



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**BRUSH & NIB v. CITY OF PHOENIX  
CV-18-0176-PR**

**PARTIES:**

*Petitioners:* Brush & Nib Studio, LC, and Joanna Duka and Breanna Koski

*Respondent:* The City of Phoenix

*Amici Curiae in support of Petitioners:*

- (1) Center for Religious Expression
- (2) Jewish Coalition for Religious Liberty
- (3) Arizona Legislators Senators Karen Fann, Sine Kerr, Steve Yarbrough, Sylvia Allen, Rick Gray, Nancy Barto, John Kavanaugh, Steve Smith, Kimberly Yee, David Farnsworth, Warrant Petersen, and Sonny Borrelli; and Representatives Paul Boyer, Noel Campbell, Vince Leach, David Livingston, Mark Finchem, Kevin Payne, Drew John, Kelly Townsend, Michelle Udall, Travis Grantham, Jay Lawrence, Rusty Bowers, Ben Toma, and Bret Roberts
- (4) Ethics & Religious Liberty Commission of the Southern Baptist Convention *et al.*
- (5) The States of Arizona, Arkansas, Louisiana, Nebraska, Oklahoma, Texas, and West Virginia, and the Commonwealth of Kentucky
- (6) Tyndale House Publishers, Inc., Crossroad Productions, Inc. D/B/A Catholic Creatives and Christian Professional Photographers
- (7) Professor Adam J. McLeod
- (8) National Center for Law and Policy
- (9) Cato Institute and Professors Dale Carpenter and Eugene Volokh
- (10) Law and Economics Scholars Prof. Lloyd Cohen, Antonin Scalia Law School, George Mason University; Prof. Richard A. Epstein, New York University School of Law, University of Chicago, and the Hoover Institution; Samuel Gregg, D. Phil, Research Director of the Acton Institute; Prof. Timothy R. Lickness, Trinity Law School, Trinity International University; Allen Mendenhall, Associate Dean, Thomas Goode Jones School of Law; Assist. Prof. Catherine R. Pakaluk, The Busch School of Business and Economics, The Catholic University; Assist. Prof Jay W. Richards, The Busch School of Business, The Catholic University of America; Prof. R. Neil Rodgers, Trinity Law School, Trinity International University; Adj. Prof. Lisa A. Runquist, Trinity Law School, Trinity International University; Andrew Seeley, Tutor, Thomas Aquinas College; Dean Myron Steeves, Professor of Law, Trinity Law School, Trinity International University; and Adj. Prof. Andrew Westover, Trinity Law School, Trinity International University;
- (11) The C12 Group, LLC

*Amici Curiae in support of Respondent:*

- (1) American Civil Liberties Union and American Civil Liberties Union of Arizona
- (2) Bloom and Blueprint Event Co., LLC, Jen Jinkens Photography & Maeflour Cakes LLC

- (3) First Amendment Scholars Prof. Jane Bambauer, James E. Rogers College of Law, University of Arizona; Prof. Erwin Chemerinsky, Berkeley Law School, University of California; Prof. Frederick Mark Gedicks, Brigham Young University Law School; Prof. Amos N. Guiora, S.J. Quinney College of Law, University of Utah; Prof. (Emer.) David Kater, Sandra Day O'Connor College of Law, Arizona State University; Prof. Toni M. Massaro, James E. Rogers College of Law, University of Arizona; Prof. Laurence H. Tribe, Harvard Law School; and Prof. (Emer.) Laurence H. Winer, Sandra Day O'Connor College of Law, Arizona State University.
- (4) Americans United for Separation of Church and State; Anti-Defamation League; Bend the Arc; A Jewish Partnership for Justice; Central Conference of American Rabbis; Disciples Center for Public Witness; Disciples Justice Action Network
- (5) Lambda Legal Defense and Education Fund, Inc.
- (6) ONE Community Media, LLC, d/b/a ONE Community and the following businesses and business associations were granted leave to join in the brief filed in the Court of Appeals on 7/17/2017 by amici curiae/businesses supporting the City in the Court of Appeals:

American Express Company; PayPal Holdings, Inc.; Univision Arizona, a division of Univision Communications, Inc.; Lyft, Inc.; Greater Phoenix Economic Council; Planned Parenthood Arizona, Inc.; Valley Youth Theater; Gammage & Burnham PLC; HBI International; The Farm at South Mountain; Duck and Decanter, LTD.; Glendale Chamber of Commerce; Phoenix Art Museum; Four Peaks SEO; Arizona Blockchain Initiative; Arizona Coalition to End Sexual & Domestic Violence; Arizona Lodging and Tourism Association; Arizona School Board Association; Arizona YWCA of Metropolitan Phoenix; Compass CBS Foundation; Coronado Neighborhood Association; Art of Framing; WebPT; ECHO Magazine/ACE Publishing; AZ Datacom; Anthem Network; Law Offices of Tracy M. Marsh, PLLC; Carter Law Firm, PLLC; Gateway Bank; BLK BOX PHX; The Beatitudes Campus; Rebarre Studio; Brodin HR Law, PLLC; Ambassador Group Insurance; St. Peter's Episcopal Church and Montessori School; Cactus Carlos, LLC & Cactus Carlos II, LLC; Bar the Door, LLC; Advanced Fertility Care, PLLC; CASCO Financial Group Incorporated; Castle & Castle PLLC; Christina Buck Photography; Clutter Control Specialists; Co+Hoots LLC; Community Tire Pros & Auto Repair; ALZA Realty Company, LLC; Concilio Latino de Salud, Inc.; Board Developer, LLC; All About Kids Pediatrics, P.C.; Corvis Distributing, LLC; CR BIZ, LLC; Cre8ive Event Rentals, Inc.; D & D Pet Supplies, LLC; Cruise n on Route 66; Cultivate Counseling PLLC; Curmudgeons Anonymous; Axosoft, LLC; Dani Cutler Content Creation LLC; Danton Photography and Fine Arts; Davisson Entertainment LLC; Northwestern Mutual, Mariah Holback; Denise Meridith Consultants; Desert Fairways Realty, LLC; Desert Roots Kitchen; All About Restful Pets; Creosote Partners, LLC; EGreen-IT Solutions, L.L.C.; Artisan by Santa Barbara Catering; Elizabeth Douglas Photography; Episcopal Church of St. Matthew; Even Stevens Sandwiches; Exit Realty Arizona; Experience Scottsdale, Fiori, LLC; First Draft Book Bar; Fit Health Care Clinic; Handyman Matters; Frances Vintage; Ask Sandy Rogers; Ganas Consulting LLC; 11th Monk3y, LLC; Gayle Parent Art; GeekiTek L.L.C.; Geek~Bijou, LLC; High Stakes Mastermind Groups; Butterfly Petals; Gloria Guerra Bilingual Insurance; Sue Weiger Golf; Grace Lutheran Church, 19North Community Alliance, INC.; Grey Cat Dot Design; The Halpin Companies, INC., K-Vaughn Consulting, LLC; Handyman Xtreme, LLC;

Harder Development; Hart of AZ Art Gallery LLC; Hera Hub Phoenix; Magnanimous, Inc.; Hoot 'N' Waddle, LLC; Hope at the Center, LLC; HR Answers, LLC; JP Retail Management INC.; Mayes Telles PLLC; Konsider It Done LLC; KWink media; Molever Conelly PLLC; Leger Strategies, LLC; Casa Kira, MADE Art Boutique; New Carpa Theatre; Many to ONE; Dawning Public Relations; Mary Holden Editor; The Nitro Live Icecreamery LLC; Meridian Educational Consulting; One Breath Healing, LLC; Modified Arts LLC; PSCU Incorporated; Nancy Cartoon, LLC; Narwhal Stories LLC; Ocotillo Music, LLC; Wholesale Division of Painted Sky Apparel LLC; Noble Beast LLC; Novle; Audience Audit INC.; Numbers Matter Accounting & Bookkeeping, LLC; Million Dollar Teacher Project; Old Paint Records; ON Media Arizona; On Q Financial, INC.; On the Mark; Spark Solutions USA LLC; Open Wide Dental; Oxide Studio; The Tech Federation LLC; Palette at Phoenix Art Museum; A & P Global Goods, LLC; The Astrology Store LLC; Perry Consulting LLC; Phalen Enterprises, L.L.C.; The Law Offices of John Phebus, PLLC; Phoenix Diners Collective; Pivot Produce LLC; Pixa Creative; Upper West Side PHX, LLC; POP PHX; Power Window Repair; Shanti Yoga PHX LLC; PurpleCRM LLC; Trinity Cathedral; Recruit Bit Security LLC; Red Rock Impressions I LLC & Red Rock Impressions LLC; True Shine, LLC; Rem A D Window Repair L.L.C.; Remedy Website Repair; Republic West Remodeling, INC.; Bright Brothers Strategy Group; Sel Restaurant Group, LLC; Rites O'Passage, Ceremony & Coaching; Rott & Grapes, LLC; Rott & Row, LLC; Ryan Rapp & Underwood P.L.C.; Savior Hospice, LLC; Schnur Enterprises, LLC; Schuster Print Marketing; Scottsdale Cat Clinic, INC.; Sedona Divine Olive Oils LLC; White Tie Productions LLC; Shanley Ten Eyck, Inc.; Rhino Elevate Media LLC; Sigil Drums LLC; Amboly Investments LLC; Sonoran Glass School; Rev. Thomas R. Weller Ministries; Sperduti Communications, LLC; Splash Media Group, INC; Vermilion Events LLC; Storm Wisdom, LLC; Summit Alliance Solutions, LLC; TeamWorks Communication Management; Temple Emanuel of Tempe; Studio ADT; The Clayton Venues; Solomon's Porch-PHX; Stillpoint Meditation LLC; Think BIG Consulting; Thomae Law, PLC; West Valley Women; ReFresh IT LLC; Truce LLC; True Roots Development, LLC; Ally Pediatric Therapy; Tyrell Coaching Services; ProcureIT USA, LLC; Whiskers & Rover Pet Sitters; Urban Eyecare LLC; Thumb Butte Distillery, INC.; Venue Projects, LLC; Global Age, LLC; Viewpoint Merchant Consulting; Wave Productivity, LLC; AZ Party Artists; Vanguardia LLC d/b/a VanguardiaArizona.com; Aunt Rita's Foundation, non-profit; and AZ Synergy Counseling

## **FACTS:**

Brush & Nib, owned by Joanna Duka and Breanna Koski (collectively, "Owners"), is a for-profit limited liability company operating as a place of public accommodation under Phoenix City Code § 18.1. Owners both pre-fabricate and custom-design calligraphy artwork for the public for weddings and other occasions. Owners will sell their pre-made works for any event. However, they want to be able to legally refuse to create custom-made merchandise for same-sex weddings. They assert that their custom merchandise "convey[s] messages about a particular engaged couple, their upcoming marriage, their upcoming marriage ceremony, and the celebration of that marriage." Owners also believe their work is inseparable from their devout religious beliefs, which include the belief that an ordained marriage is between one man and one woman. As such, they

contend that requiring them to create customer-specific merchandise for same-sex weddings violates their religious beliefs. Owners also say they seek to refuse to create artwork that “contradict[s] biblical truth, demean[s] others, endorse[s] racism, [or] incite[s] violence.”

Owners have not yet refused to sell any services or products to same-sex couples, as no such couple has yet made a definite offer to purchase. Through an on-line form, Owners received inquiries from two persons purportedly of the same sex, whom Owners never contacted for fear they would be prosecuted under Phoenix City Code § 18-4(B), the City’s anti-discrimination ordinance (“the Ordinance”). Owners sought a preliminary injunction against enforcement of the Ordinance and a declaration that it violates, *inter alia*, the Arizona Constitution’s free speech clause, Art. II, § 6, and the Arizona Free Exercise of Religion Act (“FERA”), A.R.S. § 41-1493 *et seq.*

Phoenix City Code § 18-4(B) is found in the Code’s Chapter 18 (Human Relations) under § 18-4 (Prohibited Acts). Section 18-4(A) prohibits discrimination in employment, and § 18-4(B) prohibits discrimination in public accommodations, with an exemption for bona fide religious organizations (not relevant here). Section 18-4 was enacted in 2013. A violation of the Ordinance is a Class One Misdemeanor. It provides:

B. Discrimination in public accommodations.

1. Discrimination in places of public accommodation against any person because of race, color, religion, sex, national origin, marital status, sexual orientation, gender identity or expression, or disability is contrary to the policy of the City of Phoenix and shall be deemed unlawful. [Footnote omitted].

2. No person shall, directly or indirectly, refuse, withhold from, or deny to any person, or aid in or incite such refusal, denial or withholding of, accommodations, advantages, facilities or privileges thereof because of race, color, religion, sex, national origin, marital status, sexual orientation, gender identity or expression, or disability nor shall distinction be made with respect to any person based on race, color, religion, sex, national origin, marital status, sexual orientation, gender identity or expression, or disability in connection with the price or quality of any item, goods or services offered by or at any place of public accommodation. [Footnote omitted].

...

The Arizona Constitution’s Free Speech Clause provides that “[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. Arizona’s Free Exercise of Religion Act (“the Act”), consisting of §§ 41-1493 to 41-1493.02, was added by Laws 1999, Ch. 332, § 1, effective August 6, 1999. A.R.S. § 41-1493.01 provides as follows:

A. Free exercise of religion is a fundamental right that applies in this state even if laws, rules or other government actions are facially neutral.

B. Except as provided in subsection C, government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.

C. Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person is both:

1. In furtherance of a compelling governmental interest.
2. The least restrictive means of furthering that compelling governmental interest.

D. A person whose religious exercise is burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. A party who prevails in any action to enforce this article against a government shall recover attorney fees and costs.

The Superior Court denied the preliminary injunction, ruling that the Ordinance did not violate Owners' freedom of speech in light of the compelled speech doctrine elucidated by the U.S. Supreme Court in *West Virginia Board of Education v. Barnett*, 319 U.S. 624 (1943) and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006). Owners then appealed that ruling. Because a stay was denied, the case moved forward in Superior Court, which issued a ruling granting summary judgment to the City. The appeal of the summary judgment was consolidated with the appeal of the denial of preliminary injunction. On June 4, 2018, while the consolidated appeal was pending, the U.S. Supreme Court issued *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, 1722 (2018), declining to address the petitioner's First Amendment claim that requiring him to create a cake for a same-sex wedding would violate his right to free speech, but holding that the Colorado Civil Rights Commission had violated petitioner's right to religious neutrality under the First Amendment.

On June 7, 2018, the Arizona Court of Appeals unanimously affirmed the summary judgment for the City. It held that, although they had contended that Ariz. Const. Art. II, § 6 provided broader protection than the U.S. Constitution, Owners had not explained how the two analyses would differ, and thus federal law would be applied. The Court concluded that, in light of U.S. Supreme Court precedent, a law allowing Owners to refuse service based on sexual orientation would constitute a "grave and continuing harm." *Brush & Nib Studio, LC v. City of Phoenix*, 244 Ariz. 59, 67 ¶ 11 (App. 2018) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015)). It held, however, that Owners may post on their website a statement endorsing the belief that marriage is between a man and a woman, as well as a disclaimer that, notwithstanding that belief, the law requires them to provide goods and services to everyone regardless of sexual orientation. A section of the Ordinance governing such statements was therefore struck down as unconstitutional, while the remainder of the Ordinance was upheld as constitutional. The Arizona Supreme Court granted Owners' Petition for Review.

## ISSUES:

I. "Does Phoenix violate the Arizona Constitution's Free Speech Clause when it forces commissioned artists to create custom artwork—consisting of words and paintings—conveying messages they object to and when it bans commissioned artists from publishing a statement explaining the artwork they can and cannot create?"

II. "Does Phoenix violate Arizona's Free Exercise of Religion Act when it uses criminal penalties—including jail time—to force commissioned artists to create custom artwork expressing messages that violate their sincerely held religious beliefs and when it bans religiously motivated speech?"

***This Summary was prepared by the Arizona Supreme Court Staff Attorneys' Office solely for educational purposes. It should not be considered official commentary by the court or any member thereof or part of any brief, memorandum or other pleading filed in this case.***