ARIZONA SUPREME COURT

BRUSH & NIB STUDIO, LC, BREANNA KOSKI, and JOANNA DUKA, Plaintiffs/Appellants/Cross-Appellees, v. **CITY OF PHOENIX**, Defendant/Appellee/Cross-Appellant.	Arizona Supreme Court No. CV-18-0176-PR Arizona Court of Appeals, 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/CROSS-APPELLANT 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 a claim of a right to engage in sexual orientation discrimination made by a for-profit business and its owners who make money producing and 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 the City of Phoenix ("the City" or "Phoenix"), and agrees with the key points of the City's Supplemental Brief. In particular, *Amicus* agrees that Plaintiffs Brush & Nib Studio, LC, Breanna Koski, and Joanna Duka (collectively "B&N") have failed to show that being required to comply with the City's public accommodations nondiscrimination ordinance, Phoenix City Code § 18-4(B) ("the ordinance"), unconstitutionally abridges their free speech rights or improperly burdens their free exercise rights. And, because there is no substantial burden on religious exercise and no infringement of free speech, strict scrutiny does not apply. However, even under strict scrutiny, § 18-4(B) withstands this legal challenge because, as both courts below held, the ordinance is the least restrictive means of advancing the City's compelling interest in preventing sexual orientation discrimination.

Amicus writes separately to provide more information about why, under any level of scrutiny, the City's interest in protecting lesbian, gay, bisexual, and transgender ("LGBT") people from discrimination is compelling. This brief describes

the recurrent resistance to civil rights by some who have invoked religious freedom to justify discrimination, and the consistent, appropriate conclusion by courts across many decades that such arguments must fail. With information specific to Arizona and Phoenix, together with other evidence of discrimination, *Amicus* also shows why effective nondiscrimination rules are needed now to protect LGBT people from being turned away by public accommodations. In challenges to laws such as § 18-4(B), there should be no doubt that the government's interest in enforcement is compelling, and that there is no narrower way of stopping discrimination than by banning discrimination. Accordingly, *Amicus* urges this Court to rule consistently with the many other state courts that recently have addressed this issue and firmly have rejected business owners' arguments for refusing wedding-related services to same-sex couples, while providing those services to different-sex couples. For this Court to disagree and allow discriminatory exemptions from Phoenix's ordinance would not be doctrinally justified, and would have terrible consequences for this minority population and for everyone who may need the protection of similar laws in the future. *Amicus* urges this Court to affirm the Court of Appeals' decision.

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 through impact litigation and other advocacy. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584

(2015) (affirming same-sex couples' freedom to marry); *Lawrence v. Texas*, 539 U.S. 558, 561 (2003) (invalidating Texas ban on same-sex intimacy); *Majors v. Jeanes*, 48 F. Supp. 3d 1310 (D. Ariz. 2014) (striking Arizona's ban on marriage for same-sex couples). Lambda Legal has represented same-sex couples or appeared as *amicus curiae* in many cases in which religious beliefs were asserted to justify discrimination. *E.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, __ U.S. __, 138 S. Ct. 1719 (2018); *Cervelli v. Aloha Bed & Breakfast*, 415 P.3d 919 (Haw. Intermed. App. 2018), *review den.*, 2018 WL 3358586 (Haw. July 10, 2018), *cert. filed*, No. 18-451 (Oct. 9, 2018); *Klein d/b/a Sweetcakes by Melissa v. Oregon Bur. Labor & Indus.*, 410 P.3d 1051 (Or. App. 2017), *review den.*, No. S065744 (Or. June 21, 2018), *cert. filed*, No. 18-547 (Oct. 19, 2018); *North Coast Women's Care Med. Grp., Inc. v. Superior Ct. (Benitez)*, 189 P.3d 959 (Cal. 2008).

This appeal addresses similar issues. Because it is likely to affect thousands of LGBT people in Phoenix, where Lambda Legal has over 1,000 members, *Amicus* has a particular interest in assisting the Court via the information in this brief.

ARGUMENT

I. Across Generations of Equality Struggles, Courts Repeatedly Have Confirmed That Religious Objections Do Not Thwart 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 civil rights laws protecting all of us from harm.

Indeed, the U.S. 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) (*per curiam*). Fifty years later, in *Masterpiece Cakeshop*, the Court's majority of six justices cited *Piggie Park* when observing that, while "religious and philosophical objections [to same-sex couples marrying] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." 138 S. Ct. at 1727. By citing *Piggie Park* this way in *Masterpiece Cakeshop*, the Court confirmed that there is to be consistent application of the principle that religious beliefs do not excuse unlawful discrimination by public accommodations, regardless of whether the discrimination is based on race or sexual orientation.

Piggie Park's clarity and forcefulness on this point might be expected today, given the legal and social consensus against race discrimination that has evolved since then. But the federal law was still new in 1968. And *en route* to the current national consensus that our civil rights laws serve essential public interests, such laws repeatedly faced religion-based objections. Some Christian schools excluded students who supported interracial dating, based on the view that "mixing of the races is . . . a violation of God's command." *See Bob Jones Univ. v. United States*, 461 U.S. 574, 580, 583 n.6 (1983). Some employers objected on religious grounds to their employees' interracial friendships. *See*, *e.g.*, *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (holding that religious freedom did not excuse employer's violation of Civil Rights Act by firing white clerk due to her friendship with a black man). As referenced above, some white restaurant owners refused to serve black customers, citing religious objections to "integration of the races." *See*, *e.g.*, *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944–45 (D.S.C. 1966) (rejecting barbeque restaurant owner's religious defense of race discrimination), *rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968). And, famously, religion was invoked to justify laws against interracial 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").

Likewise, as women entered the workplace, some who objected on religious grounds sought exemptions from nondiscrimination laws. Despite the longstanding traditions on which such claims often were premised, courts recognized that accommodating such objections would vitiate the anti-discrimination protections on which workers are entitled to depend. *See, e.g.*, *Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1397–1399 (4th Cir. 1990) (holding employer's free exercise rights did not justify violation of Fair Labor Standards Act's equal pay requirement); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1367–69 (9th Cir. 1986) (rejecting religious school's argument that its free exercise rights excused unequal benefits for female employees); *Bollenbach v. Bd. of Educ.*, 659 F. Supp. 1450, 1473 (S.D.N.Y. 1987) (holding employer's refusal to hire women bus drivers due to religious objection of Hasidic male bus riders was improper).

Similarly, after some governments enacted fair housing laws that protected unmarried couples, landlords unsuccessfully sought exemptions on the belief that they themselves would be complicit in their tenants' sin if they provide a residence 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 defense 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 consistently have recognized the public's need for peaceful co-existence in the marketplace, which requires ensuring that all members of society can receive equal treatment, regardless of discriminatory beliefs any given business owner may have about particular groups of people. Today, these principles are tested once again, as LGBT people seek full participation in American life. There is growing understanding that sexual orientation is a personal characteristic bearing no relevance to one's ability to contribute to society, including one's ability to form a loving relationship and build a family. *Obergefell*, 135 S. Ct. at 2591-92. And yet, some people's fervent religious objections to treating LGBT people as equals still prompt widespread harassment and discrimination. *See, e.g., Cervelli v. Aloha Bed & Breakfast*, Answering Brief of Plaintiffs-Appellees, CAAP-13-0000806, Hawaii Intermed. Ct. of App., at 5 (Nov. 27, 2013) (explaining refusal to provide lodging to lesbian couple, proprietor said same-sex relationships are "detestable" and "defile our land"); *Klein d/b/a Sweetcakes*, 410 P.3d at 1058 (explaining business's refusal to produce wedding cake for lesbian couple, owner said women's relationship was "an abomination"); *Bodett v. Coxcom, Inc*., 366 F.3d 736 (9th Cir. 2004) (supervisor religiously harassed lesbian subordinate); *Peterson v. Hewlett-Packard Co*., 358 F.3d 599 (9th Cir. 2004) (anti-gay proselytizing intended to upset coworkers); *Knight v.*

Conn. Dep't. of Pub. Health, 275 F.3d 156 (2d Cir. 2001) (anti-gay proselytizing by visiting nurse to home-bound AIDS patient); *North Coast Women's Care Med. Grp.*, 189 P.3d at 967 (physicians' religion-based refusal of treatment to lesbian patient).[1]

As laws and company policies have begun to offer protections against this discrimination, some who object now are asking courts to allow the religious exemptions that have been denied in the past. For the most part, the past principle has held true and the equality needs of third parties have remained a constraint on religion-based conduct in commercial contexts. *See, e.g., Cervelli* at 919; *Bodett*, 366 F.3d at 736; *Peterson*, 358 F.3d at 599; *Knight*, 275 F.3d at 156; *North Coast Women's Care Med. Grp.,* 189 P.3d at 970. But religious objections to equal treatment of LGBT people by those engaged in commerce remains a problem, and refusals of wedding-related services have become a vehicle of choice for those who seek a different rule of law. *See, e.g., Masterpiece Cakeshop*, 138 S. Ct. at 1719 (cake); *Klein d/b/a Sweetcakes*, 289 Or.App. at 1056 (cake); *Washington v. Arlene's Flowers*, 389 P.3d 543 (Wash. 2017) (flowers), *reversed and remanded*, 138 S. Ct. 2671 (2018); *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d. 1090 (D. Minn. 2017) (videography); *Gifford v. McCarthy*, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016) (facility rental); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert.*

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[1] *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).

denied 134 S. Ct. 1787 (2014) (photography).

B&N's request for permission to refuse to produce goods for same-sex couples is simply part of the current iteration of this problem. And the answer must remain the same. As in the wedding-vendor cases decided by courts of sister states, the exemption B&N seeks would mark a sea change—opening the door to denials of goods and services, housing, employment, and other unequal treatment for LGBT people, persons living with HIV, and anyone else whose family life or minority status is disfavored by a business owner's religious convictions. 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 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, these laws 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).

Using recent U.S. Census Bureau data, this is approximately 280,650 people.[2] Further, again according to Gallup, 4.1% of the Phoenix area population identifies as LGBT. Frank Newport & Gary Gates, *San Francisco Metro Area Ranks Highest in LGBT Percentage*, Gallup (Mar. 20, 2015); David Leonhardt & Clair Cain Miller, *The Metro Areas with the Largest, and Smallest, Gay Populations*, N.Y. Times (Mar. 20, 2015). Again using U.S. Census data for the overall population, this is nearly 66,700 people. U.S. Census Bureau, *Quickfacts*, *supra*, note 2. 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 Gates, *In U.S., More Adults Identifying as LGBT*, Gallup (Jan. 11, 2017).

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 abuse by government actors as well as by the general public. Williams Institute, *Arizona – Sexual Orientation and Gender Identity Law and Documentation of Discrimination*, UCLA School of Law (Sept. 2009) (cataloguing employment discrimination based on sexual orientation and gender identity in Arizona within 15-chapter study reporting widespread discrimination by state

[2] The U.S. Census Bureau estimates Arizona's population to be 7,016,270 people and the population of the City of Phoenix to be 1,626,078 people. United States Census Bureau, *Quickfacts Maricopa County, Arizona* (estimates as of July 1, 2017).

governments against LGBT people) ("*Documenting Discrimination*").

Documenting Discrimination surveys the patchwork nature of civil rights protections for LGBT people in the state as of 2009 and discusses many examples of discrimination, focusing on misconduct by 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*, UCLA School of Law (Jan. 2015).

Adding to this disturbing picture is striking evidence that lesbian, gay, and bisexual ("LGB") individuals in Arizona are likely to be victims of hate crimes 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 crime statistics for 2017, of the 243 reported incidents in Phoenix, 44 (18.1%) were based on sexual orientation. FBI, *2017 Hate Crime Statistics, Arizona Hate Crime Incidents per Bias Motivation and Quarter by Agency* (2017). The other reported hate crimes in Phoenix were based on race, ethnicity, or ancestry (142 incidents); religion (41 incidents); disability (4 incidents); and gender identity (12 incidents). *Id*. Statewide that year, of the 288 reported incidents, 55 (19.1%) were based on sexual orientation; 168 on race, ethnicity, or ancestry; 48 on religion; 5 on disability; and 12 on gender identity. *Id*. These incident rates for Arizona and Phoenix are higher than the national rate of sexual orientation-motivated bias crimes, which was 15.9% of all reported incidents according to the FBI's 2017 data. FBI, *2017 Hate Crime Statistics.*

Incidents and Offenses (2017).

Of course, rates of hate-motivated crime 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. 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) (describing contentious legislative consideration of the bill); Will O'Bryan, *Arizona Lifts Sodomy Ban, May's Bill Ends 20-year Fight for 'Archaic Law' Repeal*, Wash. Blade (May 11, 2001). When it finally did repeal its criminal statute, the state was one of the last to lift that threat before the U.S. Supreme Court held in 2003 that all such bans are invalid. *Lawrence v. Texas,* 539 U.S. at 570. But even then, the repeal was met with a large-scale attempt to persuade the governor to veto. *See, e.g.,* Beth DeFalco, *Hull Signs Repeal of Archaic Sex Laws*, The Arizona Republic (May 8, 2001) ("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 [him] to veto the bill. In comparison, [the governor] had about 1,800 requests to sign it.").

Adding to the resistance to decriminalizing same-sex relationships, Arizona's legislature and the voting public have in recent years approved new laws and constitutional amendments that have targeted LGBT people. For example, in 1996, the legislature amended state law explicitly to exclude same-sex couples from

marriage. A.R.S. § 25-101(C). Then, in 2008, Arizona voters amended the Constitution similarly to restrict marriage to "one man and one woman." Ariz. Const. art. XXX, § 1. Another explicit denial of equal treatment remains in Arizona's statute books today, whether enforceable or not. A.R.S. § 15-716 states: "No [school] 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 four years ago, the legislature approved Senate Bill 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014). This controversial bill, which inspired nationwide condemnation and ultimately was vetoed, was designed to amend the 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 Shoichet & Halimah Abdullah, *Arizona Gov. Jan Brewer Vetoes Controversial Anti-Gay Bill, SB 1062*, CNN (Feb. 26, 2014); Tal Kopan, *10 Things to Know: Arizona SB 1062*, Politico (Feb. 27, 2014).

An attorney with the Alliance Defending Freedom, B&N's counsel here, 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), ("*Hearing on SB 1062*"); *see also Elane Photography*, 309 P.3d at 77. In other words, SB 1062 was intended to allow an individual or corporation to assert religious 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).

The bill was widely recognized as anti-LGBT. *See, e.g.*, Shoichet & Abdullah, *supra*; Clarissa Cooper, *Hundreds Gather in SB 1062 Protest*, The Arizona Republic (Feb. 24, 2014). It was strongly opposed by those representing LGBT people. *See, e.g., Hearing on SB 1062*, *supra* (statement of Rebecca Wininger, President, Equality Arizona). It also was strongly opposed by business and civic leaders, and 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*, The Arizona Republic (Feb. 24, 2014). Although Governor Brewer's 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*, The Arizona Republic (March 11, 2014). 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).

In addition to the prejudice 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. Lambda Legal's Help Desk maintains an electronic database recording these requests, with non-archived records going back five years. A search of the database finds that the Help Desk received 788 such calls between January 1, 2013 and December 11, 2018, with the requests coming from all parts of the state—from Kingman in the Northwest, to Page on the northern border, to Tucson in the South, with by far the greatest number from within Maricopa County.[3] The requests concerned problems ranging from workplace mistreatment, to family law disputes, to diverse forms of harassment and violence. Many concerned discrimination by public accommodations, such as denial of use of a public building for an LGBT event; denial of a home refinancing loan; denial of the married couple rate for car insurance; denial of access to a homeless shelter; and homophobic verbal abuse by security guards at a large retail store, by staff of a coffee shop, and by government employees responsible for processing benefit claims.[4]

For the U.S. Supreme Court's consideration of the same legal issues in

[3] See Appendix A, which is a cropped screenshot accurately showing the number of database records of calls from people in Arizona retrieved on December 11, 2018.

[4] Lambda Legal protects the confidentiality of those who request legal assistance, however, some additional details can be provided if it would assist the Court.

Masterpiece Cakeshop, Lambda Legal performed a similar review of its entire Help Desk database and presented a representative sampling of the public accommodations discrimination problems about which LGBT people had requested assistance, as well as the practical and emotional impacts of that treatment. Brief of *Amici Curiae* Lambda Legal Defense and Education Fund, Inc., *et al*., in Support of Respondents, *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comn'n*, No. 16-111 (Oct. 30, 2017). The contexts ranged literally from cradle (infertility care, midwifery services, and childbirth classes) to grave (funeral services), and nearly everything in between.

The fact that Arizona does not have state-level nondiscrimination laws that explicitly protect LGBT people, *see* A.R.S. §§ 41-1442 (public accommodations) and 41-1463 (employment), 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. Movement Advancement Project, *Arizona's Equality Profile* (2018). If these municipal laws can be made hollow by religious carve-outs, many of the more than 280,000 LGBT people living in Arizona will be much more vulnerable to discrimination.

Amicus sounds alarm bells here not just because everyone should have equal access to the full range of goods, services, housing, jobs, and other opportunities offered generally to the public; in addition, social science research finds that

discriminatory refusals of generally available opportunities exacerbate the stress from social exclusion and stigma that can lead to serious health problems, including depression, anxiety, substance use disorders, and suicide attempts. 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 Meyer & David Frost, *Minority Stress and the Health of Sexual Minorities,* Handbook of Psychology and Sexual Orientation, 252-266 (Patterson & D'Augelli, eds., 2013). Moreover, religious reinforcement of anti-LGBT bias often increases the negative effects on mental health. *See* Ilan Meyer, *et al*., *The Role of Help-Seeking in Preventing Suicide Attempts among Lesbians, Gay Men, and Bisexuals*, Williams Institute, UCLA School of Law (2014) (research shows anti-gay messages from religious leaders increase severe mental health reactions); Edward J. Alessi, *et al*., *Prejudice Events and Traumatic Stress Among Heterosexuals and Lesbians, Gay Men, and Bisexuals*, 22 J. of Aggression, Maltreatment & Trauma 510-526 (2013). Given the history and continuing reality of anti-LGBT bias in Arizona, it should be beyond question that the City's 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) (enforcing Minnesota public accommodations law). In the context of public accommodations, specifically, the U.S. 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 through the denial of public accommodations humiliates and reinforces stigma. If B&N were allowed to refuse its 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 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 harm the parties targeted and excluded by those claims).

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, marital status, or religious 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 it.

Many business owners do hold religious and other beliefs that guide their lives. Permitting those engaged in 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 will not stay confined to discrimination based on family relationships or decisions. The notion that the owner of a business sins by engaging in a commercial transaction with a "sinful" customer could apply just as well to transactions about 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.

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 June 7, 2018 decision of the Court of Appeals.

Dated: December 20, 2018

Respectfully submitted,

MAYESTELLES PLLC

By: /s/ Jessica M. Hernandez

JESSICA M. HERNANDEZ

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APPENDIX A

As explained in footnote 3 on page 15 of the foregoing brief, the image below is a cropped screenshot that accurately shows the total number of records (788) 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 December 11, 2018 and retrieved records of inquiries between January 1, 2013 and December 11, 2018 from people in Arizona.