Jeremy D. Tedesco (Arizona Bar No. 023497)
jtedesco@adflegal.org
Jonathan A. Scruggs (Arizona Bar No. 030505)
jscruggs@adflegal.org
Samuel D. Green (Arizona Bar No. 032586)
sgreen@adflegal.org
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, Arizona 85260
Telephone: (480) 444-0020
Fax: (480) 444-0028

Roberta S. Livesay (Arizona Bar No. 010982)
Livesay.roberta@hlwaz.com
Helm, Livesay & Worthington, LTD
1619 E. Guadalupe, Suite One
Tempe, Arizona 85283
Telephone: (480) 345-9500
Fax: (480) 345-6559

Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

BRUSH & NIB STUDIO, LC, a limited liability company; BREANNA KOSKI; and JOANNA DUKA

Plaintiffs,

v.

CITY OF PHOENIX,

Defendant.

CV2016-052251

Case No. _____

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT

Oral Argument Requested

TABLE OF CONTENTS

Table of Authorities

Cases:

State Constitutional Provisions:

Statutes:

Other Authorities:

Introduction and Motion

This motion is about art and how much our society values it. Plaintiffs Joanna Duka and Breanna Koski are Christian artists who own and operate Brush & Nib Studio, an upscale hand-painting, hand-lettering, and calligraphy company. Verified Complaint ¶ 4. Brush & Nib creates custom artwork – invitations, signs, prints – containing handwritten words and hand-drawn paintings. *Id.* at ¶¶ 101-103, 112, 133. Like other artists, Joanna and Breanna want to create art consistent with their artistic vision, a vision shaped by their religious beliefs. *Id.* at ¶¶ 5, 577-632. They also want to explain this vision on Brush & Nib's website and explain how this vision affects what they can and cannot create. *Id.* at ¶¶ 6-7, 518-525.[1] But Phoenix City Code § 18.4(B) forbids this.

Section 18.4(B) bars public accommodations from discriminating on the basis of a person's race, color, religion, sex, national origin, marital status, sexual orientation, gender identity, or disability and from making any communication implying people will be discriminated against or are objectionable because of these protected traits. Compl. ¶ 419. These rules should not affect Brush & Nib since Brush & Nib decides what art it will create based on the art's message, not the requester's personal characteristics. *See, e.g.*, *id.* at ¶¶ 314-17.

But Phoenix's interpretation of § 18.4(B) puts Brush & Nib in the crosshairs. Phoenix construes § 18.4(B)'s ban on sexual orientation discrimination to require public accommodations to provide any service to same-sex couples that they would also provide to opposite-sex couples, regardless whether those services are expressive in nature or not. Compl. ¶¶ 424-25, 444-64. Thus, whether public accommodations serve sandwiches or create custom art, Phoenix treats them exactly the same. As a result, § 18.4(B) requires Brush & Nib to create art for same-sex wedding ceremonies because Brush & Nib creates art for opposite-sex wedding ceremonies, and § 18.4(B) bans any statement where Brush & Nib declines to create art for or opposes same-sex wedding ceremonies.

This application of § 18.4(B) to Brush & Nib violates the Arizona Constitution's Free Speech Clause and the Arizona Free Exercise of Religion Act. By forcing Brush & Nib to create art for same-sex

[1] To see the entire statement Brush & Nib wants to publish, see Compl. Exhibit 23.

wedding ceremonies, § 18.4(B) violates a cardinal free speech principle: speakers have the right to choose the content of their own message. And by silencing Brush & Nib's statements about marriage and about what art Brush & Nib can create, § 18.4(B) bars Brush & Nib's artistic, political, and religious speech. Arizona law does not permit this assault on artistic and religious freedom. Arizona's Speech Clause and Religion Act protect artists' rights to speak and to remain silent consistent with their artistic and religious beliefs.

Arizona law protects these freedoms for at least two reasons. First, art deserves great protection. The "subtle shaping of thought…characterizes all artistic expression." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). Art's power resonates in everything from federal legislation protecting visual art (the Visual Artist Rights Act) to our personal experience admiring a painting. We simply value art too much to let Phoenix invade the artistic process as if Phoenix were regulating widgets. Second, government favoritism in the artistic marketplace demands great skepticism. And make no mistake. Phoenix is playing favorites. It allows artists to speak and create in favor of same-sex marriage yet threatens to incarcerate artists if they speak or create only for opposite-sex marriage. We should all be concerned when the government tries to eradicate a particular idea by silencing adherents and forcing dissenters to profess orthodoxy. When the government manipulates the artistic marketplace and commandeers artists' minds to squelch an idea, no idea is safe. Everyone eventually loses.

Phoenix has targeted Brush & Nib by imposing an impossible choice on it: either (a) forego its right to publish and to create art of its choosing or (b) suffer up to $2500 fines and 6 months in jail *for each day* it violates § 18.4(B). Compl. ¶¶ 436-43, 482-534. But speakers should not have to choose between silence and a cell. To prevent this imminent loss of its rights, Brush & Nib requests a preliminary injunction that enjoins § 18.4(B) to allow Plaintiffs to create art consistent with their artistic and religious beliefs about marriage and to publish their desired statements about art, God, and marriage.[2]

[2] While this motion seeks relief for each Plaintiff, it refers to Plaintiffs collectively as Brush & Nib. Plaintiffs' verified complaint and exhibits attached to this complaint contain all other relevant facts not mentioned in this motion.

Argument

Brush & Nib needs a preliminary injunction to avoid the imminent loss of its rights. To obtain one, Brush & Nib must establish that (I) its claims will likely succeed, (II) it will possibly suffer irreparable harm without an injunction, (III) the balance of hardships favors Brush & Nib, and (IV) public policy favors an injunction. *Ariz. Ass'n. of Providers v. State*, 223 Ariz. 6, 12, 219 P.3d 216, 222 (App. 2009). Courts apply a sliding scale to these factors. *Id.* To satisfy this scale, Brush & Nib can show either probable success and possible irreparable harm or serious questions about the merits and hardships sharply favoring Brush & Nib. *Id.* Brush and Nib can satisfy either standard.

I. Brush & Nib will likely succeed to show that § 18.4(B) violates Arizona's Free Speech Clause and Free Exercise of Religion Act.

Arizona's Speech Clause and Religion Act protect Brush and Nib's rights to speak and to stay silent in accordance with its artistic and religious beliefs. But § 18.4(B) squelches Brush & Nib's speech based on its content and compels Brush & Nib to speak against its beliefs. These restrictions on fundamental rights must satisfy a high standard called strict scrutiny. They cannot. Section 18.4(B) therefore violates the Arizona Speech Clause and Religion Act.[3]

A. Arizona's Speech Clause requires § 18.4(B) to satisfy strict scrutiny because § 18.4(B) silences speech based on content and compels Brush & Nib to speak.

Arizona's Speech Clause says "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Ariz. Const. art. II, § 6. This language differs from and offers more protection than the First Amendment. *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354-55, 773 P.2d 455, 459-60 (1989). Section 6 in turn condemns § 18.4(B) for targeting the content of Brush & Nib's speech and for compelling Brush & Nib to speak.

1. *The Free Speech Clause protects Brush & Nib's right to speak and to create art.*

Brush & Nib wants to create art of its choosing and to publish particular statements about art, God, and marriage. Arizona's Speech Clause – Art. II, § 6 – safeguards these activities.

---

[3] Brush & Nib raises other claims in its complaint and reserves the right to pursue them in later filings.

Brush & Nib's desired statements use words to discuss God, art, and the politically charged topic of marriage. Compl. ¶¶ 507, 520-24, Exs. 23-24, 563. Brush & Nib's art meanwhile contains words and paintings. *Id.* at ¶ 133. And Section 6 protects both these statements and this art because § 6 treats "written… words" and media "such as painting" as "pure speech." *Coleman v. City of Mesa,* 230 Ariz. 352, 358, 284 P.3d 863, 869 (2012). Section 6 treats paintings, like the written word, as pure speech because art conveys the artist's unique artistic vision and message, as Brush & Nib's artwork exemplifies. Compl. ¶¶ 114-15, 181-85 (explaining that Joanna and Breanna "convey their artistic vision in each work.").

The First Amendment bolsters this point. Although the First Amendment and § 6 differ, a First Amendment violation "necessarily implies" a § 6 violation because § 6 protects more speech than the First Amendment. *Coleman,* 230 Ariz. at 361 n.5. In light of this relationship, First Amendment cases set the floor for § 6 protection. Paintings thus easily fall within § 6's reach because the First Amendment protects "paintings, drawings, and engravings…" *Kaplan v. California*, 413 U.S. 115, 119 (1973).

But this protection does not stop at Brush & Nib's artistic output. Section 6 also protects Brush & Nib's artistic process. Indeed, § 6 distinguishes the act of creation (writing) from the act of dissemination (publishing) and protects each. The Arizona Supreme Court agrees. It considers both tattoos and "the process of tattooing" to be "expressive activity." *Coleman*, 230 Ariz. at 359-60. *See id.* ("[T]he art of writing is no less protected than the book it produces; nor is painting less an act of free speech than the painting that results."). That Court even found "the business of tattooing is constitutionally protected." *Id.* Under this logic, Brush & Nib's artistic output, artistic process, and artistic business are each protected speech. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1063 (9th Cir. 2010) (finding tattoos, tattooing process, and the tattooing business to be speech under First Amendment).

This protection also covers Brush & Nib's right to not create art. Because the right to speak "includes both the right to speak freely and the right to refrain from speaking" and Brush & Nib speaks in its art, Brush & Nib can decline to create art. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). These rights to speak and not speak are "concomitant." *Id.* And for good reason. They safeguard the same thing

– "the broader concept of 'individual freedom of mind.'" *Id.* (citation omitted). Speech and silence often depend on each other as well. For example, Brush & Nib's right to say "we can't" means little if Brush & Nib must create art against its will. And Brush & Nib's right to create art of its choosing means little if Brush & Nib cannot tell others what it can and cannot create. This mutual dependence means § 6 must protect the right to not speak just as it protects the right to speak, especially since the First Amendment protects the right to not speak and § 6 protects more than the First Amendment.

2. *Section 18.4(B)(3) must satisfy strict scrutiny because it targets speech based on content.*

Because § 6 protects Brush & Nib's right to speak and not speak, this Court should scrutinize § 18.4(B) for hindering these rights. Taking § 18.4(B)(3) first, this sub-section bans Brush & Nib's desired speech based on its content and therefore deserves strict scrutiny.

Section 18.4(B)(3) makes it unlawful for public accommodations to "display, circulate, publicize …any…communication which states or implies that any…service shall be refused…because of…sexual orientation….or that any person, because of…sexual orientation….would be unwelcome, objectionable, unacceptable, undesirable or not solicited." This language outlaws Brush & Nib's statements that support one-man-one-woman marriage and that decline to create art for any other marriage, such as a same-sex marriage. These statements not only decline to create art but endorse biblical marriage exclusively (Compl. ¶¶ 300-01, 520-21, Exs. 23-24), thereby implying other types of marriage are objectionable. This content easily falls within § 18.4(B)(3)'s vast proscription.

But § 18.4(B)(3) does not merely prohibit speech. It does so based on content. Laws that regulate speech based on content deserve closer scrutiny than laws that regulate speech regardless of content. *See State v. Evenson*, 201 Ariz. 209, 212-13, 33 P.3d 780, 783-84 (App. 2001) (describing content-based, content-neutral distinction). A law regulates based on content if it facially "draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Section 18.4(B)(3) does precisely this. It bans speech about some topics (statements opposing same-sex marriage) but allows speech about other topics (statements opposing certain political beliefs). Indeed, courts have found laws like § 18.4(B)(3) to be content-based for this reason. *See Campbell v. Robb*, 162 F. App'x 460, 468 (6th Cir. 2006) (finding publication ban in Fair Housing Act to be content-based).

In fact, § 18.4(B)(3) perpetrates an "egregious form of content discrimination" called viewpoint discrimination where the government targets "particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). This occurs because § 18.4(B)(3) allows some viewpoints on a subject but bans different viewpoints on the same subject. So Brush & Nib could say it creates for or promotes same-sex marriage but cannot say it declines to create for or promote same-sex marriage. This is classic viewpoint discrimination. *See In re Tam*, 808 F.3d 1321, 1327-1328 (Fed. Cir. 2015) (finding restriction on disparaging trademarks to be viewpoint-based). Such viewpoint and content discrimination is presumptively unconstitutional and must survive strict scrutiny. *Id. Accord Evenson*, 201 Ariz. at 212-13.

Phoenix cannot overcome this presumption by portraying Brush & Nib's speech as promoting an illegal activity. Brush & Nib's speech does not promote an illegal activity because Brush & Nib can choose what messages it will include within its expressive medium, i.e. its custom artwork. Because Brush & Nib speaks in its art, in its artistic process, and in its artistic business, Brush & Nib has the § 6 right to not speak. *See supra* § I.A.1. So, to exercise its right to not speak, Brush & Nib can decline to create art and can publish statements to that effect.

This syllogism holds even though Phoenix's public accommodation law (§ 18.4(B)(2)) requires Brush & Nib to create art for same-sex weddings. As the U.S. Supreme Court held in *Hurley v. Irish–American Gay, Lesbian & Bisexual Grp.*, public accommodation laws cannot compel speech. 515 U.S. 557, 569 (1995). Like § 18.4(B)(2), the public accommodation law in *Hurley* banned sexual orientation discrimination. *Id.* at 571-73. It also compelled a privately-organized parade to accept marchers promoting gay pride. *Id.* But *Hurley* condemned this compulsion because it "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. Like a parade organizer, Brush & Nib also has an autonomy interest in its speech – its art. And so under *Hurley*, Phoenix cannot use its public accommodation law to compel Brush & Nib to create art it finds objectionable.

While *Hurley* protected a non-profit and Brush & Nib sells art, that distinction does not matter. "It is well settled that a speaker's rights are not lost merely because compensation is received..." *Riley v. Nat'l*

Fed'n of the Blind, 487 U.S. 781, 801 (1988). Indeed, the Arizona Supreme Court has already protected expressive businesses under § 6. *See Coleman*, 230 Ariz. at 359-60 ("[T]he business of tattooing is constitutionally protected."). And *Hurley* itself said businesses have the free speech right to stay silent. 515 U.S. at 574 (noting that right to not speak is "enjoyed by business corporations generally…as well as by professional publishers."). In fact, the U.S. Supreme Court has repeatedly protected businesses from compelled speech. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n,* 475 U.S. 1 (1986) (protecting for-profit electric company); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (protecting for-profit newspaper). And a Kentucky circuit court recently condemned a public accommodation law for compelling a for-profit print shop to print t-shirts for a gay-pride festival. *Hands on Originals, Inc. v. Human Rights Comm'n*, No. 14-CI 04474 (Fayette Cir. Ct. Apr. 27, 2015).[4]

As these cases show, the state compels speech whenever it compels businesses to open access to their "inherently expressive" mediums – words on a shirt, words in a newsletter, Brush & Nib's art. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.,* 547 U.S. 47, 64-65 (2006) (distinguishing compelled access to expressive and non-expressive mediums). This principle means Phoenix cannot force Brush & Nib to open its expressive medium (its art) to messages it considers offensive. And because Brush & Nib can legally decline to create art, Brush & Nib can legally explain what art it can and cannot create. By banning this particular explanation based on its content, § 18.4(B)(3) therefore violates Brush & Nib's § 6 right to publish statements explaining a legal activity.

3. *Section 18.4(B)(1)-(2) must satisfy strict scrutiny because it forces Brush & Nib to create art.*

While § 18.4(B)(3) silences Brush & Nib's protected speech, § 18.4(B)(1)-(2) compels Brush & Nib to speak against its will. This compulsion also deserves strict scrutiny.

Section 18.4(B)(1) says "[d]iscrimination in places of public accommodation against any person because of…sexual orientation…is contrary to the policy of the City of Phoenix and shall be deemed unlawful." And § 18.4(B)(2) says "[n]o person shall…deny to any person…accommodations,

[4] Available at http://perma.cc/75FY-Z77D (last visited May 4, 2016).

advantages, facilities or privileges thereof because of…sexual orientation…" When applied, these sections require Brush & Nib to create art for same-sex wedding ceremonies because Brush & Nib creates art for opposite-sex wedding ceremonies. Indeed, Phoenix has already interpreted § 18.4(B)(1)(2) to require expressive businesses to do so. Compl. ¶¶ 444-64. But Arizona's Speech Clause protects Brush & Nib's right to not speak (e.g. its right to not create art). *See supra* § I.A.1-2. By violating this right, § 18.4(B)(1)-(2) must survive strict scrutiny. *See Pac. Gas*, 475 U.S. at 19 (requiring law compelling speech to overcome strict scrutiny).

This violation is clear because the government impacts the artistic message and artistic process when it compels artists to create. *See Cressman v. Thompson*, 798 F.3d 938, 954 (10th Cir. 2015) (emphasizing that state cannot compel the dissemination of images like original artwork "whose creation is itself an act of self-expression"). To safeguard this message and process, § 6 protects the right of artists like Brush & Nib to choose what they create.

Brush & Nib illustrates the need for this protection because Brush & Nib custom designs original art for each client's events. Brush & Nib collaborates with each client, envisions a unique work for each client's event, and then creates a unique work that conveys Brush & Nib's artistic vision about that event. Compl. ¶¶ 114-15, 169-228. Brush & Nib thus uses its clients' events like raw material that it reshapes to create art that communicates its vision of beauty. *Id.* at ¶¶ 185, 259-60. This is why Brush & Nib first interviews each client and then creates without that client – so that Brush & Nib can tailor its work to convey its message about each client's event. *Id.* at ¶¶ 114, 182-85. And Brush & Nib clients pay top dollar for this customized vision and creativity – $900 for 100 wedding invitation suites for example. *Id.* at ¶¶ 106-11. Because Brush & Nib customizes its art for and conveys its message about each event, Phoenix inevitably affects Brush & Nib's artistic process and message when Phoenix compels Brush & Nib to create art for a particular event. To say the event does not impact this message is like saying Monet's message stays the same whether he paints water lilies or the bombing of Guernica. That's just not how art works. *See White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) ("In painting, an artist conveys his sense of form, topic, and perspective…So long as it is an artist's self-expression, a painting will be protected under the First Amendment, because it expresses the artist's

perspective.").

The wedding context amplifies this point. Every time Brush & Nib creates art for a wedding, Brush & Nib conveys messages about that wedding. Compl. ¶¶ 122-26, 180-90. Although Brush & Nib wants to convey God's design for marriage in its wedding art, Phoenix law forces it to change its message. Compl. ¶¶ 179-85, 287-91, 302-04, 443, 501. For example, an invitation saying "John and Jim invite you to celebrate their marriage" differs in content from an invitation saying "John and Jane invite you to celebrate their marriage." The former contradicts biblical marriage. The latter does not.

Even if Brush & Nib's art stayed the exact same for every wedding, the art's meaning would still change. Context controls content. The meaning of an invitation with "come celebrate our marriage" depends on the type of marriage celebrated. Just as wedding ceremonies convey messages about the marriage celebrated, artwork about the ceremony also conveys messages about the marriage celebrated. *See Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) (explaining that wedding ceremonies "convey important messages about the couple, their beliefs, and their relationship to each other and to their community....The core of the message in a wedding is a celebration of marriage and the uniting of two people in a committed long-term relationship."). In this respect, Phoenix affects the meaning of Brush & Nib's wedding art by dictating its subject matter – the wedding celebrated.

But art's subject matter does not merely affect the *artistic* message and process. It affects *the artist's* message and process. While Brush & Nib's clients may use Brush & Nib's art to express their message, this art remains Brush & Nib's speech. "The First Amendment protects the artist who paints a piece just as surely as it protects the gallery owner who displays it, the buyer who purchases it, and the people who view it." *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015). Because Brush & Nib puts its name or initials on its custom artwork, observers would know that Brush & Nib created this artwork and approves of its message. Compl. ¶¶ 249-58.

More importantly, Brush & Nib can control its art regardless of what others perceive. Artists' rights do not turn on third party perceptions. *Coleman*, for example, protected tattoo artists' right to speak even though third parties may not think tattoo artists endorse tattoos they place on someone else. Federal copyright law protects artists' right to control their art regardless if others would attribute that art to

someone else. 17 U.S.C. §§ 102, 106 (affording copyright protection to "original works of authorship" including "pictorial, graphic, and sculptural works" and giving copyright owner "exclusive rights" to distribute copies). And the Visual Artist Rights Act protects artists' right to control their visual art regardless if others would attribute that art to someone else. 17 U.S.C. § 106A (protecting right to prevent the "modification of that work which would be prejudicial to his or her honor or reputation…"). In all these areas, the law recognizes artists' rights to control their art no matter what others perceive.

The compelled speech doctrine recognizes this too. The U.S. Supreme Court has repeatedly found compelled speech regardless what observers perceive. Thus, the state cannot force newspapers to print someone else's editorial, whether readers think newspapers agree with that editorial or not. *Tornillo*, 418 U.S. at 243-46. And the state cannot force companies to put someone else's statement in their newsletter, whether readers think those companies agree with that statement or not. *Pacific Gas*, 475 U.S. at 15 n.11. As these cases show, the right to not speak does not turn on what "a bystander would think…" *Frudden v. Pilling*, 742 F.3d 1199, 1204-05 (9th Cir. 2014) (citations and quotations omitted).

But most significantly, misperceptions never justify the government hijacking someone's mind and body to serve its expressive purposes. Take the students who had to pledge allegiance and salute the flag in *West Virginia Bd. of Educ. v. Barnette,* 319 U.S. 624, 634, 637 (1943). Onlookers may not have thought these students agreed with the pledge or the flag simply by following a law that required every student to pledge and salute. But the Supreme Court found compelled speech anyway. The same holds for Brush & Nib. For Phoenix has not merely compelled access to Brush & Nib's art. It has compelled access to Joanna and Breanna's hands and minds. Phoenix has burst into their art studio, dangled a jail key before their eyes, and extracted something from their imaginations. At least the *Barnette* students only had to say offensive words given them and salute. Joanna and Breanna must do something even worse – imagine an offensive vision from scratch, embody that vision into finite form, and then broadcast that vision to others. To an artist who injects her spirit into her work, nothing could be worse. The perceptions of others do not alleviate this harm. They do not alter the reality of Phoenix forcing an artist to "to utter what is not in his mind." *Id.* Section 6 prevents this harm. Section 6 protects Brush & Nib's rights to control what it creates and to speak about what it can create.

Nor does this protection open the floodgates to discrimination. Brush & Nib's argument only protects expressive businesses when they create something inherently expressive. These businesses still must follow all laws when they do not speak. Brush & Nib is just one of a rare breed of businesses that creates and sells art. And courts have already applied free speech protections to these businesses and their speech. *Coleman*, 230 Ariz. at 359-60 ("the business of tattooing is constitutionally protected.").

In reality, the only limitless legal principle appears in § 18.4(B)(1)-(2). If this law can compel Brush & Nib to create art contrary to its beliefs, then Phoenix can force every expressive business and artist for hire to speak messages they find objectionable: an atheist-owned marketing studio would have to create advertisements for the Church of Scientology; a homosexual singer would have to sing for a Westboro Baptist church event; an atheist musician would have play at an Easter church service; a homosexual print shop owner would have to print posters for religious events opposing same-sex marriage; a musical promoting racial diversity would have to cast Caucasians in roles undermining its pro-diversity message.[5] These restrictions endanger speaker autonomy and deserve strict scrutiny. The restriction on Brush & Nib is no different.

B. Arizona's Religion Act requires § 18.4(B) to satisfy strict scrutiny because § 18.4(B) substantially burdens Brush & Nib's rights to speak and to create consistent with its religious beliefs.

Section 18.4(B) not only violates Arizona's Free Speech Clause. It violates Arizona's Religion Act. According to this Act, laws that substantially burden religion must satisfy strict scrutiny (i.e. further a compelling government interest in a narrowly tailored way). A.R.S. § 41-1493.01(C). To invoke this Act, Brush & Nib must establish that (1) its action is motivated by a religious belief; (2) its religious belief is sincerely held, and (3) § 18.4(B) substantially burdens the exercise of its religious beliefs. *State v. Hardesty*, 222 Ariz. 363, 366, 214 P.3d 1004, 1007 (2009).

As for motive and sincerity, Brush & Nib believes that God ordains marriage to be between one man and one woman and that it would violate its faith if it created art for same-sex wedding ceremonies. Compl. ¶¶ 299-304. Brush & Nib also believes it should publish certain statements because of its

---

[5] *See* http://www.washingtontimes.com/news/2016/mar/31/open-casting-call-for-hamilton-causes-a-little-ruc/ (last visited May 4, 2016).

religious desire to explain its religiously inspired vision and to be loving, upfront, and courteous with customers. *Id.* at ¶¶ 308-13, 508-24, Exs. 23-24. Brush & Nib cannot lie or let customers falsely assume it will create art it cannot. *Id.* And Brush & Nib wants to tell others how its religious beliefs inspire its artistic vision about true beauty, beauty that reflects God. *Id.* Phoenix has no basis to doubt the sincerity of these beliefs.

As for substantial burden, Arizona courts evaluate this by looking to the Act's federal analogue, the Religious Freedom Restoration Act (RFRA). *See Hardesty*, 222 Ariz. at 367 n.7 (using RFRA this way). And under RFRA, a law substantially burdens religion when it imposes "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd of Indiana Employment Security Division.*, 450 U.S. 707, 719 (1981).[6] This inquiry does not assess how substantial or central a religious practice is to a believer. "[I]t is not for us to say that their religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014). The inquiry focuses on consequences. It asks how substantial or "severe" the consequences are if someone continues her religiously motivated conduct. *Id.* at 2775.

Section 18.4(B) burdens Brush & Nib's religious exercise in two ways. First, § 18.4(B)(1)-(2) compels Brush & Nib to engage in an act (creating objectionable art) that violates its religious beliefs. *See id.* at 2775 (finding substantial burden when law forced business to provide contraceptives against owners' beliefs); *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972) (finding substantial burden when law forced Amish parents to send children to school against Amish beliefs). Second, § 18.4(B)(3) bans Brush & Nib's religiously motivated speech about art and marriage. If any type of regulation burdens religion, a flat ban on religious speech does. And these burdens are substantial. § 18.4(B) inflicts criminal penalties – $2500 fines and six months jail time – for each day Brush & Nib violates the law. Courts have found substantial burden for much less. *See Yoder*, 406 U.S. at 208 (finding $5 criminal fine created substantial burden). This substantial burden means § 18.4(B) must satisfy strict scrutiny.

[6] Although *Thomas* came before RFRA, RFRA incorporated pre-RFRA cases that define a substantial burden. 42 U.S.C.A. § 2000bb(B)(1).

C. Section 18.4(B) fails strict scrutiny.

Because § 18.4(B) stymies Brush & Nib's rights, it must satisfy strict scrutiny, "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997). Under this test, § 18.4(B) is "presumed unconstitutional," a presumption Phoenix can rebut only by demonstrating that § 18.4(B) "is drawn with narrow specificity to meet a compelling state interest." *Ruiz v. Hull*, 191 Ariz. 441, 457, 957 P.2d 984, 1000 (1998). Phoenix carries the burden to prove both compelling interest and narrow tailoring. *Id.* It can do neither.

Broad generalities cannot satisfy the compelling interest standard. Phoenix must instead identify an interest important enough to be compelling, prove this interest addresses an actual problem, and prove that restricting and compelling Brush & Nib's speech improves this problem. *See Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (requiring "an 'actual problem' in need of solving…and the curtailment of free speech must be actually necessary to the solution…"); *Hobby Lobby*, 134 S. Ct. at 2779 (requiring law to promote interest when applied to "particular religious claimants" rather than broadly formulated interests).

Section 18.4(B)(3) fails this standard because it censors particular ideas. Censoring ideas does not serve a legitimate much less compelling interest. Nor can Phoenix justify its goal by trying to shelter people from offensive ideas. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

Section 18.4(B)(1)-(2) fares no better than § 18.4(B)(3). While § 18.4(B)(1)-(2) may stop some discrimination and Phoenix has an abstract interest in that, Phoenix must prove a compelling interest to force Brush & Nib to create art. It cannot. As *Hurley* noted, anti-discrimination laws that compel speech do not serve legitimate interests. 515 U.S. at 579. And Phoenix can allow Brush & Nib to create freely without allowing sexual orientation discrimination. On one hand, this discrimination does not exist in Phoenix. In the past three years, the Phoenix Equal Opportunity Department has received only two complaints alleging sexual orientation discrimination by a public accommodation, and the Department did not find a verifiable case in either instance. Compl. ¶¶ 444-48, 748-49, Exs. 18-19. On the other

hand, Phoenix can allow Brush & Nib to create freely without limiting anyone's access to services. At least 55 other invitation businesses create for same-sex weddings in Phoenix. *Id.* at ¶¶ 538-561, Exs. 26-28. And the invitation industry's national scope means same-sex couples in Phoenix can access countless sources of invitations. *Id.* So allowing Brush & Nib to create freely does not stop anyone from obtaining invitations.

Besides not serving a compelling interest, § 18.4(B) also lacks narrow tailoring. To be narrowly tailored, laws must serve a compelling interest by the least restrictive means practically available. *Kenyon v. Hammer*, 142 Ariz. 69, 86-87, 688 P.2d 961, 978-79 (1984). But Phoenix can achieve its goals in less restrictive ways. Consider § 18.4(B)(3), which does not merely ban words declining service. It bans any "communication" that "implies" someone would be "unwelcome, objectionable, unacceptable, undesirable or not solicited" because of protected characteristics. The federal publication bans lack this language and for good reason. 42 U.S.C. § 2000e-3; 42 U.S.C. § 3604(c). This language silences an enormous amount of political, artistic, and religious expression. Public accommodations communicate many political, religious, and artistic messages that could imply someone is unwelcome or objectionable. Any criticism of a group or ideas associated with a group could imply that group is unwelcome. Phoenix simply cannot ban all this legal speech.

Section 18.4(B)(3) could also ban less speech by targeting statements about non-expressive activities. Once again, the federal publication bans provide a guide. They only ban statements "relating to employment" and those "with respect to the sale or rental of a dwelling." 42 U.S.C. § 2000e-3; 42 U.S.C. § 3604(c). This narrower language bans speech about illegal conduct – words used to prevent someone from renting or being hired. But § 18.4(B)(3) lacks this limitation and therefore restricts speech promoting legal activities like speaking and creating art. Phoenix could easily narrow § 18.4(B)(3) to allow speech about these legal, expressive activities.

Like § 18.4(B)(3), § 18.4(B)(1)-(2) also lacks narrow tailoring. *Hurley* explains why. It said Massachusetts's public accommodation law could stop discrimination without compelling speech. 515 U.S. at 578-81. And if that public accommodation law can stop discrimination without compelling speech, so can Phoenix's. In fact, Phoenix can achieve its goals without compelling speech in many

ways. Phoenix could exempt expressive businesses that object to creating art they find offensive. Or Phoenix could publish information criticizing discrimination. *See 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 507 (1996) (criticizing a ban on displaying liquor prices because "educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective."). With all these alternatives, the decision to restrict and compel Brush & Nib's speech cannot be justified.

II. Brush & Nib will suffer irreparable harm without an injunction.

Irreparable harm means harm "not remediable by damages." *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787 (App. 1990). No amount of money can compensate Brush & Nib for losing its rights. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (finding free speech violation caused irreparable harm); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (finding RFRA violation caused irreparable harm).

III. The balance of hardships sharply favors Brush & Nib.

Without an injunction, Brush & Nib loses its free speech and free exercise rights. With an injunction, Phoenix loses nothing because "the government does not have an interest in the enforcement of an unconstitutional law." *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003).

IV. Public policy favors a preliminary injunction.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). The same holds for Brush & Nib's rights. The public benefits when artists can contribute authentic artwork and authentic messages to the public discourse about what is good, what is beautiful, and what is true.

Conclusion

This case is about art and how much we value it. This case is not about discrimination and how much we detest it. No one doubts we should stop discrimination. But commendable goals do not justify unconstitutional laws. Phoenix can stop discrimination without resorting to speech elimination, idea extraction, and art manipulation. This Court should therefore issue the requested preliminary injunction because Brush & Nib will likely succeed to show successful claims and possible irreparable harm or at the very least serious questions about the merits and hardships sharply favoring Brush & Nib.

Respectfully submitted this 12th day of May, 2016.

By: _____

Jeremy D. Tedesco (Arizona Bar No. 023497)
Jonathan A. Scruggs (Arizona Bar No. 030505)
Samuel D. Green (Arizona Bar No. 032586)
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, Arizona 85260
Telephone: (480) 444-0020
Facsimile: (480) 444-0028
jtedesco@adflegal.org
jscruggs@adflegal.org
sgreen@adflegal.org

Roberta S. Livesay (Arizona Bar No. 010982)
Livesay.roberta@hlwaz.com
Helm, Livesay & Worthington, LTD
1619 E. Guadalupe, Suite One
Tempe, Arizona 85283
Telephone: (480) 345-9500
Fax: (480) 345-6559

Attorneys for Plaintiffs

ORIGINAL filed this 12th day of May, 2016 with the Clerk of the Court.

COPIES delivered this 12th day of May, 2016, to:

The Honorable _____
Maricopa County Superior Court

COPIES will be served via process server to:

City of Phoenix
Clerk, Cris Meyer
200 W. Washington Street
Phoenix, AZ 85003

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2016, I conventionally filed the foregoing paper with the Clerk of Court; and I hereby certify that the foregoing paper will be served via private process server with the Summons and Complaint to the following participants:

City of Phoenix
Clerk, Cris Meyer
200 W. Washington Street
Phoenix, AZ 85003

By: _____

Jeremy D. Tedesco, Arizona Bar No. 023497
jtedesco@ADFlegal.org
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax
Attorney for Plaintiffs