ARIZONA COURT OF APPEALS

DIVISION ONE

BRUSH & NIB STUDIO, LC, BREANNA KOSKI, and JOANNA DUKA, Plaintiffs/Appellants, v. **CITY OF PHOENIX**, Defendant/Appellee.	Division One No. 1 CA-CV 16-0602 Maricopa County Superior Court No. CV 2016-052251

BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF DEFENDANT/APPELLEE CITY OF PHOENIX

[Submitted with consent of all parties pursuant to ARCAP 16(b)(1)(A)]

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

STATUTES, ORDINANCES AND LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns sexual orientation discrimination by a for-profit business and its owners who make money selling printed products—including wedding invitations—to the general public. *Amicus Curiae* Lambda Legal Defense and Education Fund, Inc. ("*Amicus*" or "Lambda Legal") submits this brief in support of Defendant/Appellee the City of Phoenix ("the City" or "Phoenix"), and agrees with the City on the key points of its Answering Brief.[1] In particular, *Amicus* agrees that Plaintiffs/Appellees Brush & Nib Studio, Breanna Koski, and Joanna Duka (collectively "B&N") lack standing to challenge certain portions of the City's public accommodations anti-discrimination ordinance, Phoenix City Code § 18-4(B) ("§ 18-4(B)" or "the ordinance"), because their claims are speculative and contingent due to the lack of any actual or threatened prosecution of B&N by the City.[2]

Amicus also agrees that the superior court correctly refused B&N's request for a preliminary injunction that would allow it to deny services to same-sex couples

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[1] Amicus submits this brief with the consent of all parties pursuant to ARCAP 16(b)(1)(A).

[2] Although B&N's standing argument in its Reply Brief (at 2) cites *State v. B Bar Enterprises, Inc.*, 133 Ariz. 99, 101 n.2 (1982), the Arizona Supreme Court actually concluded in that case that there was *no* standing, even when a party challenging a statute had had a complaint filed against it under the statute. The Court exercised its prudential standing discretion to hear the case anyway because standing had not been raised as an issue on appeal. *Id*. Here, by contrast, there has been *no* actual complaint filed or threatened against B&N, and standing *has* been raised as an issue on appeal.

notwithstanding § 18-4(B). As the City explains, B&N cannot show a likelihood of success on the merits of its arguments that § 18-4(B) unconstitutionally abridges its free speech rights or improperly burdens its religious free exercise rights. Requiring B&N to provide the same services to same-sex couples as it provides to different-sex couples is not a free speech infringement under either the First Amendment to the U.S. Constitution or Article II, § 6 of the Arizona Constitution because, as the superior court held, producing and selling place cards, invitations and other printed paper goods is conduct, not speech.[3] Although wedding invitations certainly contain a message, that message is the couple's; B&N's production of invitations according to its customer's wishes, selecting from among the designs and materials the business offers to the range of its customers, does not transform the customer's message into the business's message.

Amicus also agrees that requiring B&N to provide the same design and printing services to same-sex couples as to different-sex couples does not substantially burden the business's religious practices in violation of Arizona's Free Exercise of Religion Act ("FERA"), A.R.S. § 41.1493.01. And, because there is no

[3] As the City notes, "Arizona courts routinely rely on First Amendment cases in the free speech context, and there is no reason to change course in this case." Brief of Appellee at 49; *see also State v. Stummer*, 219 Ariz. 137, 142 (Ariz. 2008) (en banc) ("Arizona Courts have had few opportunities to develop Arizona's free speech jurisprudence. With regard to unprotected speech, Arizona courts construing Article 2, Section 6 have followed federal interpretations of the United States Constitution.") (citations omitted)).

substantial burden on religious exercise and no infringement of free speech, *Amicus* further agrees that strict scrutiny is not the applicable test. However, even under strict scrutiny, § 18-4(B) withstands constitutional challenge because, as the City explains, the ordinance is the least restrictive means of advancing the City's compelling interest in preventing sexual orientation discrimination by places of public accommodation.

Amicus writes separately to provide additional information about why, under any level of scrutiny, the City's interest in protecting lesbian, gay, bisexual, and transgender ("LGBT") individuals from discrimination is compelling. This brief describes the recurrent resistance to civil rights by those invoking religious freedom to justify discrimination, and the consistent, appropriate conclusion by courts across many decades that such arguments must be rejected. With information specific to Arizona and Phoenix, together with other evidence of anti-LGBT discrimination, *Amicus* also shows why effective anti-discrimination rules are needed now to protect LGBT individuals and same-sex couples from being turned away from business establishments. For purposes of constitutional challenges to anti-discrimination laws such as § 18-4(B), there should be no doubt that the government's interest in enforcing these civil rights protections is compelling.

Accordingly, *Amicus* urges this court to rule consistently with the series of other state appellate courts that recently have addressed this issue, and firmly have

rejected business owners' claims of rights to refuse wedding-related products and services to same-sex couples, while providing those same products and services to different-sex couples. For this Court to take a different direction and allow discriminatory exemptions from Phoenix's anti-discrimination ordinance would not be constitutionally justified, and would have terrible consequences for this minority population and everyone who may need the law's protection.

In its January 6, 2017, ruling, the superior court considered and properly rejected B&N's defenses to Phoenix City Code § 18-4(B). *Amicus* supports the City's request that this Court affirm the superior court's order denying B&N's motion for a preliminary injunction.

IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Lambda Legal is the nation's oldest and largest legal organization working for full recognition of the civil rights of LGBT people and everyone living with HIV, through impact litigation, education, and policy advocacy. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2591-92 (2015) (affirming equal right of same-sex couples to marry and to marriage recognition); *Lawrence v. Texas*, 539 U.S. 558, 561 (2003) (invalidating Texas ban on same-sex adult intimacy as unconstitutional denial of liberty); *Majors v. Jeanes*, 48 F. Supp. 3d 1310 (D. Ariz. 2014); 14 F. Supp. 3d 1313 (D. Ariz. 2014) (holding that Arizona's

state constitutional ban on marriage for same-sex couples violates U.S. Constitution).

Lambda Legal has represented same-sex couples or appeared as *amicus curiae* in numerous cases in which religious freedom has been asserted as a justification for discrimination against same-sex couples. *See, e.g.*, *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017); *Gifford v. McCarthy*, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016); *Klein, dba Sweetcakes by Melissa v. Oregon Bureau of Lab. & Indus.*, No. CA A159899 (Or. Ct. App. filed April 25, 2016); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *cert. granted sub nom Masterpiece Cakeshop, Inc. v. Colo. Civ. Rts. Comm'n*, __ U.S. __, 2017 WL 2722428 (June 26, 2017) (No. 16-111); *North Coast Women's Care Med. Grp., Inc. v. Superior Ct. (Benitez)*, 189 P.3d 959 (Cal. 2008).

The issues raised in this appeal are similar to those addressed in these and other cases discussed herein. Because the Court's decision here is likely to affect thousands of LGBT people in Phoenix, where Lambda Legal has over 1,000 members, Lambda Legal has a particular interest in assisting the Court in its consideration of these issues, through the additional factual and legal information provided in this brief.

STATEMENT OF THE CASE

Amicus Curiae joins in the City of Phoenix's statement of the case.

ARGUMENT

I. Across Generations of Equality Struggles, Courts Repeatedly Have Confirmed That Religious Objections Do Not Trump Society's Compelling Interest in a Non-Discriminatory Marketplace.

In the United States, differing religious beliefs about family life and gender roles often have generated disputes in the context of public accommodations, as well as in education, employment, medical services, and other settings. Although some forms of religiously motivated discrimination have receded, history finds successive generations asking anew whether protections for religious liberty provide exemptions from laws protecting others' liberty and right to participate equally in civic life. Courts have provided a consistent, necessary answer to that question: Religious beliefs do not entitle any of us to exemptions from generally applicable laws protecting all of us.

Indeed, the Supreme Court has described free exercise defenses to anti-discrimination laws as "so patently frivolous that a denial of counsel fees to the [plaintiffs] would be manifestly inequitable." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 403 n.5 (1968) (referring to argument that the Civil Rights Act of 1964 "constitutes an interference with the 'free exercise of the Defendant's religion'" (internal citation omitted)).

Throughout the ages, however, opponents of civil rights for particular other people repeatedly have invoked religion as a reason to perpetuate discrimination.

During the past century's struggles over racial integration, some Christian schools excluded black applicants based on the view that "mixing of the races is regarded as a violation of God's command." *See Bob Jones Univ. v. United States*, 461 U.S. 574, 580, 583 n.6 (1983). Some restaurant owners refused to serve black customers, citing religious objections to "integration of the races." *See Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944–45 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968). Religion also was invoked to justify laws and policies against interracial relationships and marriage. *See Loving v. Virginia*, 388 U.S. 1, 3 (1967) (invalidating state interracial marriage ban where trial judge had opined that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents" and therefore "did not intend for the races to mix"); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (holding that religious free exercise could not excuse church's violation of Civil Rights Act when firing white clerk due to her friendship with a black man).

Likewise, as women entered the workplace, some objected on religious grounds and sought exemptions from employment non-discrimination laws. Despite the longstanding religious traditions on which such claims often were premised, courts recognized that accommodating religious objections would vitiate the anti-discrimination protections on which workers are entitled to depend. *See, e.g.*, *EEOC*

v. Fremont Christian Sch., 781 F.2d 1362, 1367–69 (9th Cir. 1986) (rejecting religious school's argument that the First Amendment's Free Exercise Clause excused offering unequal spousal benefits to female employees); *Bollenbach v. Bd. of Educ.*, 659 F. Supp. 1450, 1473 (S.D.N.Y. 1987) (employer improperly refused to hire women bus drivers due to religious objection of Hasidic male bus riders).

Similarly, after state and local governments enacted fair housing laws that protected unmarried couples, landlords unsuccessfully sought exemptions on the belief that they themselves commit a sin by providing residences in which tenants might commit fornication. *See, e.g.*, *Smith v. Fair Emp't and Hous. Comm'n*, 913 P.2d 909, 928–29 (Cal. 1996) (rejecting religion-based defenses because anti-discrimination requirements did not impose substantial burden, as landlord's religion did not require investing in rental apartments); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 279–80 (Alaska 1994) (same).

Thus, across generations, the question already has been asked and answered with reassuring regularity. Courts have consistently recognized the public's abiding interest in fair access and peaceful co-existence in the marketplace, which requires protecting all members of society in their equal treatment by public accommodations, regardless of discriminatory beliefs any given business owner may have about particular groups of people.

Today, these principles are tested once again in the context of sexual orientation discrimination, as LGBT people seek full participation in American life. There is growing understanding that sexual orientation and gender expression are personal characteristics bearing no relevance to one's ability to contribute to society, including one's ability to form a loving relationship and build a family together. *Obergefell*, 135 S. Ct. at 2591-92; *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) (holding that discrimination based on nonconformity with gender stereotypes can be actionable sex discrimination). And yet, pervasive and fervent religious objections on the part of some to interacting with LGBT people in commercial contexts still inspire widespread harassment and discrimination. *See, e.g., Bodett v. Coxcom, Inc*., 366 F.3d 736 (9th Cir. 2004) (supervisor religiously harassing lesbian subordinate); *Peterson v. Hewlett-Packard Co*., 358 F.3d 599 (9th Cir. 2004) (anti-gay proselytizing intended to provoke coworkers); *Knight v. Conn. Dep't. of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (visiting nurse proselytizing to home-bound AIDS patient); *Erdmann v. Tranquility, Inc*., 155 F. Supp. 2d 1152 (N.D. Cal. 2001) (supervisor harassment of gay subordinate with warnings he would "go to hell" and pressure to join workplace prayer services); *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 539–40 (W.D. Ky. 2001) (physician refusal to employ gay people), *vacated on other grounds*, 53 Fed. Appx. 740 (6th Cir. 2002); *North Coast Women's*

Care Med. Grp., 189 P.3d at 967 (physicians' refusal of treatment to lesbian patient).[4]

As laws and company policies have begun to offer more protections against this discrimination, some who object on religious grounds are asking courts to change course and allow religious exemptions where they have not done so before. For the most part, the past principle has held true and the needs of third parties have remained a constraint on religion-based conduct in commercial contexts. *See, e.g., Bodett,* 366 F.3d at 736 (rejecting religious accommodation claim)*; Peterson,* 358 F.3d at 599 (same); *Knight,* 275 F.3d at 156 (same); *Erdmann*, 155 F. Supp.2d at 1152 (antigay harassment was unlawful discrimination); *Hyman*, 132 F.Supp.2d at 539-540 (rejecting physician's claim of religious exemption from nondiscrimination law); *North Coast Women's Care Med. Grp.,* 189 P.3d at 970 (same).[5]

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[4] *See also* Sam Levin, *Transgender Man to Sue Barbershop that Denied Service for 'Religious' Reason*, The Guardian (Mar. 13, 2016), https://www.theguardian.com/us-news/2016/mar/13/transgender-man-to-sue-california-barbershop-refused-service; SDGLN Staff, *Hawaii Court Rules for Lesbian Couple Turned Away by Bed and Breakfast*, San Diego Gay & Lesbian News (Apr. 16, 2013), http://sdgln.com/news/2013/04/15/hawaii-court-rules-lesbian-couple-turned-away-bed-n-breakfast (lodging). *See generally* Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1189–92 (2012).

[5] *See also Oliver v. The Barbershop*, Stipulated Final Judgment, Case No. CIVDS1608233, Super. Ct. for San Bernardino Cty., Calif. (Jan. 19, 2017), https://www.lambdalegal.org/in-court/legal-docs/oliver_ca_20170201_order; *Cervelli v. Aloha Bed & Breakfast*, Answering Brief of Plaintiffs-Appellees Diane Cervelli and Taeko Bufford and Plaintiff-Intervenor-Appellee William D. Hoshijo, CAAP-13-0000806 Hawaii Intermed. Ct. of App. (Nov. 27, 2013),

As noted above, B&N's desire to refuse to produce wedding invitations for same-sex couples exemplifies a recent iteration of the persistent problem of those engaged in commercial activity who claim religious rights to reject LGBT people; now it's refusals of wedding-related goods and services. *See, e.g., Washington v. Arlene's Flowers,* 389 P.3d 543 (Wash. 2017) (flowers); *Gifford v. McCarthy*, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016) (facility rental); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015) (cake); *Elane Photography, LLC v. Willock,* 309 P.3d 53 (N.M. 2013), *cert. denied* 134 S. Ct. 1787 (2014) (photography). *See also, e.g,,* Scott Wolchek, *Farmer Suing East Lansing After Being Kicked out of Farmer's Market,* WILK (May 31, 2017), http://www.wilx.com/content/news/Farmer-suing-East-Lansing-after-being-kicked-out-of-farmers-market-425581234.html (event venue); Larry Avila, *Madison Photographer Files Lawsuit Challenging City's, State Equal Protection Law,* Wis. State J. (Mar. 8, 2017), http://host.madison.com/wsj/business/madison-photographer-files-lawsuit-challenging-city-s-state-equal-protection/article_8a708830-fda8-5d76-ba38-f0b2076d7e17.html (photography); Chris Boyette, *These Photographers Say They Shouldn't Be Forced to Shoot Same-Sex Weddings,* CNN (Dec. 8, 2016), http://www.cnn.com/2016/12/08/health/wedding-video-same-sex-couple-lawsuit-

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https://www.lambdalegal.org/in-court/legal-docs/cervelli_hi_20131127-answering-brief-of-plaintiffs-appellees-and-plaintiff-intervenor-appellee.

trnd/index.html (videographers); Sharyn Jackson, *Gortz Haus Owners File Suit Against Iowa Civil Rights Commission,* Des Moines Register (Oct. 8, 2013), http://perma.cc/B9MB-NRN2 (event venue).

As in the wedding vendor cases already decided by courts of sister states, the exemption B&N seeks here would mark a sea change — opening the door to similar denials of goods and services, housing, employment, and other equitable treatment for LGBT people, persons living with HIV, and anyone else whose family life or minority status is disfavored by a merchant's religious convictions. As the U.S. Supreme Court has recognized, our laws and traditions have "afford[ed] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence,* 539 U.S. at 574 (citation omitted). The Court's explanation of the "respect the Constitution demands for the autonomy of the person in making these choices," *id.,* makes clear that the "person" whose autonomy is protected is the individual himself or herself — not those engaging in commercial conduct regulated in standard ways for everyone's benefit in the public marketplace. This must remain the rule. Religion must not become a tool for invidious deprivations of basic human rights.

Given our nation's history, many Americans now do recognize that being told "we don't serve your kind here" is discrimination that not only inflicts immediate dignitary harm on those rejected, but also stigmatizes the entire disparaged group

and corrodes our civil society. This is as true for LGBT people and same-sex couples today as it always has been for those targeted and denied equal treatment in public life based on others' religious or personal judgments. Public accommodations nondiscrimination laws exist to eliminate this harmful conduct. In Phoenix and elsewhere, they must remain effective for everyone's sake.

II. The City's Interest in Ending Discrimination Against LGBT People, Regardless of the Motivations For That Discrimination, Is Compelling.

Arizona has a substantial LGBT population. A 2017 Gallup survey determined that Arizona's LGBT population constitutes 4% of the state's overall population. Gary J. Gates, *Vermont Leads States in LGBT Identification*, Gallup (Feb. 6, 2017), http://www.gallup.com/poll/203513/vermont-leads-states-lgbt-identification.aspx. Using recent U.S. Census Bureau data, this amounts to approximately 212,000 people.[6] Further, again according to Gallup, 4.1% of the Phoenix metropolitan area population identifies as LGBT. Frank Newport & Gary J. Gates, *San Francisco Metro Area Ranks Highest in LGBT Percentage*, Gallup (Mar. 20, 2015), http://www.gallup.com/poll/182051/san-francisco-metro-area-ranks-highest-lgbt-percentage.aspx?utm_source=Social%20Issues&utm_medium=newsfeed&utm_ca

[6] The U.S. Census Bureau estimates Arizona's population to be 6,931,071 people and the population of the City of Phoenix to be 1,615,017 people. United States Census Bureau, *Quickfacts*, https://www.census.gov/quickfacts/fact/table/maricopacountyarizona,phoenixcityarizona,AZ/PST045216 (estimates as of July 1, 2016).

mpaign=tiles; David Leonhardt and Clair Cain Miller, *The Metro Areas with the Largest, and Smallest, Gay Populations*, N.Y. Times (Mar. 20, 2015), https://www.nytimes.com/2015/03/21/upshot/the-metro-areas-with-the-largest-and-smallest-gay-population.html?mcubz=2&_r=0. Again using U.S. Census data for the overall population, this amounts to more than 66,000 people. U.S. Census Bureau, *Quickfacts*, *supra*, note 6. These numbers are consistent with national demographics; Gallup estimates that nationwide, 4.1% of the U.S. population (approximately ten million adults) identify as LGBT. Gary J. Gates, *In U.S., More Adults Identifying as LGBT*, Gallup (Jan. 11, 2017), http://www.gallup.com/poll/201731/lgbt-identification-rises.aspx.

Although the number of LGBT Arizonans is considerable, Arizona remains a challenging place for this minority. Researchers at the Williams Institute at UCLA School of Law have documented the history of discrimination against LGBT Arizonans, reporting substantial discrimination by government actors as well as by members of the general public. Williams Institute, *Arizona — Sexual Orientation and Gender Identity Law and Documentation of Discrimination* (UCLA School of Law, Sept. 2009), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Arizona.pdf (documenting public sector employment discrimination based on sexual orientation and gender identity in Arizona as part of 15-chapter study reporting

widespread, persistent discrimination by state governments against LGBT people) ("*Documenting Discrimination*").

Documenting Discrimination surveys the patchwork nature of nondiscrimination protections for LGBT people in the state as of 2009 and discusses many examples of discrimination, focusing on discrimination by agents of government. *Id*. at pp. 1-2, 12-14. *See also* Christy Mallory & Brad Sears, *Employment Discrimination Based on Sexual Orientation and Gender Identity in Arizona*, The Williams Institute (UCLA School of Law, Jan. 2015), http://williamsinstitute.law.ucla.edu/wp-content/uploads/AZ-Nondis crimination-Report.pdf.[7]

Adding to this disturbing picture is striking evidence that lesbian, gay, and bisexual ("LGB") individuals in Arizona are likely to be victims of hate crime at rates grossly disproportionate to their small percentage of the population and greater than the rates for LGB people in the nation as a whole. According to the FBI's hate

[7] B&N cites a law review essay discussing indications that there is more employment discrimination against LGBT people than refusals by places of public accommodation, B&N Reply Brief at 29 (*citing* Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 Ind. L. J. 693, 720-21 (Spring, 2017)), suggesting that discrimination by businesses is not a problem worthy of concern. However, the rate of discrimination complaints is affected by many factors (such as available remedies) and is not the same as the rate at which discrimination occurs. More to the point, discrimination causes harm whenever it occurs. If it has been less frequent in particular contexts, that hardly would be grounds to create exemptions that will facilitate more such conduct.

crime statistics for 2015, of the 231 reported incidents in Phoenix, forty-nine (21.2%) were based on sexual orientation. Federal Bureau of Investigation, *Arizona Hate Crime Incidents per Bias Motivation and Quarter by Agency, 2015*, https://ucr.fbi.gov/hate-crime/2015/tables-and-data-declarations/13tabledatadecpdf/table-13-state-cuts/table_13_arizona_hate_crime_incidents_per_bias_motivation_and_quarter_by_agency_2015.xls. The other reported hate crimes in Phoenix were based on race, ethnicity, or ancestry (137 incidents), religion (forty incidents), and disability (five incidents). *Id*. Statewide that year, of the 276 reported incidents, fifty-seven (20.6%) were based on sexual orientation, 162 on race, ethnicity, or ancestry, fifty-two on religion, and five on disability. *Id*.

These incident rates for Arizona and Phoenix are higher than the national rate of sexual orientation-motivated bias crimes, which was 18.1% of all reported incidents according to the FBI's 2015 data. Federal Bureau of Investigation, *Incidents and Offenses,* https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidents andoffenses_final.

Of course, rates of hate-motivated incidents are only one measure of a social climate. Yet, by other measures as well, the Grand Canyon state has been notably unwelcoming and slow to treat its LGBT residents as equal citizens under law. For example, the state did not lift its ban on same-sex adult intimacy until 2001. *Arizona Panel OKs Sodomy Repeal*, Planet Out (Feb. 13, 2001), http://www.glapn.org

/sodomylaws/usa/arizona/aznews18.htm (describing contentious legislative consideration of HB 2414, the repeal bill); Will O'Bryan, *Arizona Lifts Sodomy Ban, May's Bill Ends 20-year Fight for 'Archaic Law' Repeal*, Washington Blade, (May 11, 2001), http://www.glapn.org/sodomylaws/usa/arizona/aznews32.htm.

When it finally did repeal its criminal statute, the state was one of the last to lift that threat before the Supreme Court held in 2003 that all such bans are unconstitutional. *Lawrence v. Texas,* 539 U.S. at 570. But even then, the legislature's action was met with significant public opposition and a large-scale attempt to persuade the governor to veto the bill. *See, e.g.*, Len Munsil, *'Archaic' Repeal Efforts Threaten Decency*, The Daily Courier (Mar. 22, 2001), https://www.dcourier.com/news/2001/mar/22/archaic-repeal-efforts-threaten-decency/ (op-ed arguing that to repeal the sodomy ban would be an attack on the institution of marriage and that criminal penalties for sodomy promote an appropriate societal preference for different-sex couples' marriages and families); Lee Pulaski, *Repealing Sex Laws Kicks Government out of Beds*, Chino Valley Review (May 21, 2001), https://www.cvrnews.com/news/2001/may/21/repealing-sex-laws-kicks-government-out--48210/ ("several thousand people contacted the governor's office and urged Hull not to sign the bill. They said that repealing those laws would lower society's moral standards."); Beth DeFalco, *Hull Signs Repeal of Archaic Sex Laws*, Arizona Republic (May 8, 2001), https://www.glapn.org/sodomylaws/usa/arizona/aznews

20.htm ("the repeal idea had become the lighting rod issue of this year's legislative session, sparking more than 5,600 calls and letters to [Governor Hull's] office from Arizonans urging [the governor] to veto the bill. In comparison, [the governor] had about 1,800 requests to sign it.").

In addition to the resistance to decriminalizing same-sex adult relationships, Arizona's legislature and the voting public have in recent years passed new anti-LGBT laws and constitutional amendments that have targeted LGBT people and same-sex couples for denials of equal rights. For example, in 1996, Arizona's legislature amended state law to explicitly exclude same-sex couples from marriage. A.R.S. § 25-101(C). Subsequently, in 2008, Arizona voters passed Proposition 102, which similarly amended the state constitution to restrict marriage to "a union of one man and one woman." Ariz. Const. art. XXX, § 1; *see also* Lambda Legal, *State Laws and Constitutional Amendments Targeting Same-Sex Relationships*, https://www.lambdalegal.org/publications/state-laws-and-constitutional-amendments-targeting-same-sex-relationships. Another explicit denial of equal treatment that remains in Arizona's statute books, whether enforceable or not, is A.R.S. § 15-716, which states: "No district shall include in its course of study instruction which promotes a homosexual life-style; portrays homosexuality as a positive alternative lifestyle; [or] suggests that some methods of sex are safe methods of homosexual sex."

Finally, only three years ago, Arizona's legislature approved Senate Bill 1062 ("SB 1062"), 51st Leg., 2d Reg. Sess. (Ariz. 2014). This controversial bill, which inspired nationwide condemnation and ultimately was vetoed, was designed to amend Arizona's Free Exercise of Religion Act ("FERA"), A.R.S. § 41.1493.01, to create a private free exercise right of action in cases in which the government is not a party, and also to grant free exercise rights to corporations. *See* Catherine E. Shoichet & Halimah Abdullah, *Arizona Gov. Jan Brewer Vetoes Controversial Anti-Gay Bill, SB 1062*, CNN (Feb. 26, 2014), http://www.cnn.com/2014/02/26/politics/arizona-brewer-bill/index.html; Tal Kopan, *10 Things to Know: Arizona SB 1062*, Politico (Feb. 27, 2014), http://www.politico.com/story/2014/02/arizona-sb1062-facts-104031; Bill Hardin, *SB 1062 is a Radical Law Change that Hurts Ariz.*, Arizona Republic (Feb. 28, 2014), http://www.azcentral.com/story/opinion/columnists/2014/02/24/sb-1062-creates-radical-change-that-hurts-ariz/5794251/. As the ACLU of Arizona put it, SB 1062 would have turned FERA from a shield "to protect a person's own right" into a sword that could be used to "discriminate against others." ACLU of Arizona, *The Facts on Arizona's SB 1062*, https://www.acluaz.org/sites/default/files/field_documents/aclu-az_facts_on_sb_1062.pdf.

An attorney with the Alliance Defending Freedom, B&N's counsel here, actually was forthright during the bill's committee hearing that it had been drafted

in response to the New Mexico Supreme Court's decision in *Elane Photography* that New Mexico's law similar to FERA does not apply in disputes between private parties and thus cannot excuse anti-LGBT discrimination contrary to the state's public accommodations law. *See Hearing on SB 1062 Before the Senate Comm. on Gov't and Env't*, 51 Leg., 2d Reg. Sess. (Ariz. 2014) (statement of Joseph La Rue, Attorney, Alliance Defending Freedom), http://azleg.granicus.com/MediaPlayer.php ?view_ id=13&clip_id=13105&meta_id=257255 ("*Hearing on SB 1062*"); *see also Elane Photography*, 309 P.3d at 77. In other words, SB 1062 was specifically intended to allow an individual or corporation to assert religious free exercise rights in a private lawsuit to excuse otherwise unlawful conduct, including discrimination against same-sex couples. SB 1062 (C), (D) 51 Leg., 2d Reg. Sess. (Ariz. 2014). *See also* Shoichet & Abdullah, *supra*; Kopan, *supra*; Hardin, *supra*. As a result, the bill was widely recognized as anti-LGBT. *See, e.g.*, Shoichet & Abdullah, *supra*; Hardin, *supra*; Clarissa Cooper, *Hundreds Gather in SB 1062 Protest*, Arizona Republic (Feb. 24, 2014), http://www.azcentral.com/story/news/politics/2014/02/25/hundreds -gather-in-sb-1062-protest/5800819/.

The bill was strongly opposed by those representing LGBT people in the state. *See, e.g., Hearing on SB 1062*, *supra* (statement of Rebecca Wininger, President, Equality Arizona); Jennifer C. Pizer, *ArizoNO: Saying NO to Misuse of Religion to Discriminate*, Lambda Legal (Feb. 26, 2014), https://www.lambdalegal.org/blog/

20140226_arizono-no-misuse-of-religion-to-discriminate**.** It also was strongly opposed by business and civic leaders as well as some elected officials. *See, e.g.*, Editorial Board, *Don't Wait to Nix SB 1062. Our View: Every Day Gov. Jan Brewer Waits to Veto SB 1062 Hurts Arizona More*, Arizona Republic (Feb. 24, 2014), http://www.azcentral.com/story/opinion/editorial/2014/02/24/sb-1062-brewer-veto/5787653/.

Although Governor Brewer's own staff had helped to develop the bill, the opposition's breadth and intensity prompted her to veto it. Yvonne Wingett Sanchez & Mary Jo Pitzl, *Brewer Staff Helped Work on SB 1062*, Arizona Republic, azcentral.com (March 11, 2014), http://www.azcentral.com/story/news/politics/2014/03/11/brewer-staff-helped-work-on-sb-1062/6282745/. In her veto message, she explained that the bill could "result in unintended and negative consequences" and "ha[d] the potential to create more problems than it purports to solve." Gov. Jan Brewer, Remarks on SB 1062, 2 (Feb. 26, 2014) (transcript available at http://i2.cdn.turner.com/cnn/2014/images/02/26/gs_022614_sb1062remarks.pdf).

The amount of contentiousness and upheaval caused by that proposal to permit religion-based discrimination is a cautionary lesson for the current moment. Three years after the veto, the public distress that SB 1062 inspired in all directions still influences members of the legislature and others. *See* Alia Beard Rau, *Anti-LGBT Legislation Gets the Cold Shoulder with the Arizona Legislature. Here's Why*,

Arizona Republic (Feb. 3, 2017), http://www.azcentral.com/story/news/politics/arizona/2017/02/03/3-years-later-arizonas-religious-freedom-bill-sb-1062-still-affects-lgbt-legislation/97305546/.

In addition to the prejudice and discrimination directed against LGBT Arizonans through the political process over the years, the requests Lambda Legal has received from people in Arizona for assistance with diverse discrimination problems is further evidence of a troublingly hostile climate for LGBT people. Lambda Legal's Legal Help Desk maintains an electronic database recording these requests, with non-archived records going back to January 1, 2012. A search of the database finds that the Help Desk received 626 such calls between January 1, 2012 and July 15, 2017, with the requests coming from all parts of the state and concerning problems ranging from denials of service in public accommodations, to workplace problems, to family law disputes, to various forms of harassment and violence.[8]

[8] See Appendix A attached hereto, which is a cropped screenshot accurately showing the total number of records retrieved by a search of the Legal Help Desk database, which contains confidential records maintained by Lambda Legal, as conducted on July 17, 2017, for records of calls for assistance from people in Arizona.

The fact that Arizona does not have state-level nondiscrimination laws that explicitly protect LGBT people, *see* A.R.S. §§ 41-1442[9] and 41-1463,[10] reinforces the importance of effective protections at the local level, such as § 18-4(B). Other Arizona cities — including Flagstaff, Sedona, Tempe, and Tucson — have taken similar steps to protect LGBT people from discrimination by enacting anti-discrimination ordinances of their own. *Arizona's Equality Profile*, Movement Advancement Project, http://www.lgbtmap.org/equality_maps/profile_state/AZ. If these municipal ordinances can be rendered largely hollow by religious carve-outs, many of the approximately 200,000 LGBT people living in Arizona will be much more vulnerable to discrimination.

Amicus sounds alarm bells here not only because everyone should have equal access to the full range of goods, services, housing, jobs, and other opportunities offered generally to the public. Social science research finds that discriminatory refusals of generally available opportunities exacerbate the stress from social exclusion and stigma that can lead to serious mental health problems, including depression, anxiety, substance use disorders, and suicide attempts. Ilan Meyer,

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[9] Arizona Revised Statute § 41-1442 provides protection against discrimination in public accommodation on the basis of "race, color, sex, national origin, or ancestry"; sexual orientation is not enumerated in this list. *Id.*

[10] Arizona Revised Statute § 41-1463 provides protection against employment discrimination on the basis of "race, color, sex, age or national origin"; sexual orientation is not enumerated in this list. *Id.*

Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence, Psychological Bulletin, Vol. 129, No. 5, 674-97 (2003); Vickie Mays & Susan Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 19 Am. J. Pub. Health 1869-76 (2001). *See generally* Ilan H. Meyer & David M. Frost, *Minority Stress and the Health of Sexual Minorities* in Charlotte J. Patterson & Anthony R. D'Augelli, eds., Handbook of Psychology and Sexual Orientation 252-266 (Oxford Univ. Press 2013).

Moreover, religious reinforcement of anti-LGBT bias often increases the negative effects on mental health. *See* Ilan H. Meyer, Merilee Teylan & Sharon Schwartz, *The Role of Help-Seeking in Preventing Suicide Attempts among Lesbians, Gay Men, and Bisexuals*, The Williams Institute (UCLA School of Law, 2014) (research shows anti-gay messages from religious leaders and organizations increases severe mental health reactions), http://williamsinstitute.law.ucla.edu/research/health-and-hiv-aids/lgb-suicide-june-2014/; Edward J. Alessi, James I. Martin, Akua Gyamerah & Ilan H. Meyer, *Prejudice Events and Traumatic Stress among Heterosexuals and Lesbians, Gay Men, and Bisexuals*, The Williams Institute (UCLA School of Law, 2013), http://www.tandfonline.com/doi/full/10.1080/10926771.2013.785455#abstract. *See also* Maurice N. Gattis, Michael R. Woodford & Yoonsun Han, *Discrimination and Depressive Symptoms Among*

Sexual Minority Youth: Is Gay-Affirming Religious Affiliation a Protective Factor?, Arch. Sex. Behav. 1589 (2014), https://www.ncbi.nlm.nih.gov/pubmed/25119387 (abstract) (finding that harmful effects of discrimination among sexual minority youth affiliated with religious denominations that endorsed marriage for same-sex couples were significantly less than those among peers affiliated with denominations opposing marriage equality).

Given the history and continuing reality of anti-LGBT bias in Arizona, it should be beyond question that the City's nondiscrimination ordinance serves compelling public interests and must remain effectively enforceable.

III. This Court Should Not Recognize Any Religious Exemption From The City's Essential Nondiscrimination Ordinance.

The Supreme Court unequivocally has held that non-discrimination laws "serve[] compelling state interests of the highest order." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (upholding enforcement of Minnesota public accommodations law). In the context of public accommodations, specifically, the Supreme Court also has acknowledged the "moral and social wrong" of discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964).

Like for other socially vulnerable minorities, perpetuating discrimination against LGBT people and same-sex couples through the denial of public accommodations humiliates and reinforces stigma. If B&N were allowed to refuse its calligraphy and design services to same-sex couples, despite providing those

same services to different-sex couples, it would result in precisely the sort of "exclusion that . . . demeans [and] stigmatizes." *Obergefell* at 2602. *See also* Douglas NeJaime, Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2574-78 (2015) (discussing how complicity-based conscience claims result in increased dignitary harms to the third parties targeted by those claims).

Accordingly, numerous scholars concerned with the deleterious effects of discrimination, and public accommodations discrimination in particular, firmly oppose religious exemptions to civil rights laws because they thwart the essential ameliorative work of those laws. *See e.g.*, Louise Melling, *Religious Refusals to Public Accommodations Law: Four Reasons to Say No*, 38 Harv. J. L. & Gender 177, 190 (2015) ("Anti-discrimination laws are fundamentally a way of according recognition, of embracing and opening the doors to those traditionally excluded. . . . Exemptions to these laws undermine that respect and recognition and they legitimize discrimination, even if only in small pockets of society.); Laura S. Underkuffler, *Odious Discrimination and the Religious Exemption Question,* 32 Cardozo L. Rev. 2069, 2088 (2011) (laws prohibiting discrimination against LGB persons "attempt to 'foster[] . . . individual dignity, . . . creat[e] . . . a climate and environment in which each individual can utilize his or her potential . . . and [ensure] equal protection' of

the laws.") (quoting *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.,* 536 A.2d 1, 37 (D.C. 1978) (alterations in original)).

Despite our history, the social science findings, and many forceful court decisions, some with passionate convictions continue to assert religious beliefs in cases such as this one to excuse invidious discrimination. Given the immense demographic diversity and religious pluralism of our nation, the law must remain crystal clear: each person's religious liberty ends where legally prohibited harm to another begins. That well-settled principle of American law must apply equally with regard to all invocations of religious belief, whether urged to justify racial, gender, or marital status discrimination or discrimination based on sexual orientation. Religious liberty cannot shield invidious deprivations of another's basic rights. Our shared pledge calling for "liberty and justice *for all*" demands nothing less.

Many business owners do hold religious and other beliefs that guide their lives. Permitting those engaged in for-profit commerce to apply religion to refuse service contrary to public accommodation laws would embolden other businesses to do the same and would subvert the compelling state interests served by § 18-4(B). B&N offers no limiting principle and, indeed, there is none. Religious critiques of marriage for same-sex couples can be leveled just as easily at interracial and interfaith marriage, at all same-sex relationships, at heterosexual cohabitation, at

divorce, at contraception, sterilization, and infertility care, at unwed motherhood, and at innumerable other personal decisions about family life.

Moreover, the "go elsewhere" approach that B&N defends[11] will not stay confined to discrimination on the basis of such family relationships or decisions. The notion that the owner of a commercial business sins by engaging in a commercial transaction with a "sinful" customer could apply just as well to transactions concerning any goods or services, housing, or employment.

In sum, granting B&N's demand for an exemption from Phoenix's public accommodations law would eviscerate bedrock doctrine that has been reaffirmed consistently over time. The settled approach permits and encourages a flourishing coexistence of the diverse religious, secular, and other belief systems that animate our nation while ensuring equal opportunity for everyone in the public marketplace.

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[11] See, for example, the argument repeated at page 31 of B&N's Reply Brief that a less restrictive means of accommodating both nondiscrimination interests and religious liberty interests would be to require businesses to publish lists of alternative vendors to which same-sex couples could go. That suggestion misses the point, as observed trenchantly by the Washington Supreme Court in *Arlene's Flowers*:

> [t]his case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches. … As every other court to address the question has concluded, public accommodations laws do not simply guarantee access to goods or services. Instead, they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace. Were we to carve out a patchwork of exceptions for ostensibly justified discrimination, that purpose would be fatally undermined.

389 P.3d at 566 (internal citations omitted).

The proposed alternative would transform that marketplace into segregated dominions within which each business owner with religious convictions "become[s] a law unto himself," *Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872, 879 (1990) (internal citation omitted), and would force members of minority groups to suffer the harms and indignities of being required to go from shop to shop searching for places where they will not be treated as pariahs.

Section 18-4(B) provides critically needed protections against ostracism and other discriminatory treatment in public life. Phoenix enacted the ordinance to protect vulnerable members of our diverse society from discrimination regardless of others' religious reasons for wanting to refuse them things of value offered to everyone else. Despite this country's long history recognizing that religious exemptions to civil rights laws will largely nullify such laws, B&N nonetheless asks this Court to let it single out LGBT individuals and same-sex couples for rejection, humiliation, and stigma as it operates its business. The answer must be "no."

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Lambda Legal respectfully asks this Court to affirm the January 5, 2017, order of the Superior Court of Arizona, Maricopa County.

Dated: July 17, 2017

Respectfully submitted,

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APPENDIX A

As explained in footnote 8 on page 22 of the foregoing brief, the image below is a cropped screenshot that accurately shows the total number of records (626) retrieved by a search of Lambda Legal's Legal Help Desk database, which contains confidential records of calls to the organization requesting assistance with discrimination problems. The database search was conducted on July 17, 2017 and retrieved records of calls between January 1, 2012 and July 15, 2017 from people in Arizona.