

IN THE SUPREME COURT

STATE OF ARIZONA

BRUSH & NIB STUDIO, LC, et al.,

Plaintiffs/Appellants/
Cross-Appellees,

vs.

CITY OF PHOENIX,

Defendant/Appellee/
Cross-Appellant

Supreme Court
No. CV-18-0176-PR

Court of Appeals
No. 1 CA-CV 16-0602

Maricopa County Superior Court
No. CV2016-052251

**BRIEF OF *AMICI* TYNDALE HOUSE PUBLISHERS AND THE NATIONAL
CENTER FOR LAW & POLICY IN SUPPORT OF PETITION FOR REVIEW**

(filed with the written consent of the parties)

Stewart Salwin, Ariz. Bar No. 027406

stewart@statecraftlaw.com



649 North Fourth Avenue, First Floor

Phoenix, Arizona 85003

(602) 382-4078

*Attorney for Tyndale House Publishers
and The National Center for Law & Policy*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
AMICI’S INTEREST IN THE LITIGATION	2
REASONS TO GRANT THE PETITION	2
I. The right to exercise editorial discretion in determining the content of one’s speech has a long and important history in the Anglo-American legal tradition.	2
II. Arizona’s Declaration of Rights is broader than the Federal Bill of Rights.	4
A. The wording of the provisions of the Declaration of Rights is broader.	4
B. Case law finds the Declaration of Rights affords broader protections.	5
C. The Drafters of Arizona’s Declaration of Rights designed the provisions to be more protective of than the Federal Bill of Rights.	6
III. This Court should adopt a textual approach to analyzing the Declaration of Rights.	7
A. Arizona needs a more stable framework for applying the Declaration of Rights to be more protective of liberty than the Federal Constitution.	7
B. A textual approach to analyzing Arizona’s Declaration of Rights would strongly protect individual liberty.	9
C. A textual approach would not require this Court to overrule existing precedent.	10
IV. The textual standard Applied to this case requires the application of strict scrutiny to Phoenix City Code § 18–4(B)(2)–(3).	12
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page
<i>Ark. Educ. TV Comm’n v. Forbes</i> , 523 U.S. 666 (1998)	3
<i>Brush & Nib Studio, LC v. City of Phoenix</i> , 244 Ariz. 59, 418 P.3d 426 (Ct. App. 2018).....	13
<i>Coleman v. City of Mesa</i> , 230 Ariz. 352, 284 P.3d 863 (2012)	5
<i>Employment Division v. Smith</i> , 494 U.S. 872 (1990)	11
<i>Estate of Reinen v. N. Arizona Orthopedics, Ltd.</i> , 198 Ariz. 283, 9 P.3d 314 (2000)	8
<i>Graham v. Tamburri</i> , 240 Ariz. 126, 377 P.3d 323 (2016)	11
<i>Matter of Appeal In Cochise Cty. Juvenile Action No. 5666-J</i> , 133 Ariz. 157, 650 P.2d 459 (1982)	5, 8
<i>Morrison v. Olson</i> , 487 U.S. 654 (1988)	8, 9
<i>Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm’n</i> , 160 Ariz. 350, 773 P.2d 455 (1989)	6, 11, 12
<i>Salib v. City of Mesa</i> , 212 Ariz. 446, 133 P.3d 756 (Ct. App. 2006).....	7
<i>State v. Ault</i> , 150 Ariz. 459, 724 P.2d 545 (1986)	6
<i>State v. Hardesty</i> , 222 Ariz. 363, 214 P.3d 1004 (2009)	8
<i>State v. Holle</i> , 240 Ariz. 300, 379 P.3d 197 (2016)	10
<i>State v. Stummer</i> , 219 Ariz. 137, 194 P.3d 1043 (2008)	5, 6, 7, 12
<i>Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976).	12

TABLE OF AUTHORITIES

Page

Constitutional Provisions

Article II, Section 6 of the Arizona Constitution.....	5, 10
Article II, Section 8 of the Arizona Constitution.....	6
Article XX, Paragraph 1 of the Arizona Constitution	5, 10

Secondary Authorities

John D. Leshy, <i>The Arizona Constitution: A Reference Guide</i> (1993)	5, 8
<i>The Records of the Arizona Constitutional Convention of 1910</i> (John S. Goff ed., 1991)	7, 10

INTRODUCTION

Among the most cherished rights in the American tradition is the right to be free from government coercion in matters of conscience. The Arizona Constitution, no less than the U.S. Constitution, protects these cherished rights of free speech and exercise of religion. This case gives the Court an opportunity to clarify how its jurisprudence on rights guaranteed by the Arizona Constitution protect critical rights of free expression and to respect the freedom of thought. As illustrated by the Court of Appeal's opinion below, Arizona courts tend to avoid analysis of Arizona's Declaration of Rights when dealing with fundamental liberties, often acting as if they are interchangeable with the federal Bill of Rights. This approach is misguided and fails to give independent effect to Arizona law.

Too often, Arizona courts fall back on the federal case law for corollary rights, even if a more robust application of the Arizona Constitution could afford greater protection for individual liberty. Amici provide historical material and an analytical framework supporting a more vigorous application of Arizona speech rights and exercise of religion. As explained below, in this case the city ordinance that requires Appellants to create artwork that expresses a view contrary to their religious sentiments is a clear violation of the freedoms guaranteed by the Declaration of Rights and should be subject to strict scrutiny and declared to violate the Arizona Constitution.

AMICI'S INTEREST IN THE LITIGATION

Tyndale House Publishers (“Tyndale”) was founded in 1962 by Dr. Kenneth N. Taylor as a means of publishing *The Living Bible*. Tyndale publishes Christian fiction, nonfiction, children's books, and other resources, including Bibles in the New Living Translation. Tyndale House is based in Carol Stream, Illinois, but its publications are sold in every state of the union, including selling material to over 500 accounts in Arizona over the past two years. As a publisher of predominantly religious literature, Tyndale is deeply concerned with protecting the rights of free speech and exercise of religion.

The National Center for Law and Policy (“NCLP”) is a non-profit legal and public policy advocacy organization that has, since its inception, promoted and defended constitutionally protected rights of conscience and religious freedom in the courts and culture. The NCLP is deeply concerned about the future of religious freedom throughout the United States, including the growing threat state anti-discrimination statutes pose to the constitutionally protected liberties of individuals, groups, and organizations to believe, express, and live out their religious faith, free from the oppressive burden of coercive governmental control.

REASONS TO GRANT THIS PETITION

I. The right to exercise editorial discretion in determining the content of one’s speech has a long and important history in the Anglo-American legal tradition.

The right to be free from compelled speech has been recognized as including the right to exercise editorial discretion in fields that create and produce messages such as

publishing, broadcasting, and cable programming. *See Ark. Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 673-74, 118 S.Ct. 1633, 1639 (1998).

The freedom of publishers and others engaged in similar activities to determine what speech to convey has not always been protected by governments in the past, but rather are freedoms that have been fought for, won, and preserved over time and at great cost. In fact, Amici Tyndale House Publishers is named after William Tyndale, an important figure in the history of freedom of speech for publishers.

Tyndale lived in England from about 1494 to 1536. Although highly controversial at the time because of his religious views, Tyndale was the first to translate the New Testament (as well as portions of the Old Testament) into English, and he used the relatively new printing press to publish it. His publication of the Bible into English, as well as his published criticisms of the King's actions, infuriated Henry VIII along with other political and church leaders, and resulted in his exile from England. Because of the content of his publications, Tyndale was declared a heretic, was eventually captured in Antwerp, and on October 5, 1536, he was strangled and burned at the stake.

Nearly two centuries later, even in Colonial America, freedom of speech for printers and publishers was still not entirely secure. One notable early case in American legal history concerning censorship of printers was the famous libel trial of a publisher named John Peter Zenger. In 1733, Zenger created the *New York Weekly Journal*, the first opposition newspaper in the Colonies. His publication attacked New York's British

Governor, William Cosby. Zenger's publication used sarcasm, innuendo, and allegory to ridicule the royal governor, and it was also the first American publication to include essays by leading English libertarian philosophers as well as the popular Cato's Letters which played a key role in the American Revolution. Because of his criticisms of the governor, Zenger was charged criminally with seditious libel.

At trial, Zenger argued for acquittal, not by denying that he had published the materials at issue, but rather by arguing that the content of what he published was true. Zenger's case established in the Colonies that printers would be free to criticize the government, and became one of many factors helping shape the political culture that led to the Revolutionary War and the adoption of the First Amendment. With this rich tradition of the freedom to publish, or in the case of Appellants, hand-write, free from government coercion, this Court has good reason to grant review in this case.

II. Arizona's Declaration of Rights is broader than the Federal Bill of Rights.

A. The wording of the provisions of the Declaration of Rights is broader.

Arizona's Constitution intentionally sets forth basic civil liberties in broad and sweeping language that goes beyond the negative rights ("Congress shall make no law ...") afforded by the First Amendment.

Article II, Section 6 states, "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

Likewise, the Arizona Constitution grants expansive protections to religious liberties. See John D. Leshy, *The Arizona Constitution: A Reference Guide* 327 (1993) (describing Article XX, Paragraph 1 as a “ringing statement of religious freedom”). Article XX, Paragraph 1 states, “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.”¹

B. Case law finds the Declaration of Rights affords broader protections.

Arizona courts have often recognized that Article 2, Section 6 affords greater protections than the First Amendment. See, e.g., *Coleman v. City of Mesa*, 230 Ariz. 352, 361, 284 P.3d 863, 872 n.5 (2012) (noting that Article 2, Section 6 is “more protective of free speech rights than the First Amendment”); *State v. Stummer*, 219 Ariz. 137, 143, 194 P.3d 1043, 1049 ¶17 (2008) (affirming that Article 2, Section 6 has “greater scope than the first amendment”); *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm’n*, 160 Ariz. 350, 358, 773 P.2d 455, 463 (1989) (noting the Arizona Constitution provides “more stringent protections” to free speech than the Federal Constitution).

Elsewhere, this Court has also interpreted other provisions of the Arizona Constitution to extend beyond the protections afforded by the Federal Constitution. In *State v. Ault*, this Court found that “[t]he Arizona Constitution is even more explicit than

¹ This Court has determined that Article II, Section 12 of the Declaration of Rights should be read in conjunction with Article XX, Paragraph 1. See *Matter of Appeal In Cochise Cty. Juvenile Action No. 5666-J*, 133 Ariz. 157, 163, 650 P.2d 459, 465 (1982).

its federal counterpart in safeguarding the fundamental liberty of Arizona citizens.” 150 Ariz. 459, 463, 724 P.2d 545, 549 (1986). Accordingly, the Court held that Article II, Section 8² prohibits “warrantless entry into a home in the absence of exigent circumstances or other necessity,” and it prohibits the admission of evidence found in violation of a warrantless entry even if the inevitable discovery rule under federal law might allow admission of the evidence. *Id.*

C. The Drafters of Arizona’s Declaration of Rights designed the provisions to be more protective than the Federal Bill of Rights.

At the time of the ratification of Arizona’s Constitution, the Federal Bill of Rights had not yet been incorporated to apply to the actions of state and local governments, and the founders recognized that the rights under the Arizona Constitution would be the sole constitutional protections of individual liberties against actions by the state government. *The Records of the Arizona Constitutional Convention of 1910*, 759 (John S. Goff ed., 1991) (hereinafter “Goff”) (reporting the statement of Delegate Ingraham that “[t]he first ten amendments to the United States Constitution ... have no application to the state law; they are restrictions upon the power of the United States”). In securing these rights Arizona’s drafters chose to adopt the free speech provisions, along with other provisions in the Arizona Declaration of Rights, from similar provisions in the State of Washington’s constitution, rather than the Federal Constitution. *See State v. Stummer*, 219 Ariz. at 142,

² “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Ariz. Const. art. II, § 8

194 P.3d at 1048 n.4 (“The framers declined to adopt the language of the First Amendment’s free speech provision, although they did use some federal constitutional provisions as models for related provisions of the Arizona Constitution.”).

III. This Court should adopt a textual approach to analyzing the Declaration of Rights.

A. Arizona needs a more stable framework for applying the Declaration of Rights to be more protective of liberty than the federal constitution.

This Court has yet to develop a systematic approach to analyze the Declaration of Rights. *See, e.g., Salib v. City of Mesa*, 212 Ariz. 446, 453–54, 133 P.3d 756, 763–64 ¶ 24 (Ct. App. 2006) (noting that the scope of the difference between Article 2, Section 6 and the First Amendment has never been defined).

As a result, the majority of Arizona free-speech cases revolve around mimicked interpretations of the First Amendment. When the Arizona Constitution’s protections are raised in cases, the answers provided by the Arizona Constitution are inconsistent. *See Leshy* at 43 (“Most free speech decisions rendered by Arizona courts ... either (1) have addressed only the First Amendment ... ; (2) have explicitly addressed both [Article II, Section 6] and the federal Constitution but grounded the discussion solely on cases construing the federal Constitution ... ; or (3) have discussed the First Amendment and [Section 6] without suggesting any difference between the two”).

Meanwhile, questions of religious liberty have almost never relied on Article XX, Paragraph 1, to the extent that the provision appears a dead letter. *See, e.g., Estate of*

Reinen v. N. Arizona Orthopedics, Ltd., 198 Ariz. 283, 291, 9 P.3d 314, 322 (2000) (declining to reach arguments based on Art. XX Paragraph 1). The vast majority of Arizona cases that involve freedom of religion have been decided on the grounds of the First Amendment or more recently the Free Exercise of Religion Act (“FERA”). *See, e.g., State v. Hardesty*, 222 Ariz. 363, 367, 214 P.3d 1004, 1008 (2009). The only recent case to have mentioned Arizona’s religious freedom clause is *Matter of Appeal In Cochise Cty.*, but in deciding the case the Court made clear it was relying on federal free exercise case law. 133 Ariz. 157.

The risk of having no independent framework to analyze Arizona’s Declaration of Rights is that these rights will either be adjudicated in an ad-hoc format or neglected entirely. An ad-hoc approach to constitutional interpretation risks capriciousness in judicial decision making. *See Morrison v. Olson*, 487 U.S. 654, 734 108 S.Ct. 2597, 2641(1988) (Scalia, J., dissenting) (warning of the dangers of ad-hoc constitutional jurisprudence in preference to a textual approach).

Amici propose the following framework for analyzing rights claimed under the Arizona Constitution:

1. Rigorously apply the text of the Arizona Bill of Rights to each case, without being constrained by case law construing the federal Bill of Rights.
2. Allow the government to overcome individual liberty claims where a law or action (a) directly advances a compelling state interest and (b) is narrowly tailored to avoid burdening the constitutional right.

This Arizona text first approach gives independent meaning to the wording selected by the drafters and ratifiers of the Arizona Declaration of Rights, and properly does not allow judicial decisions construing federal law—particularly decisions post-dating the drafting and approval of the Arizona Constitution, which were never incorporated into the Arizona Constitution through any democratic process—to effectively amend the Arizona Declaration of Rights. The limited ability for the government to overcome religious liberty claims will effectively recognize, for pragmatic reasons, a “strict scrutiny” safety valve to the liberties articulated in the Arizona Declaration of Rights.

Under this framework, the Court would be acknowledging that the Arizona Declaration of Rights would offer greater protections than the federal Bill of Rights where (a) the wording of the Arizona Bill of Rights is more expansive than the wording of its federal counterpart and/or (b) burdens on federal constitutional rights are reviewed under a more deferential standard than strict scrutiny.

If this analytical framework is applied in this case, the Court of Appeal’s decision would be reversed.

B. A textual approach to analyzing Arizona’s Declaration of Rights would strongly protect individual liberty.

This case gives the Court a perfect opportunity to clarify the analytical framework for applying the Arizona Constitution’s protection of rights. Despite the sweeping language of Article II, Section 6 and Article XX, Paragraph 1, a structured analysis of what this language means has not been fully developed.

In so doing, this Court is free to develop its own standard for review of Arizona’s constitutional provisions without being tethered to federal First Amendment analysis. Indeed, the majority of First Amendment caselaw that has been developed did not exist at the time Arizona’s Constitution was adopted by the people, and Arizona specifically declined to adopt the language of the First Amendment. *See Goff* at 658–59.

First, when interpreting the provisions of Article II, Section 6 and Article XX, Paragraph 1, the starting point for analysis should be the text of those provisions. *See State v. Holle*, 240 Ariz. 300, 302, 379 P.3d 197, 199 ¶ 11 (2016) (noting a statute’s text is the most reliable indicator of intent).

If a state action infringes on a person’s right to “freely speak, write, and publish” or if it does not exhibit “[p]erfect toleration” of a person’s “religious sentiment,” then such action should be considered presumptively unconstitutional under Article II, Section 6 and Article XX, Paragraph 1. Not relevant here, because Phoenix cannot show this is a compelling interest with a narrowly tailored solution, in some cases restrictions on constitutional liberties may be allowed to stand under certain, limited circumstances. To determine whether an infringement on liberties is justified, the court should determine whether the action is “narrowly tailored to advance a compelling state interest.” *See Graham v. Tamburri*, 240 Ariz. 126, 130, 377 P.3d 323, 327 ¶ 11 (2016).

C. A textual approach would not require this Court to overrule existing precedent.

The framework suggested above is straightforward. It gives force to the statement that the Arizona Constitution provides greater protections to free speech and free exercise than does the Federal Constitution. For example, some cases under the Free Exercise Clause are given less than strict scrutiny reviewed under the oft-criticized decision in *Employment Division v. Smith*, 484 U.S. 872 (1990). It is also consistent with the rulings that this Court has made in previous cases in which it has considered the application of Article II, Section 6.³ This approach, therefore, does not require this Court to overrule any of its precedent. Rather, it provides a disciplined, systematic approach to Article II, Section 6 and Article XX, Paragraph 1 analysis which has formerly been lacking in the jurisprudential analysis.

In *Mountain States*, for example, the Court determined that “time, place, and manner” restrictions on speech “must be drawn with narrow specificity.” *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm’n*, 160 Ariz. 350, 358, 773 P.2d 455, 463 (1989). This Court contrasted this approach with that taken by the United States Supreme Court, which had articulated a three-part test for determining whether a time, place, and manner restriction is reasonable: is the regulation content neutral, does it serve a significant governmental interest, and does it leave open ample alternate channels for communication. *Id.*, citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425

³ Because the Court has not yet analyzed any case under Article XX, Paragraph 1 on its own terms a reversal of precedent is likewise not required.

U.S. 748 (1976). This Court held that “when dealing with regulations that affect speech,” the state must regulate “with narrow specificity so as to affect as little as possible the ability of the sender and receiver to communicate.” *Id.*⁴ That analysis is consistent with the approach suggested here.

IV. The textual standard Applied to this case requires the application of strict scrutiny to Phoenix City Code § 18–4(B)(2)–(3).

In this context of this case, application of the textual standard requires a reversal of the Court of Appeals’ decision.

The custom artwork that Appellants create for weddings and other occasions, including painting, calligraphy, and hand-lettering, implicate their ability to write freely. Appellants write words on their custom designs, and Phoenix City Code § 18–4(B)(2)–(3) (the “Phoenix Ordinance”) would compel Appellants to write. State action that compels a person to write things with which they disagree clearly interferes with that person’s ability to “freely write” and therefore presumptively violates Article II, Section 6.

Similarly, Appellant’s objection to creating custom artwork for same-sex weddings arises from sincere religious belief. *Brush & Nib Studio, LC v. City of Phoenix*, 244 Ariz. 59, 418 P.3d 426, 444 (Ct. App. 2018) (noting that the City of Phoenix does not dispute that Appellants are motivated by sincere religious belief). The question then becomes

⁴ In a narrowly drawn ruling, this Court struck down a regulation limiting the hours that an adult book store could remain open, describing it as “content-based secondary effects regulation” of speech and analyzing it using an intermediate standard of scrutiny. *State v. Stummer* 219 Ariz. 136, 144 (2008). It is unclear whether the standard developed by the Court would call for a different conclusion than the federal standard, however, and the Court’s analysis on this point is likely dicta.

whether forcing Appellants to create custom artwork offensive to their particular religious beliefs secures “perfect toleration” of their “religious sentiment.” Clearly not. “Perfect” toleration would forbid the state from forcing religious devotees to perform actions contrary to their beliefs. For example, it would obviously not be “perfectly tolerant” of religious sentiment for the state government to force a Muslim to draw a picture of Muhammed. Similarly, it is not perfectly tolerant of Appellants’ religious sentiment for the state to force them to create wedding art celebrating same-sex marriage when they have a undisputedly religious-based objection. Both actions force religious adherents to act in ways that run contrary to their beliefs. The Phoenix Ordinance thus violates the plain language of Article XX, Paragraph 1.

As presumptively violative of Article II, Section 6 and Article XX, Paragraph 1, the Phoenix Ordinance would therefore be subject to strict scrutiny.

CONCLUSION

This Court should grant the petition review and to use this case an opportunity to adopt a textual approach to analyzing the free speech and religious liberty guarantees of the Arizona Constitution.

DATED this 28th day of September, 2018.

STATECRAFT PLLC

By: /s/Stewart Salwin
Stewart Salwin
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
*Attorney for Tyndale House Publishers and
The National Center for Law & Policy*