ARIZONA SUPREME COURT

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

AMICUS BRIEF[1] IN SUPPORT OF PLAINTIFFS/APPELLANTS/CROSS-APPELLEES' PETITION FOR REVIEW

David L. Rose, Esq.
2525 E. Camelback Road, 7th Floor
Phoenix, AZ 85016
Telephone: (602) 288-7905
Facsimile: (602) 255-0103
dlr@tblaw.com

Counsel for certain Amici Arizona Legislators

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

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

State Statutes

Other Authorities

DISCLOSURE OF SPONSORS AND SPONSORS' INTERESTS

Amici are certain Legislators of the State of Arizona, serving in Arizona's House and Senate, and are listed in the appendix to this brief. *See* Appx. 1. Amici supports this Court's review as members of a coordinate branch of Arizona's government. The Court's disposition of this case will provide valued guidance as Arizona's legislature contemplates how lawmakers might protect the interests presented in this case, concerning rights to free speech, free expression and free exercise of religion, as well as statutory rights, such as rights to accommodation that may be at issue. Amici are also interested in this Court reviewing the Court of Appeals ("COA") application of Arizona's Free Exercise of Religion Act (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). Amici have a particular concern in this Court's interpretation of that statute which Amici carefully crafted.

Amici agree and are aware, as 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). The case addresses whether public accommodation laws may coerce speakers to convey messages contrary to their faith, and whether accommodation statutes could be better balanced so all Arizonans, of every walk of life, may participate and freely

and publicly express themselves with the least amount of government intrusion upon individual rights. Arizona's Legislators will no doubt grapple balancing questions of free speech and expression as well as freedoms of religious exercise with access to accommodations, and this Court's views on the case will aid them as they engage in policy making. Therefore, for these reasons and those set forth below, as well as those detailed in the petition, Amici urge the Court to grant the petition for certiorari.

INTRODUCTION

The COA was correct that this case "may be the first of its kind in Arizona." *Brush & Nib*, 418 P.3d 426, 434 ¶ 10, and the case raises policy issues that are now commonplace, if controversial, across the country. Consequently, Amici urge this Court to grant certiorari so that the legislature may have the legal perspective of Arizona's highest Court. That perspective is invaluable to the coordinate legislative branch as it considers what additional measures, if any are necessary, would be the best public policy to enable all Arizonans to exercise their rights in the public square with the greatest degree of freedom.

Amici acknowledge they have no standing to ask for such guidance themselves. *Bennett v. Napolit*ano, 206 Ariz. 520, 524, 16, 81 P.3d 311, 315 (2003). However, this Court should address questions of important questions of law as the Constitution of Arizona has no express case or controversy requirement,

Ariz. Const. art. VI, and this Court has observed that judicial economy and administration of justice may be served when an actual controversy where interests are given representational appearance presents itself to the Court such that it can render a meaningful decision on the issues before it. *Amory Park Neighborhood Ass'n v. Episcopal Cmty. Servs.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985). This is such a case. It presents the Court, and Arizona's coordinate branches of government, the opportunity to reflect on how Arizona government might foster freedom to the greatest extent for all Arizonans.

The issues presented by this case have been presented to the several states for policy consideration by express invitation and action of the United States Supreme Court in its latest foray into the issues. *See Washington v. Arlene's Flowers, Inc.* 389 P.3d 543 (Wash. 2017), *vacated and remanded*, 138 S. Ct. 2761 (2018) (remanding case to the Washington Supreme Court for proceedings consistent with *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018)). *Masterpiece Cakeshop* left some issues from that case, especially in light of remand, open to consideration by state policy makers and, directly, by courts of the several states. *See id*. Indeed, the Court itself urged other courts and policy makers to "further elaborat[e]" on the important issues at stake. *Masterpiece Cakeshop*, 138 S. Ct. at 1723-24, 1732.

As a sovereign state in our Republic, Arizona will not be alone in its policy considerations, but neither should it lag behind. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). Indeed, "under our federal system the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). In our country the separation of powers between states and between states and the federal government encourage those entities exercising their proper governmental powers to "control each other" through our constitutional republic's given checks and balances. The Federalist No. 51 at 351 (James Madison) (J. Cooke ed. 1961). The undersigned Arizona Legislators find that they can exercise their powers to do so in a more informed manner on the pressing issues presented by this case if this Court exercises its review over the decision of the COA.

There are two principle reasons for this, addressed as follows. First, the COA engaged in the logical fallacy of begging the question regarding whether the activity of the business owners engaged in in the case is indeed speech, as the COA is concluded by tautology that no speech was at issue. Consequently, the COA's analysis under the Speech Clause needs this Court's review as the COA seems to

have applied accommodations law inaccurately with respect to the competing speech rights of the petitioners. Second, the COA decision assumed that equal access to public accommodations—an interest protected by Arizona statute—trumped the constitutional rights of free exercise and religious freedom as well as those of freedoms of speech and expression.

Amici point out these issues to foreground the policy questions the COA decision presents. Amici recognize that the Court may find that the COA decision was correct in every respect. However, Amici agree with petitioners that the importance of the issues raised merit this Court's review, and Amici will value this Court's opinion, whatever it is, as Amici thoughtfully engage in policy-making as is their duty as public officials.

REASONS FOR GRANTING THE PETITION

Amici do not add to factual discussion detailed in the petition and by COA. As policy-makers Amici are responsibly curious about the central issues raised by the case: whether public accommodation laws can force speakers to convey messages contrary to their faith, and the competing accommodations questions. Amici are convinced that each of the arguments advanced in the Petition are bases that merit this Court granting certiorari. Amici follow those arguments and find they have merit, but will not repeat them, and instead offer the following to the Court as reasons to grant review in this case.

Petitioners raise a fair point that the COA erred because that Court did not recognize that public accommodation laws whose main purpose is prohibiting discrimination can still trigger compelled speech analysis. Pet. at 11-12 (citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995)). Petitioners point is appropriate and merits this Court's review. Yet Amici wish to add to this point because of the troubling way the issue was treated in the decision below.

I. The COA's Speech Clause Analysis is in Need of this Court's Review.

Consider how the COA framed the coerced speech question. The COA first distinguished *Coleman v. City of Mesa*, 230 Ariz. 352, 284 P.3d 863 (2012), by simply stating that the case 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 426, 437 ¶ 21 (citing *Coleman*). This rationale dodges the question and is foreclosed by the Supreme Court's decision in *Janus v. Am. Fed'n of State, Cty., & Mun. Emps. Council 31*, 138 S.Ct. 2448 (2018), where the Court held that "measures compelling speech are at least as threatening" as "restrictions on what can be said." *Id*. at 2463. The COA's analysis and invocation of "using the First Amendment as a shield" is logically identical to the *Janus* dissent's rhetoric regarding "weaponizing the First Amendment", *id*. at

2501 (Sotomayor, J. dissenting), which the *Janus* majority squarely rejected. *Id*. at 2463.

The COA's logic in its Speech Clause analysis is that creative activity is not speech because the COA says it is not speech, reasoning that is both circular and that begs the question. Petitioners are correct to point out that the COA erroneously applied the analysis of *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), as the COA misread that case, which guaranteed equal access of military recruiters, as one that endorses forced expression. Pet. at 12 (citing *Rumsfeld*). The Petitioner's criticism and analysis are correct. The COA proposes a conduct/speech analysis that is faulty under almost every conceivable Supreme Court precedent. But consider how the COA's decision fails to square with a binding classic: *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Under the COA's analysis the forced hand raising in the unconstitutional flag salute would merely be "conduct" not "expression" if they appeared identical to a "general observer." *Brush & Nib*, 418 P.3d 426, 439 ¶ 29. Similarly, under the COA's logic, the protected conduct of parade marching in *Hurley*, would be conduct unprotected as expression, a proposition the Supreme Court squarely rejected in that case. *Compare Brush & Nib*, 418 P.3d 426, 437 ¶ 21 *with* 515 U.S. 557, 571-73 (1995).

To get around the conduct/expression analysis required by Supreme Court caselaw, the COA relies upon simple assertion rather than analysis, concluding: "The mere fact that Section 18–4(B) requires Appellants to comply with the law does not render their creation of design-to-order merchandise for same-sex weddings expressive conduct." *Brush & Nib*, 418 P.3d 426, 439 ¶ 29. The court then discusses a number of instances where the meaning of an expression would not be understood as expressive by "a general observer." *Id*.

But this is not the proper test in a forced speech analysis and never has been. As the leading case puts it, the test is whether it is allowable that government regulation "invades that sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control." *Barnette*, 319 U.S. at 642. The reaction of the "general observer" to conduct is irrelevant to this analysis – just as the flag salute at issue in *Barnette* would not have constituted forced speech for some non-Jehovah's Witnesses, so it did constitute forced speech for the Jehovah's Witnesses in that case. *Id*. The point is clear: a "general observer" would likely not be able to tell whether the salute by a Jehovah's Witness was materially different from that of a non-Jehovah's Witness. Yet the compelled speech doctrine, and the constitutional analysis, turned on that difference. The point of analysis is that of the compelled person, not some "general observer." *See id*. The COA applied the wrong test. It did not consider

whether under the circumstances, the regulation caused forced expression. Rather, it merely insisted that because it did not consider Petitioners' activities expression they were not protected expression in fact or as a matter of law. This conclusion was error of logic and law.

Put plainly, the COA's Speech Clause analysis rests on the classical logical fallacy *petitio principia,* commonly known as Argument by Assertion or Begging the Question: the belief that if you say something enough times and repeatedly assume a conclusion, it eventually is taken as true and therefore you win the argument. In short, the fallacy entails: "To take for granted the matter in dispute, to assume without proof." Oxford English Dictionary (online edition, accessed September 18, 2018); *accord* Sister Miriam Joseph, C.S.C., Ph.D., THE TRIVIUM: THE LIBERAL ARTS OF LOGIC, GRAMMAR, AND RHETORIC 205 (Paul Dry Books, ed. 2002) (1937); Bryan Garner, GARNER'S MODERN AMERICAN USAGE 93–94 (3d ed. 2009). Though repetition may sometimes be persuasive in rhetorical effect, its use is common enough that it is recognized as a fallacy and, when recognized, is quickly dispelled as fallacy, and consequently abandoned for lack of persuasive power, as is often also repeated in the conclusion of those who inspect the use of repetition in rhetoric: "truth will out." WILLIAM SHAKESPEARE, MERCHANT OF VENICE, II, ii, 78.

And to move from logical to legal rules, this Court has held that findings and conclusions must be based on sound logic, and that when the government relies on inferences to bridge the gap between facts adduced and conclusions reached, those conclusions must follow logically from the facts upon which they are based; indeed, this Court has been crystal clear in noting that mere repetition of a theory does not constitute the truth. *See State v. Heron*, 94 Ariz. 81, 85, 381 P.2d 764, 767 (1963) ("The gravemen of these charges in the indictment, stripped of its legal phraseology, begs this simple question when applied to the facts of this case: Does the truthful entry of a fraudulent transaction constitute a false entry within the meaning of the statute? Logic as well as the authorities requires that this question be answered in the negative."); *accord Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 20 (2003) (Scalia, J. dissenting) ("that begs the question—that is, it assumes the answer to the very question presented [and] neither logic nor precedent supports that conclusion").

That is the case here with COA's analysis of the speech claim at issue. This Court should conduct the compelled speech analysis as the law requires, from the perspective of the regulated person. *Barnette*, 319 U.S. at 642. As Justice Jackson summed up:

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too

> great. But freedom 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*.

Id. at 641-42 (emphasis added). The fundamental issue in this case is the one dodged by the COA's analysis: compelled artistic creation for a patron with whom the artist has fundamental differences based upon conscience.

For Arizonans the determination of this issue will have far reaching consequences for the ability of every citizen of creativity with conscience. For instance, would this Court find that Arizona's government could compel an artist whose medium was fine art painting to produce a painting at odds with the artist's conscience such that it invades the "sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control[?]" *Barnette*, 319 U.S. at 642.

Amici as policy makers who must balance questions of constitutional rights of expression with statutory rights to accommodation find that this question must be faced baldly. It must also be answered directly and through accurate application of constitutional law. The COA did not provide this analysis; Amici therefore seek this Court's. Given the happy variety of Arizonans' backgrounds in our state melting pot, the question posed in this case could take the following forms out a myriad:

- May Arizona's government require a fine art painter with a public portraiture business and who is a self-avowed feminist to create a portrait that features the denigration of women?
- May Arizona's government force a Muslim cartoonist who openly commissions his work to the public to accept a request to create a cartoon image of the Quran's desecration?
- Perhaps Arizona's government may require a Jewish sculptor for hire to create a work denigrating the Torah?

Such practitioners are open for business; they serve the public generally; these requests would undoubtedly violate their closely held convictions and Arizona's accommodations law would come into play.

This is no parade of horribles, no hyperbole; they are permissible consequences of affirming the COA. May Arizona under its public accommodations laws require speakers and artists to create in such circumstances in conformance with the Constitution? The COA decision entails these questions; its analysis addresses them not at all, as the COA simply concluded public accommodations statutes regulate conduct and therefore forced expression is not at issue. This answer is inaccurate as a matter of constitutional law and unacceptable as imprecise policy.

II. This Court Should Review the COA's Applied Substantial Burden Analysis under Arizona's Free Exercise of Religion Statute.

Given the facts of this case and the possible questions outlined above, Amici ask this Court to review the COA's application of the "substantial burden" analysis under Arizona's Free Exercise of Religion Act. A.R.S. § 41-1493.01(C). Petitioners are correct that this Court has not had occasion to determine the meaning of "substantial burden" under that statute in the sole case where this Court reviewed it. Pet. at 18 (citing *State v. Hardesty*, 222 Ariz. 363, 366 ¶ 11 (2009)). Amici agree that the COA's application of the statute in this case conflicts with decisions of the United States Supreme Court, and also undercuts the religious liberty Arizona Legislators sought to foster with that statute. Consequently, Amici ask this Court to review the COA's application of that statute, as they may consider amending it given the COA's cramped reading of the statute's protections.

CONCLUSION

Because the COA's decision possibly 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 grant the petition for review.

Respectfully submitted this 28th day of September, 2018.

By: */David L. Rose/*

David L. Rose, Esq.
2525 E. Camelback Road, 7th Floor
Phoenix, AZ 85016
Telephone: (602) 288-7905
Facsimile: (602) 255-0103
dlr@tblaw.com
Counsel for certain Amici Arizona Legislators

David L. Rose, Esq.
Arizona Bar No. 014020
2525 E. Camelback Road, 7th Floor
Phoenix, AZ 85016
Telephone: (602) 288-7906
Facsimile: (602) 255-0103
dlr@tblaw.com
Counsel for certain Amici Arizona Legislators

ARIZONA SUPREME COURT

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

APPENDIX I

SENATORS:
Senator Karen Fann
Senator Sine Kerr
Senator Steve Yarbrough, President
Senator Sylvia Allen
Senator Nancy Barto
Senator John Kavanagh
Senator Steve Smith

Senator Kimberly Yee, Majority Leader
Senator David Farnsworth
Senator Warren Petersen
Senator Sonny Borrelli

HOUSE REPRESENTATIVES:
Representative Paul Boyer
Representative Noel Campbell
Representative Vince Leach
Representative David Livingston
Representative Kevin Payne
Representative Drew John
Representative Kelly Townsend
Majority Whip
Representative Michelle Udall
Representative Travis Grantham
Representative Jay Lawrence
Representative Rusty Bowers
Representative Ben Toma