoenix's concession that Joanna and Breanna's art is speech, and the

[9] Moreover, *Amici*'s fear that businesses will assert countless FERA claims is unsupported speculation that is contradicted by the real world. Lucien J. Dhooge, *The Religious Freedom Restoration Act at 25: A Quantitative Analysis of the Interpretive Case Law*, 27 WM. & MARY BILL OF RTS. J. 153, 211 (Oct. 2018) (analyzing Religious Freedom Restoration Act claims across the country and concluding that RFRA "has not been subject to abuse by business organizations which have accounted for all of three claims since 1993").

fact-specific nature of strict scrutiny, mean that this Court can limit its ruling to speakers like Joanna and Breanna.

Second, this case does not involve any access concerns or proof of widespread problems. Phoenix and *Amici* do not and cannot argue that Phoenicians lack access to custom artwork celebrating same-sex weddings. ROA-111 at 33:5-34:5 (Amici.App.048-049); ROA-36 ¶¶ 423-447 (Amici.App.004-007). *Contra* Ams. United 18 (expressing concern that a marrying couple may face "not having food at their wedding"). In fact, Phoenix has not identified a single instance of sexual-orientation discrimination by any public accommodation in Phoenix, much less a widespread practice. Its Equal Opportunity Department has received only two complaints alleging such discrimination, and the Department did not find a for-cause showing of discrimination in either instance. ROA-111 at 29:21-28.

Third, weddings are uniquely expressive events in two respects. They convey "particularized message[s]" and hold unique religious significance for many people. *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) (noting that the "message in a wedding is a celebration of marriage"). *Accord, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (noting the "sacred" place marriage holds in the lives of many). An objection connected to "limited sacramental rites" such as weddings is narrower than one that applies "at all times." *Hardesty*, 222 Ariz. at 368-69 ¶¶ 20, 23.

Fourth, this case involves a small business's personalized process of creating custom artwork. *See Masterpiece*, 138 S. Ct. at 1742-43 (Thomas, J., concurring) (describing cake designer as "an active participant in the wedding celebration" because of his customized process). The government's interest would likely be stronger in cases involving essential services like food, transportation, and lodging; or mass-produced, off-the-rack products; or products created by large corporations that dominate the market.

Fifth, businesses have strong monetary and cultural incentives to serve LGBT persons and to convey messages celebrating same-sex marriage. Br. for *Amici Curiae* Law & Economics Scholars 2-3, 12-14. In fact, Joanna and Breanna have lost business, suffered economically, and received hate-mail for declining to convey celebratory messages about same-sex marriage even though they are willing to create other artwork for all people, including those in the LGBT community. *Cf.* ROA-111 at 35:6-11 (Amici.App.050). *See also Gonzales*, 546 U.S. at 435 (distinguishing situations where adherents had economic motives to seek exemption).

Sixth, same-sex couples wishing to marry in Phoenix enjoy much societal support. ROA-111 at 34:19-35:5 (Amici.App.049-050); ROA-36 ¶¶ 449-456 (Amici.App.007). For example, the Phoenix City Council voted unanimously to install two rainbow crosswalks "as a symbol of inclusivity with the LGBTQ

community." *Stanton, Council Approve Rainbow Crosswalk Plan*, CITY OF PHX. (Apr. 24, 2018), https://bit.ly/2ViWW3V. The fact that over 260 *amici* businesses and organizations—from PetSmart and Intel to the Diamondbacks and Coyotes—support Phoenix confirms the point.[10] Notably, owners of one of these businesses advertise that they "affirm gay and lesbian couples" and "love to be part of making [their] wedding[s] beautiful, touching and memorable" through their "artistic and creative touches" and photos that "tell[] a story." DANTON PHOTOGRAPHY, https://bit.ly/2AC9L0B (last visited Jan. 11, 2019). This supporting environment mitigates any dignitary harm that may result from occasionally encountering differing views.

The unique circumstances here demonstrate that *Amici*'s doomsday predictions exist only in their imaginations. In contrast, *Amici*'s arguments would eviscerate freedom of speech and religion entirely. The government could compel Muslims to create flyers promoting Judaism, someone who identifies as lesbian to sing at a fundraiser for the Westboro Baptist Church, and an African American to design a sign advertising an Aryan Nations church event. It's not *free* speech or *free* exercise when the government compels or bans it.

[10] Over 200 businesses and organizations filed a "joinder" to a brief filed by sixty businesses and organizations at the Court of Appeals (at App.Docket-28). If the Court chooses to consider that brief filed below, it should also consider Joanna and Breanna's consolidated response (at App.Docket-40) to the briefs filed by *amici curiae* at the Court of Appeals.

CONCLUSION

This Court should reject *Amici*'s invitation to create a world where the government can compel people to speak messages contrary to their religion and conscience. Freedom of speech and religion have not only been bedrock features of our legal system since its inception, but they are also essential ingredients for a flourishing, pluralistic society.

Joanna and Breanna respectfully request that the Court enjoin Phoenix from fining and imprisoning them for politely declining to create custom wedding artwork that violates their religious beliefs and for publishing a statement explaining how their religious beliefs affect the wedding artwork they can create.

NOTICE UNDER ARCAP 21(A)

Joanna and Breanna claim attorneys' fees and costs under A.R.S. §§ 12-341 *et seq.*, 12-348, 12-1840, 41-1493.01(D), and the private attorney general doctrine, *see Arnold v. Arizona Department of Health Services*, 160 Ariz. 593, 609 (1989).

Respectfully submitted this 11th day of January, 2019.

By: /s/ Jonathan A. Scruggs

Kristen K. Waggoner (032382)
John J. Bursch (MI Bar No. P57679)*
Jeremy D. Tedesco (023497)
Jonathan A. Scruggs (030505)
Samuel D. Green (032586)
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, Arizona 85260
Telephone: (480) 444-0020
Facsimile: (480) 444-0028
kwaggoner@adflegal.org
jbursch@adflegal.org
jtedesco@adflegal.org
jscruggs@adflegal.org
sgreen@adflegal.org

Attorneys for Plaintiffs/Appellants/ Cross-Appellees

*Admitted *pro hac vice*