ARIZONA SUPREME COURT

BRUSH & NIB STUDIO, LC, et al., Plaintiffs/Appellants/Cross-Appellees, v. CITY OF PHOENIX, Defendant/Appellee/Cross-Appellant.	Arizona Supreme Court No. CV18-0176-PR Arizona Court of Appeals No. 1 CA-CV 16-0602 Maricopa County Superior Court No. CV2016-052251

AMICI CURIAE BRIEF (WITH CONSENT) OF THE STATES OF ARIZONA, ARKANSAS, LOUISIANA, NEBRASKA, OKLAHOMA, TEXAS, AND WEST VIRGINIA, AND THE COMMONWEALTH OF KENTUCKY, BY AND THROUGH GOVERNOR MATTHEW G. BEVIN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTERESTS OF AMICI CURIAE

Amici curiae, the States of Arizona, Arkansas, Louisiana, Nebraska, Oklahoma, Texas, and West Virginia, and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, file this brief in support of Petitioners. Amici curiae, as States, have compelling interests in protecting their citizens' freedoms of speech and religion secured by the United States Constitution, as well as by their individual state constitutions. Amici curiae do not, however, have a legitimate interest in coercing artists to use their talents to create government sponsored messages. Such a practice, if permitted, is not only constitutionally forbidden, but would undermine the "mutuality of obligation" upon which our "pluralistic" and "tolerant" society is founded. *Lee v. Weisman*, 505 U.S. 577, 590–91 (1992).

INTRODUCTION

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The decision of the court of appeals below, however, charts a new course. It held that the City of Phoenix could force the Petitioners here—who operate a calligraphy and painting business—to create custom-made wedding art conveying

a message in support of same-sex marriage contrary to their sincerely held religious beliefs.

The lower court arrived at this holding by concluding that this art is not protected speech when regulated by a public accommodation law that generally prescribes conduct. But art is a classic example of pure speech and pure speech cannot be made a public accommodation. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995). To hold otherwise "amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Id.* at 579. The concerns of compelled speech are further heightened here because the City's ordinance would force Petitioners to create art for a ceremony considered by them to have deep religious significance.

As applied here, the City's public accommodation ordinance also violates the Arizona Free Exercise of Religion Act. The ordinance substantially burdens artists who decline to accept commissions expressing views contrary to their religious beliefs by subjecting them to severe civil and criminal penalties. It effectively forces such artists to choose between practicing their religion and earning a living in their chosen trade, contrary to Arizona's "perfect toleration" of religion provision. Ariz. Const. art. 20, par. 1. Further, whatever interest the City might have in "ensuring equal access" and "diminishing humiliation and social stigma," Op. ¶ 50, cannot match the harm suffered by artists the City would

compel, on pain of losing their livelihood, to create customized artistic expression that violates their conscience. *See* Amici Curiae Br. of Tex., *et al.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 2017 WL 4023111, 7 (U.S. 2017) ("Tex. Br."). This fact is made clear by article 2, section 12 of the Arizona Constitution, which identifies "acts of licentiousness" and "practices inconsistent with the peace and safety of the state" as the only interests sufficient to overcome an individual's "liberty of conscience." Petitioners' decision to decline a commission for artwork does not fall within either category.

This Court should reverse the decision of the court of appeals.

BACKGROUND

Joanna Duka and Breanna Koski operate a hand-painting, hand-lettering, and calligraphy business in Phoenix, Arizona called Brush & Nib Studio, LC ("Petitioners"). ROA-111 at 3:23–4:5, 15:18–25. Petitioners happily sell their pre-made works to anyone for any purpose. *Id.* at 22:1–4. But, when deciding whether to create custom artwork, Petitioners evaluate the *message* the artwork will promote. ROA-68 at 26:19–25, 60:19–61:1. Consistent with their traditional Judeo-Christian beliefs, Petitioners do not accept commissions to create custom art that expresses a message contradicting the Bible, demeaning others, endorsing racism, or inciting violence. ROA-102 at App. 261–262; ROA-68 at 55:19–56:3. The majority of Petitioners' custom artwork is for wedding ceremonies. ROA-68

at 74:19–75:3; ROA-111 at 7:25–8:4, 15:6–11. Because Petitioners believe "that God ordained marriage to be between one man and one woman," they do not create custom-made artwork celebrating weddings for any other type of union. ROA-30 ¶¶ 22, 67–69; Op. ¶ 3. Petitioners also desire to post a statement notifying potential customers that they will not create art that conveys a message contrary to their religious and artistic beliefs and identity. ROA-30 ¶¶ 71–75, 143-144, 146, 148–150; Op. ¶ 4.

In 2013, the City of Phoenix amended Phoenix City Code 18-4(B) ("Section 18-4(B)") to prohibit discrimination on the basis of "sexual orientation, [and] gender identity or expression." Op. ¶ 8. This ordinance prohibits places of public accommodation from refusing to offer goods and services to those belonging to a protected class and also prohibits places of public accommodation from publishing or advertising a notice that communicates refusal of service for members within a protected class. Op. ¶ 8. Violating Section 18-4(B) is a Class 1 misdemeanor, carrying the possibility of six months in jail and a $2,500 dollar fine for each day a person commits a violation. ROA-111 at 28:5–23, 29:15–20.

Brush & Nib is a place of public accommodation offering goods and services within the City of Phoenix subject to Section 18-4(B). Op. ¶ 2. Petitioners brought this pre-enforcement action seeking a declaration that Section 18-4(B) cannot compel them to create custom art for weddings in violation of their

religious beliefs. Applied this way, Petitioners contend, Section 18-4(B) would violate (among other things) the Arizona Constitution's free speech clause and the Arizona Free Exercise of Religion Act ("FERA"), A.R.S. §§ 41-1493 to -1493.04. Op. ¶ 4. The trial court ruled against Petitioners, and the court of appeals affirmed (except for severing a portion of Section 18-4(B) for vagueness). Op. ¶¶ 5, 45, 55.

The court of appeals rejected Petitioners' freedom of speech claim. Op. ¶¶ 20–32. It concluded that Section 18-4(B) did not regulate Petitioners' speech. Indeed, it went so far as to conclude that creating *art* in the form of customized calligraphy and paintings for weddings was not expressive at all. Op. ¶¶ 28, 29. As for Petitioners' FERA claim, the court of appeals concluded that Section 18-4(B) did not substantially burden Petitioners' free exercise of religion because they could simply shut down the wedding part of their business to avoid any conflict with their religious beliefs, Op. ¶ 49. In any event, the court of appeals concluded that Section 18-4(B) was the least restrictive way of furthering the City's compelling interest in ensuring "equal access" and "eradicating the construction of a second-class citizenship and diminishing humiliation and social stigma." Op. ¶ 50.

ARGUMENT

I. As artistic works, commissioned art for weddings is pure speech protected by the Arizona Constitution and may not be compelled.

The Arizona Constitution protects the right of "[e]very person [to] freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Ariz. Const. art. 2, § 6. This provision affords greater protection to speech than the First Amendment of the United States Constitution. *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354–55 (1989). To determine if Arizona's free speech protections apply, a court must first determine whether the activity at issue is constitutionally protected expression. If activity is "purely expressive" (i.e., "pure speech") then it is entitled to "full" protection and can be regulated only through reasonable time, place, and manner restrictions.[1] *Coleman v. City of Mesa*, 230 Ariz. 352, 358, ¶ 19 (2012) (quotes omitted). Pure speech "refer[s] not only to written or spoken words, but also to other media (such as painting, music, and film) that predominantly serve to express thoughts, emotions, or ideas." *Id.* ¶ 18. Petitioners' creation of custom-made calligraphy and paintings fit squarely within this definition. The court of appeals erred in concluding otherwise.

[1] Conduct with an "expressive component" is also protected under the Arizona Constitution, though it may be subject to greater governmental regulation. *See Coleman*, 230 Ariz. at 358, ¶ 19. Because Petitioners' work is pure speech, *Amici* do not address the analysis for expressive conduct.

This Court's decision in *Coleman* is on all fours. In *Coleman*, the Court held that it was "incontrovertible" that tattooing qualifies as pure speech. *Id.* at 359, ¶ 23; *see also Hurley*, 515 U.S. at 569 (even a painting that does not covey a particularized message is "unquestionably" protected). The court observed that "'[t]he principal difference between a tattoo and, for example, a pen-and-ink drawing, is that a tattoo is engrafted onto a person's skin rather than drawn on paper.'" *Coleman*, 230 Ariz. at 359, ¶ 24 (quoting *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010)). This distinction, however, had "'no significance in terms of the constitutional protection afforded the tattoo.'" *Id.*

The reverse is also true. Calligraphy and painting do not become less protected if drawn on paper rather than skin. "'[A] form of speech does not lose First Amendment protection based on the kind of surface it is applied to.'" *Id.* Thus, just as tattooing is pure speech, so also are calligraphy and painting. It is also of no moment that Petitioners make their art as part of a business. The tattoo artists in *Coleman* were paid for their services, yet the fruit of their effort was nonetheless pure speech. *Id.* at 360, ¶ 31 ("The degree of First Amendment protection is not diminished merely because the protected expression is sold rather than given away.") (quotes and alterations omitted).

The court of appeals, however, reached the opposite conclusion, finding that it was "irrelevant" that calligraphy and art constitute pure speech in "certain

hypothetical circumstances." [2] Op. ¶ 22. But forcing an artist to create pure speech is not a hypothetical circumstance. It is the specific application of Section 18-4(B) at issue in this case. That public accommodation laws generally regulate conduct and, as such, are generally permissible is not the question here. Because the regulated activities at issue involve pure speech, the question is whether a general law can be used to declare "'speech itself to be the public accommodation.'" *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1741 (2018) (Thomas, J., concurring) (quoting *Hurley*, 515 U.S. at 573).

The United States Supreme Court in *Hurley* unanimously answered this question, "no." At issue in *Hurley* was a general public accommodations law which (like here) prohibited discrimination on the basis of sexual orientation. 515 U.S. at 572. Massachusetts courts had held that this law required a private parade to include a gay, lesbian and bisexual group with its own banner promoting its own

[2] The court of appeals actually went further. It held that the art in this case "is not expressive conduct" at all. The conclusion is irreconcilable with Supreme Court precedent recognizing as expressive: music; marching or parading while displaying a swastika; nude dancing; indecent, sexually oriented telephone messages; portrayals of particularly violent and intentional cruelty to animals; burning the American flag; saluting the flag; charitable solicitation without having to reveal the amount of overhead as a proportion of a charity's income; picketing against homosexuality and the Roman Catholic Church at a military funeral; describing a credit-card fee as a surcharge; and lying about having won military honors. Br. for Cake Artists, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 2017 WL 4004524, at *34–35 (U.S. 2017) (citing authorities).

message—a message that the organizer of the parade desired not to promote. *Id.* at 562–65, 572. The Supreme Court reversed, recognizing that, even though the law did not "as a general matter" violate the First Amendment, the particular application of the law required the organizer "to alter the expressive content of their parade." *Id.* at 572–73. Applied this way, the law violated "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," including the right to "decide what not to say." *Id.* at 573 (quotes omitted). Thus, contrary to the conclusion of the court of appeals, even a law which generally regulates conduct cannot require speakers to modify the content of their expression to "promot[e] an approved message or discourage[e] a disfavored one, however enlightened either purpose may strike the government." *Id.* at 578–79. The court of appeals erred in holding that it was "irrelevant" that Section 18-4(B) compelled pure speech as applied to Petitioners.

The freedom of speech concerns in this case are further amplified by the particular type of speech at issue. Not only does the code provision compel Petitioners to create pure speech they prefer not to create, it also forces them to participate in the recognition and celebration of a wedding—a ceremony long held "sacred to those who live by their religions" and with "transcendent importance" in the annals of human history. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594–95 (2015). In this case, Section 18-4(B) compels what Petitioners genuinely

understand to be religious speech; that is, it forces Petitioners to create art that expresses the message that particular unions are marriages, despite their sincerely held religious beliefs that such unions are *not* marriages and are antithetical to God's design for marriage. Because the application at issue regulates "the communication of religious beliefs," it raises serious "Free Exercise Clause concerns." *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 882 (1990). Thus, this case is distinguishable from other applications of general public accommodation laws both because it has the effect of declaring "speech itself to be the public accommodation," *Hurley*, 515 U.S. at 573, and also because it forces a message about a ceremony long associated with "the communication of religious beliefs," *Smith*, 494 U.S. at 882.

The court of appeals decision to the contrary primarily relied upon *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006). But *Rumsfeld* does not allow the City to force Petitioners to create commissioned wedding art. There, a coalition of law schools sought to restrict military recruiters' access to their students in protest of the government's policy with respect to homosexuals in the military. But the Court held that Congress could require law schools to provide military recruiters the same access to students as they provided other recruiters as a condition for their university receiving federal funding. In so holding, the Court emphasized that the law "neither limits what law schools may say nor requires

them to say anything." *Id.* at 60. But the same thing cannot be said here. The application at issue would require Petitioners to create inherently-expressive, custom-made written and pictorial art. This circumstance is 180 degrees from the key fact in *Rumsfeld* and only underscores the error below.

Finally, the City has no legitimate interest in compelling artists to modify their artistic messages to promote government-favored messages, no matter how well intentioned.[3] *Hurley*, 515 U.S. at 579 ("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."). A government simply cannot force a citizen to engage in or endorse expression—whether saluting a flag, or even passively carrying a message on a license plate. Tex. Br., *supra* at 24 (citing *Barnette*, 319 U.S. at 642 and *Wooley v. Maynard*, 430 U.S. 705, 717 (1977)).

As such, the court of appeals erred in concluding that Arizona's freedom of speech clause permits the City to commandeer the artistic services of its residents

[3] Content based *restrictions* on the content of speech have been limited to only a few "historic and traditional [exclusions]—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quotes omitted). But this case does not involve a historic exclusion. Further, it involves a government attempt to compel the *creation* of speech rather than a *prohibition* on speech.

and to force them to create customized expressions with which they disagree.[4] *See Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012) (governments cannot "prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves"). The decision of the court of appeals should be reversed.

II. Section 18-4(B) violates Petitioners' rights under the Arizona Free Exercise of Religion Act.

The court of appeals also erred in concluding that Petitioners' refusal to accept wedding commissions contrary to their religious beliefs was permitted under the Arizona Free Exercise of Religion Act. FERA provides that the "fundamental" right of religious free exercise shall not be substantially burdened, even by facially neutral laws or by a rule of general applicability. A.R.S. § 41-1493.01(A)–(B). A party raising a claim or defense under FERA must establish: (1) that an action or refusal to act is motivated by a religious belief, (2) that the religious belief is sincerely held, and (3) that the governmental action substantially burdens the exercise of religious beliefs. *State v. Hardesty*, 222 Ariz. 363, 366, ¶ 10 (2009). Once established, a burden on religious exercise can only stand if the government establishes that a law furthers "a compelling government interest" and

[4] Because the City lacks this authority, it necessarily follows that Section 18-4(B) cannot constitutionally prohibit Petitioners from posting a statement that they will not create art in violation of their religious beliefs and artistic identity.

is "[t]he least restrictive means of furthering that compelling government interest." *Id.* (citing A.R.S. § 41-1493.01(C)).

A. Section 18-4(B) substantially burdens Petitioners' exercise of religion.

Because the City concedes that Petitioners' refusal to create custom-made art for same-sex weddings is motivated by their sincerely held religious beliefs, the court of appeals focused its inquiry on whether Section 18-4(B) substantially burdens Petitioners' exercise of religion. The court of appeals erred in concluding that it did not.

First, the court of appeals applied the wrong test. It adopted the federal standard under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 ("RFRA"), for determining whether a substantial burden exists. Although FERA often parallels RFRA, *Hardesty*, 222 Ariz. at 365, ¶ 8, FERA contains an express definition of "substantial burden" whereas RFRA does not. By its express terms, "substantially burden" under FERA "is intended solely to ensure that this article is not triggered by trivial, technical or de minimis infractions." A.R.S. § 41-1493.01(E). Forcing Petitioners to participate in the recognition and celebration of ceremonies they consider sacred in violation of their religious beliefs, is hardly a "trivial, technical or de minimis infraction[]." This is especially so considering that, for each day Petitioners refuse to do so, they can be

punished with six months in jail and a fine of $2,500. The court of appeals erred by applying the wrong standard.

In any event, Petitioners also easily satisfy the federal test for substantial burden. Section 18-4(B) forces Petitioners "to choose between following the precepts of [their] religion" or "abandoning one of the precepts of [their] religion in order to accept work." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). As the court of appeals itself admitted, to remain true to their beliefs, Section 18-4(B) forces Petitioners "to discontinue selling custom wedding-related" art—the primary source of revenue for Brush & Nib. Op. ¶ 49. As another grounds for finding a substantial burden, Section 18-4(B) "affirmatively compels [Petitioners], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). Section 18-4(B) criminally punishes Petitioners with up to six months of jail time for each day they refuse to create custom-made art in violation of their sincerely held beliefs.

The court of appeals ignored these significant burdens on Petitioners' exercise of religion. In fact, the opinion below nowhere mentions the substantial criminal and civil penalties imposed by Section 18-4(B). Instead, the court of appeals pronounced that it is enough that Petitioners "are not penalized for expressing their belief." Op. ¶ 49. But FERA protects not only religious belief, it

also protects "the ability to ***act*** or refus[e] to act in a manner substantially motivated by a religious belief." A.R.S. § 41-1493(2) (emphasis added).

Next the court of appeals declared that Petitioners could just stop engaging in wedding-related speech and shut down their wedding business. But a person's free exercise of religion would be a hollow shell if government could justify any regulation by claiming that an adherent could avoid the burden of a law by discontinuing their religious practice. The court of appeal's suggestion for Petitioners to pick another job also ignores that one's choice of occupation and how they perform it is often inspired by their religious convictions.

FERA, as well as the Arizona Constitution, recognizes that sincerely held religious beliefs are not something that can be turned on and off with the flip of a switch. For this reason, the Arizona Constitution expressly recognizes the interplay between the right of religious exercise and the right to property. Article 20, paragraph 1 of the Arizona Constitution secures the "[p]erfect toleration of religious sentiment" both in "person" and in "property." Ariz. Const. art. 20, par. 1 ("Perfect toleration of religious sentiment shall be secured to every inhabitant of this state, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship, or lack of the same.").

Any suggestion that a right to religious exercise can exist without a corresponding protection of property ignores the role of property in our nation's

founding. The Framers—strongly influenced by the writings of John Locke, William Blackstone, and Edward Coke—created a system designed to maximize human freedom by protecting the means to acquire and maintain property. As Justice O'Connor outlined in her dissent in *Kelo v. City of New London*, one of the Framers' "great objects" was protecting "the security of Property." 545 U.S. 469, 496 (2005) (quotes and alterations omitted). Consistently, the United States Constitution, among other things, protects against laws "impairing the Obligation of Contracts," Art. I, § 10, "unreasonable searches and seizures," Amend. IV, and deprivation of property without due process of law, Amend. V.

This "great object of Government" extends not only to privately held real property and its protection against government taking, but also to the "right to earn a living." Timothy Sandefur, The Right to Earn A Living, 6 Chap. L. Rev. 207 (2003). Blackstone maintained that "at common law, every man might use what trade he pleased." 1 William Blackstone, Commentaries *427. And Coke, in turn, argued that "[n]o man ought to be put from his livelihood without answer." Edward Coke, The Second Part of the Institutes of the laws of England *47 (William S. Hein Co. 1986) (1797). James Madison made the explicit connection between the right to earn a living and the right to property as such:

> That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations,

> which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.

James Madison, *James Madison: Writings* 515, 516 (Jack N. Rakove ed. 1999).

Thus, the court of appeals' refusal to acknowledge the burdens Section 18-4(B) places on Petitioners' right to earn a living is contrary to the value placed on property rights under both the Arizona and federal constitutions. This is no less true where artistry is involved. What artists express and how they express it is their stock-in-trade. The City must not be allowed to force artists to create customized expressions contrary to their moral, religious, or political beliefs, even if such work is paid for by the one requesting it. If such coercion were possible, the guarantee of religious freedom in Article 20 would be very far from "[p]erfect." No matter what test is utilized to determine whether Section 18-4(B) "substantially burdens" Petitioners' religious exercise, the regulation fails it.

B. Section 18-4(B)'s burden on Petitioners' exercise of religion is not the least restrictive means to further a compelling interest.

Phoenix also cannot carry its burden of establishing that Section 18-4(B) is the least restrictive means of furthering a compelling government interest. The court of appeals found that Phoenix had a "compelling interest in preventing discrimination" as well as "diminishing humiliation and social stigma." Op. ¶50. These interests do not justify the burdens upon Petitioners' expression and exercise of religion.

There is no legitimate, let alone compelling, interest in coercing or prohibiting the speech at issue. Producing "a society free of [] biases" is not a sufficient basis to compel pure speech, "for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Hurley*, 515 U.S. at 578–79. Indeed, it is "hard to see" how Petitioners' affirmation of a traditional belief in marriage could be overcome by the City's proffered interests when "[c]oncerns about 'dignity' and 'stigma' did not carry the day" against challenges to the right of white supremacists to burn a 25–foot cross, conduct a rally on Martin Luther King Jr.'s birthday, or circulate a film featuring hooded Klan members who were brandishing weapons and threatening African-Americans with racial epithets. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1747 (2018) (Thomas, J., concurring) (citing *Virginia v. Black*, 538 U.S. 343 (2003); *Forsyth Coty. v. Nationalist Movement*, 505 U.S. 123 (1992); and *Brandenburg v. Ohio*, 395 U.S. 444, 446, n. 1 (1969)).

The insufficiency of Phoenix's interest to regulate Petitioner's religious expression is further reinforced by the "liberty of conscience" provision of Article 2, section 12 of the Arizona Constitution. It provides in part: "The liberty of conscience secured by the provisions of this constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state." Ariz. Const. art. II, § 12. From the earliest days of

statehood, this Court has affirmed that the liberty of conscience secured by the Arizona Constitution can be "circumscribed only by the limitation that such liberty shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state." *Ruse v. Williams*, 14 Ariz. 445, 451–52 (1913).

Consistently, in *Hardesty*, the Court sustained Arizona's criminalization of marijuana possession against a FERA challenge based on *public safety* grounds—a basis permitted under Arizona's liberty of conscience provision. 222 Ariz. at 367, ¶ 17 (citing *Olsen v. DEA*, 878 F.2d 1458, 1462 (D.C. Cir. 1989), for the proposition that marijuana "poses a real threat to individual health and social welfare"). Likewise, in *Planned Parenthood Arizona, Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 278, ¶ 50 (App. 2011), the court looked to the grounds recognized under article 2, section 12 in upholding a statute allowing medical providers to refrain from facilitating or participating in abortions on moral or religious grounds. The court observed that "no authority suggests that permitting individuals to choose whether to facilitate abortions places the peace and safety of the state at risk." *Id.* at 278, ¶ 48.

Here, Phoenix has not offered any suggestion that accommodating Petitioners' liberty of conscience jeopardizes public safety or "excuse[s] act of licentiousness." Ariz. Const. art. 2, § 12. After all, Petitioners' refusal to create art

for same-sex wedding ceremonies is rooted in a belief held "in good faith by reasonable and sincere people here and throughout the world." *Obergefell*, 135 S. Ct. at 2594.

Even if the City could put forward a sufficiently compelling and constitutionally permitted interest, there is no evidence to suggest that such an interest could not be sufficiently advanced by other means, including granting a religious accommodation under the circumstances here. Thus, neither "preventing discrimination" nor "diminishing humiliation" serve as a sufficiently compelling and tailored interest to justify the burden on religion under the circumstances of this case. FERA protects Petitioners from being compelled to produce custom-made art for a wedding ceremony in violation of their sincerely held convictions.

CONCLUSION

The court should reverse the decision of the court of appeals, declare Section 18-4(B) unconstitutional as applied to Petitioners' commissioned wedding art, and enter judgment in favor of the Petitioners.

RESPECTFULLY SUBMITTED this 20th day of December, 2018.

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