

ARIZONA COURT OF APPEALS

DIVISION ONE

BRUSH & NIB STUDIO, LC, a limited liability company; BREANNA KOSKI; and JOANNA DUKA,)	Court of Appeals
)	Division One
)	No. 1 CA-CV 16-0602
)	
Plaintiffs/Appellants,)	
)	Maricopa County
v.)	Superior Court
)	No. CV2016-052251
CITY OF PHOENIX,)	
)	
Defendant/Appellee.)	

**BRIEF OF ARIZONA BUSINESSES AS *AMICI CURIAE* IN
SUPPORT OF DEFENDANT-APPELLEE CITY OF PHOENIX**

FILED WITH CONSENT OF PARTIES

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July 17, 2017

Amici

Businesses:

Intel Corp.
Banner Health
PetSmart, Inc.
GoDaddy Inc.*
AZPB Limited Partnership (dba Arizona Diamondbacks)*
Suns Legacy Partners, LLC (dba Phoenix Suns)
Phoenix Mercury Basketball (dba Phoenix Mercury)
Arizona Coyotes*
Aetna, Inc.*
JDA Software, Inc.*
Cable ONE, Inc.
Desert Botanical Garden
Herberger Theater Center
Phoenix Center for the Arts
Children's Museum of Phoenix
SenesTech, Inc.
Mountain Park Health Center
Valle del Sol
Devereux Advanced Behavioral Health Arizona
FOUND:RE
Sunbelt Holdings
KEO Marketing, Inc.
OH Strategic Communications, LLC
OH Partners, LLC
Urias Communications
HMA Public Relations
Busker Works, LLC
Saguaro Strategies
Raising Arizona Kids, Inc.
The Lunsford Group, LLC
Felice + Whitney PR LLC
Accurate Signs & Engraving, Inc.
FASTSIGNS on Central
Goodmans Interior Structures
Mitchell Gold + Bob Williams
Changing Hands Bookstore

Stinkweeds
MTM Concepts LLC (dba FEZ Restaurant & Bar)
Howard Kelly Concepts LLC (dba Bliss ReBAR)
The Herb Box
Upward Projects, LLC (dba Postino Wine Café, Federal Pizza,
Windsor, Joyride & Churn)*
Yandy, LLC*
Burland Jewelry Center, Inc.
Life Design Events
Grey Key Events
Karma Event Lighting
Butterfly Petals
M Culinary Concepts
Keith & Melissa Photographers
MRSter
Ramsey the Great DJ Productions

Business Associations:

Arizona Technology Council
Greater Phoenix Leadership
Downtown Phoenix Inc.
Arizona Bankers Association
Local First Arizona
Arizona Hispanic Chamber of Commerce
Greater Phoenix Gay & Lesbian Chamber of Commerce
ONE Community Media, LLC
The Board of Governors of the Rocky Mountain Southwest Chapter of
the National Academy of Television Arts & Sciences

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. IDENTITY AND INTEREST OF <i>AMICI CURIAE</i>	3
III. ISSUE ADDRESSED BY <i>AMICI CURIAE</i>	6
IV. ARGUMENT.....	6
A. The Court Should Uphold Phoenix’s Antidiscrimination Ordinance Just as Other Courts Have Done in Similar Circumstances.	6
B. The Phoenix Antidiscrimination Ordinance Benefits Arizona Businesses and Arizona’s Economy.	10
1. Diversity and Inclusiveness Make Businesses More Productive and Competitive.....	10
2. Discrimination Hinders Arizona Businesses’ Ability to Recruit and Retain Top Talent.....	14
3. The Potential Impact of Discrimination on Diverse Employees Is Significant.	17
4. Permitting Discrimination Would Undermine Arizona’s Economy.	18
V. CONCLUSION.....	24

TABLE OF CITATIONS

CASES

<i>Bob Jones Univ. v. United States</i> , 461 U.S. 574 (1983).....	7
<i>Catholic Charities of Sacramento, Inc. v. Super. Ct.</i> , 85 P.3d 67 (Cal. 2004).....	7
<i>Craig v. Masterpiece Cakeshop, Inc.</i> , 370 P.3d 272 (Colo. App. 2015), <i>cert. granted sub nom.</i> <i>Masterpiece Cakeshop v. Colo. Civil Rights Comm’n</i> , No. 16-111 (S. Ct. Jun. 26, 2017)	2, 8, 19
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I. INTRODUCTION

Amici are Arizona businesses and trade associations that share core values of equality, respect, and dignity for all people, regardless of their sexual orientation. *Amici* believe that building and maintaining a diverse and inclusive workplace is essential to the success of their companies and organizations. *Amici* support and defend public policies that protect civil rights and foster acceptance and equal treatment for all of their employees, their customers, and the families of both.

Amici submit this brief to explain why the City of Phoenix's antidiscrimination ordinance provides significant business and economic benefits, and why creating an exception allowing discrimination against same-sex couples based on religious beliefs would be disastrous for businesses and our economy as well as the direct victims of the discrimination. The ordinance makes clear to current and prospective employees, customers, investors, and business partners that Phoenix is an open, inclusive and welcoming community that does not tolerate discrimination in the provision of goods and services in the marketplace. That is important because Arizona businesses struggle to attract and retain the best employee talent to compete effectively in a national and global economy. If, as Appellants advocate, Phoenix must allow discrimination based on religious beliefs against people who are in a same-sex relationship, businesses in this community will be at a competitive disadvantage.

The competitive disadvantage would be all the greater because Appellants' logic would justify widespread discrimination against other historically mistreated groups, not just same-sex couples. Appellants argue that individuals and businesses may disobey antidiscrimination laws simply because their religious faith teaches them to discriminate. But if that logic were correct, cab drivers in Phoenix could refuse to transport women, restaurateurs could refuse to serve interracial couples, and shop owners could refuse to provide goods and services to same-sex couples, so long as the discrimination is religiously motivated.

That is intolerable, and every court that has addressed this issue has rejected the constitutional claims that Appellants assert. *See Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543, 568 (Wash. 2017) (florist who refused to provide flower arrangements for same-sex wedding violated Washington's antidiscrimination law); *Gifford v. McCarthy*, 137 A.D.3d 30, 42 (N.Y. App. Div. 2016) (venue owner who refused to host same-sex wedding violated New York's antidiscrimination law even though owner offered to provide some services to the couple); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. App. 2015) (cake shop that refused to sell wedding cake to same-sex couple violated Colorado's antidiscrimination law), *cert. granted sub nom. Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, No. 16-111 (S. Ct. Jun. 26, 2017); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 60-77 (N.M. 2013) (wedding

photographer who refused to photograph same-sex commitment ceremony violated New Mexico's antidiscrimination law). *Amici* urge this Court to follow those decisions and hold that the Phoenix ordinance validly forbids discrimination against same-sex couples regardless of any religious motivation for such discrimination.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are businesses, organizations, and trade associations in Arizona that benefit from the Phoenix antidiscrimination ordinance both as employers seeking outstanding talent and as businesses that serve lesbian, gay, bisexual, and transsexual (LGBT) customers. Some *amici* are large employers, such as Intel, Banner Health, PetSmart, GoDaddy, the Arizona Diamondbacks, the Phoenix Suns, the Phoenix Mercury, the Arizona Coyotes, Aetna, JDA Software, and Cable ONE, which collectively employ almost 65,000 people in Arizona, including many who live or work in Phoenix.¹

Other *amici* are small and medium-sized businesses, mostly locally owned and operated, and include restaurants, bars, hotels, theaters, wedding vendors, retailers, ad agencies, political consulting companies, real estate investment

¹ See, e.g., Russ Wiles, *Hiring Picks Up at Arizona's Biggest Employers*, ARIZ. REPUBLIC (Apr. 9, 2017), <https://tinyurl.com/y7ra7b8p> (noting that Banner Health is the largest private employer in Arizona, with 43,128 employees; Intel is the 8th largest, with 11,000 employees; and GoDaddy and PetSmart are the 49th largest, with 3,500 employees each).

companies, magazines, printing and marketing firms, and healthcare and biotechnology companies. For example, *amici* include the companies and organizations that operate Postino Wine Café, Windsor, Churn, Joyride, Federal Pizza, The Herb Box, FEZ Restaurant & Bar, Bliss ReBAR, FOUND:RE, the Herberger Theater Center, Phoenix Center for the Arts, Children’s Museum of Phoenix, Desert Botanical Garden, Life Design Events, M Culinary Concepts, Grey Key Events, Karma Event Lighting, Butterfly Petals, Keith & Melissa Photographers, Ramsey the Great DJ Productions, MRSter.com, Burland Jewelry Center, Mitchell Gold + Bob Williams, Goodmans Interior Structures, Yandy.com, Stinkweeds, Changing Hands Bookstore, OH Partners, OH Strategic Communications, The Lunsford Group, HMA Public Relations, Busker Works, Felice+Whitney PR, Saguaro Strategies, Sunbelt Holdings, *Raising Arizona Kids* Magazine, Accurate Signs & Engraving, FASTSIGNS on Central, KEO Marketing, Urias Communications, Devereux Advanced Behavioral Health Arizona, Mountain Park Health Center, Valle del Sol, and SensesTech, Inc.

Still other *amici* are Arizona business and trade associations. The Arizona Technology Council (AZTC) is the state’s premier trade association for science and technology companies. It has over 800 members statewide, and its mission is to further the advancement of technology in Arizona through leadership, education, legislation and social action. Greater Phoenix Leadership (GPL) is an organization

of chief executive officers whose mission is to improve the greater Phoenix area and the State of Arizona by bringing together talent, resources, and leadership to create action on priority issues. GPL member organizations help drive the Arizona economy, retaining and growing jobs and enhancing the quality of life in Arizona. Downtown Phoenix Inc. (DPI) is a community development group that is committed to making Phoenix a vibrant urban destination and one of the nation's great cities. Local First Arizona is an organization that supports, promotes, and advocates for a strong local business community. It represents nearly 3,000 locally owned businesses of all industries and sizes across the state. The Arizona Bankers Association (AzBA) has been the voice of Arizona's banking industry for over 100 years. The association counts over 50 banks and credit card operations among its members, who operate in every corner of the state, and employ nearly 50,000 Arizonans. The Rocky Mountain Southwest Chapter of the National Academy of Television Arts and Sciences is a membership organization dedicated to excellence in television by honoring exceptional work through the prestigious Emmy Award. The Chapter serves Arizona, New Mexico, Utah, and El Centro, California.

Founded in 1948 as the primary advocate for Hispanic-owned businesses, the Arizona Hispanic Chamber of Commerce (AZHCC) has an established reputation as a leader in setting the pace for business growth in today's increasingly diversified market. Today, it has over 6,000 members statewide,

including more than 70 corporations and 250 small business owners. The Greater Phoenix Gay & Lesbian Chamber of Commerce (GPGLCC) is the oldest and longest-standing LGBT chamber of commerce in the nation. GPGLCC's members include working professionals, businesses, and non-profit organizations that share GPGLCC's values of promoting diversity and equality in business and the workforce. ONE Community Media is a member-based coalition of businesses, organizations, and professionals that support and promote diversity, inclusion, and equality for all Arizonans.

III. ISSUE ADDRESSED BY *AMICI CURIAE*

Should this Court grant businesses a constitutional right to discriminate against same-sex couples and others protected by Phoenix's antidiscrimination ordinance based on the religious beliefs of the businesses' owners?

IV. ARGUMENT

A. The Court Should Uphold Phoenix's Antidiscrimination Ordinance Just as Other Courts Have Done in Similar Circumstances.

Time and time again, courts have upheld laws prohibiting discrimination in public accommodation based on race, gender, and sexual orientation in the face of religious objections. Appellants seek a different result in this case involving same-sex couples, but their argument jeopardizes all antidiscrimination laws in Arizona.

The sponsors of Bob Jones University fervently believed that their religion forbade interracial dating and marriage. *See Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). Nonetheless, the U.S. Supreme Court upheld the Internal Revenue Service's determination that Bob Jones's policy of expelling any student in an interracial marriage was discriminatory and warranted revocation of the University's tax-exempt status. *Id.* at 580.

In California, religious groups contended that their beliefs required them to discriminate based on gender when providing health care. *See Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 85 P.3d 67, 68 (Cal. 2004). Yet the California Supreme Court similarly held that those groups were not entitled to a constitutional faith-based exception to that state's antidiscrimination laws. *Id.* at 91-92; *accord N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct.*, 189 P.3d 959, 962 (Cal. 2008) (same where doctors contended that their religious beliefs required them to refuse to provide fertility treatments to lesbian patients). Appellants' beliefs in this case are not entitled to greater constitutional protection.

The Phoenix ordinance prohibits many types of discrimination, including discrimination based on race, color, religion, sex, national origin, marital status, and disability, as well as discrimination based on sexual orientation and gender identity and expression. The ordinance treats all those forms of discrimination in the same way. So what Appellants really seek is permission for anyone operating a

place of public accommodation to refuse to serve any member of any protected class so long as religious beliefs motivate such discrimination. Yet every other court that has considered similar laws has rejected demands for similar exceptions. *See, e.g., Arlene's Flowers*, 389 P.3d at 556-68; *Gifford*, 137 A.D.3d at 35, 42; *Craig*, 370 P.3d at 288; *Elane Photography*, 309 P.3d at 60-77.

In each of those cases, the business-owner plaintiffs argued that their rights to free speech and freedom of religion entitled them to an exemption from antidiscrimination laws. And in each case the court refused, recognizing that such exemptions would undermine the valid and laudable goal of such laws. As the Washington Supreme Court put it:

[P]ublic 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.

Arlene's Flowers, 389 P.3d at 556.

The concurring opinion of New Mexico Supreme Court Justice Richard Bosson in *Elane Photography* is especially poignant in explaining why it is both fair and right to require business owners to comply with antidiscrimination laws despite their sincerely held religious beliefs:

On a larger scale, this case provokes reflection on what this nation is all about, its promise of fairness, liberty,

equality of opportunity, and justice. At its heart, this case teaches that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others. A multicultural, pluralistic society, one of our nation's strengths, demands no less. The [plaintiffs] are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead. The Constitution protects the [plaintiffs] in that respect and much more. But there is a price, one that we all have to pay somewhere in our civic life.

In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the [plaintiffs] have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world. In short, I would say to the [plaintiffs], with the utmost respect: it is the price of citizenship.

309 P.3d at 79-80.

Here too, the owners of Brush & Nib Studio are free to think, to say, and to believe as they wish. But they have chosen to engage in public commerce, a commercial act. Having done so, they must abide by the Phoenix ordinance prohibiting discrimination in such commerce.

B. The Phoenix Antidiscrimination Ordinance Benefits Arizona Businesses and Arizona's Economy.

Amici urge this Court to uphold the Phoenix ordinance to ensure that the local economy is as strong and vibrant as it can be, which can occur only when the marketplace is free of discrimination and welcoming to all.

1. Diversity and Inclusiveness Make Businesses More Productive and Competitive.

Diversity and inclusiveness positively affect all aspects of modern life. As the Ninth Circuit has recognized:

The lessons of our constitutional history are clear: inclusion strengthens, rather than weakens, our most important institutions. When we integrated our schools, education improved. When we opened our juries to women, our democracy became more vital. When we allowed lesbian and gay soldiers to serve openly in uniform, it enhanced unit cohesion. When same-sex couples are married, just as when opposite-sex couples are married, they serve as models of loving commitment to all.

Latta v. Otter, 771 F.3d 456, 476 (9th Cir. 2014) (internal citations omitted) (invalidating Idaho's and Nevada's laws preventing same-sex marriage).

Businesses are no exception to this rule. Empirical studies confirm that diversity and inclusiveness drive revenues, increase productivity, and foster innovation because a diverse workforce is essential to attracting and better serving

a diverse customer base and to recruiting and retaining the best and brightest employees.²

The business case for diversity applies equally to LGBT people. Indeed, a growing body of research confirms as much.³ For instance, a study released in April 2016 by Credit Suisse found that companies that support LGBT employees perform better in the stock market.⁴ Similarly, a 2012 research report by Deloitte

² See, e.g., Brad Sears & Christy Mallory, *How LGBT-Related Workplace Policies Can Have a Positive Impact on the Corporate Bottom Line*, in GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE, at 41-3, 41-6 to 41-9 (Oct. 2015), <https://tinyurl.com/yd8dxjse>; FORBES INSIGHTS, *Global Diversity & Inclusion: Fostering Innovation Through a Diverse Workforce*, at 5 (July 2011), <https://tinyurl.com/y7plo7qh>; Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208 (2009) (finding that every 1% increase in the rate of gender and ethnic diversity in a workforce results in a 3% and 9% rise in sales revenue, respectively).

³ See, e.g., Sears & Mallory, *supra* note 2, at 41-6; Tim Smedley, *The Evidence is Growing—There Really is a Business Case for Diversity*, FIN. TIMES (May 14, 2014), <https://tinyurl.com/y8ak4k6r>; Sylvia Ann Hewlett, *Why LGBT Employees Need Workplace Allies*, HARV. BUS. REV. (Jun. 20, 2013), <https://tinyurl.com/y6wkayo2>; see also FORBES INSIGHTS, *supra* note 2, at 5.

⁴ CREDIT SUISSE, *Credit Suisse ESG Research, LGBT: The Value of Diversity* (2016), <http://tinyurl.com/h4fdnz3> (finding that a group of 270 companies that supported LGBT employees outperformed a global index by 3 percent annually from 2010-2016); see also M.V. Lee Badgett *et al.*, WILLIAMS INST., *The Business Impact of LGBT-Supportive Workplace Policies*, at 23 (May 2013), <https://tinyurl.com/yd277y2v> (reviewing 36 research studies and finding that “the more robust a company’s LGBT-friendly policies, the better its stock performed over the course of four years (2002-2006), compared to other companies in the same industry over the same period of time”).

showed an 80% improvement in business performance when a company had high levels of diversity and inclusion.⁵

Polling data further support this conclusion: 71% of LGBT adults say they are likely to remain loyal to a brand they consider LGBT-friendly, even when less friendly companies may offer lower prices or be more convenient,⁶ and over 45% of all consumers under the age of 34 say they are more likely to do repeat business with an LGBT-friendly company.⁷ “A majority of these consumers—more than 54%—also say they would choose an equality-focused brand over a competitor.”⁸

Apart from the positive effects on consumer behavior, research suggests that businesses that are perceived as LGBT-friendly have an easier time recruiting and retaining top talent. For example, in a 2006 national poll, 89% of LGBT respondents and 72% of non-LGBT respondents reported that they consider whether a prospective employer has an LGBT-inclusive nondiscrimination policy

⁵ DELOITTE & VICTORIAN EQUAL OPPORTUNITY & HUM. RTS. COMM’N, *Waiter, Is That Inclusion In My Soup? A New Recipe to Improve Business Performance*, at 2 (May 2013), <https://tinyurl.com/jnnszk4>.

⁶ Hewlett, *supra* note 3 (citing Harris Poll data).

⁷ Press Release, WITECK COMMC’NS, INC., *America’s LGBT 2015 Buying Power Estimated at \$917 Billion* (July 20, 2016), <https://tinyurl.com/y7tclx2o> (citing August 2014 Google Consumer Survey).

⁸ *Id.*

to be an important factor in deciding where to work.⁹ Other studies have found that when gays and lesbians are able to openly acknowledge their sexual orientation in the workplace, they are less likely to leave and are at least 10% more productive.¹⁰

For these and other reasons, many Arizona businesses—including *amici*—have embraced policies and practices that promote diversity and inclusion.¹¹ For example, Intel announced its support of federal LGBT nondiscrimination legislation, noting that “a more inclusive workforce makes us a stronger company, and that our impact on people’s lives around the world is a direct result of our diverse employees. Ensuring equality for LGBT individuals is not only good for our business, it’s the right thing to do.”¹²

⁹ M.V. Lee Badgett, *supra* note 4, at 22 (citing a 2006 national poll conducted by Harris Interactive/Witeck Combs Communications).

¹⁰ Smedley, *supra* note 3; Hewlett, *supra* note 3.

¹¹ *Amici* and over 2,200 other Arizona businesses and organizations, as well as 10,000 individuals, have signed the UNITY Pledge, which calls for LGBT nondiscrimination policies in the workplace, housing, and places of public accommodations. See *Unity Pledge*, OPENAZ, <http://www.openaz.co/unity-pledge> (last visited June 28, 2017) (noting Intel, GoDaddy, PetSmart, Arizona Diamondbacks, AZTC, and other *amici* as pledge signatories); Nohelani Graf, *Anti-Discrimination Campaign Launches in Phoenix*, ABC 15 ARIZONA (Apr. 17, 2017), <https://tinyurl.com/y8vypzdV> (noting number of pledge signatories).

¹² Andrea Fava, *Intel Supports Comprehensive Federal LGBT Non-Discrimination Legislation*, POLICY@ INTEL (Aug. 7, 2015), <https://tinyurl.com/y7bhed3u>.

2. Discrimination Hinders Arizona Businesses' Ability to Recruit and Retain Top Talent.

If this Court were to sanction religious-based discrimination against same-sex couples and other protected classes, it would become significantly more difficult for *amici* and other Arizona businesses to recruit and hire diverse and talented employees.

As the U.S. Supreme Court recognized in *Grutter v. Bollinger*, “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” 539 U.S. 306, 330 (2003) (upholding race-conscious university admissions policy against equal protection challenge). *Amici* constantly strive to recruit diverse talent. But talented individuals have choices: they can choose to work here, or they can choose instead to work in one of the many cities and states whose nondiscrimination laws have no loophole allowing religiously motivated discrimination.¹³ As Tyler Kinney, a then-corporate recruiter for GoDaddy, stated in a recent *Arizona Republic* article:

¹³ Currently, twenty-one states and the District of Columbia expressly prohibit discrimination in public accommodations on the basis of sexual orientation. Nineteen of those states and the District of Columbia also expressly prohibit discrimination in public accommodations on the basis of gender identity. MOVEMENT ADVANCEMENT PROJECT, *Non-Discrimination Laws*, <https://tinyurl.com/ph36ql7> (last visited June 22, 2017). “In addition, an estimated 200 cities, many in states without a statewide discrimination ban, have passed non-discrimination ordinances to protect gay, lesbian, bisexual and transgender people.” Anna Douglas, *North Carolina’s Bathroom Legislation Makes State an Outlier in Nation*, MIAMI HERALD (Mar. 25, 2016, 7:14 PM), <https://tinyurl.com/yaqm2dmx>.

“Employees want to know that they are protected both in and out of the workplace. They don’t want to have to worry about being denied housing or refused service at restaurants simply because they are gay or transgender.”¹⁴

Again, polling data support this view. In a 2014 survey conducted by Out & Equal before the U.S. Supreme Court’s landmark decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), 60% of LGBT respondents said they would prefer a job with an employer in a state where same-sex marriages are recognized over an employer in a state that did not recognize same-sex marriages, other factors being equal, and 30% said they would consider changing jobs or declining a promotion if their employer required them to transfer to a state where same-sex marriages were not recognized.¹⁵ More recently, a 2017 survey conducted by the Harris Poll found

¹⁴ Parker Leavitt, *Scottsdale LGBT Non-Discrimination Ordinance Dead for Now*, ARIZ. REPUBLIC (Aug. 23, 2016, 12:08 PM), <https://tinyurl.com/yc4erz3h>; accord OPENAZ, *Arizona’s Reputation Matters*, <http://www.openaz.co/reputation> (last visited June 26, 2017) (“Large companies tend to open multiple locations across the state, and these business want to operate in locations where their employees have the same protections outside of the workplace as they do in the workplace. Employers don’t want their employees[’] rights to depend on their zip code.”); Letitia Stein, *In Conservative America, Small Cities Stand Up for LGBT Rights*, REUTERS (Mar. 15, 2017, 10:01 AM), <https://tinyurl.com/zkg5mux> (“Having laws in place that protect LGBT individuals is one more indicator that the talent we need will be available[.]”).

¹⁵ Press Release, WITECK COMMC’NS, *Most Americans Say Employers Should Never Discriminate, Even on Religious Grounds, According to Latest Harris/Out & Equal Poll* (Oct. 30, 2014), <https://tinyurl.com/y9qa8je9>.

that two-thirds (66%) of adults oppose laws allowing businesses to refuse service to LGBT persons because of their religious objections.¹⁶

It is no stretch, then, to conclude that LGBT and non-LGBT workers from outside Phoenix will be less likely to accept job offers from employers in Phoenix if grocery stores, restaurants, movie theatres, card shops, or other businesses may refuse to serve LGBT customers on religious grounds. This is a very real concern for Arizona employers. Although private-sector hiring in Arizona was up 2.8% last year, “hiring might have been even more robust, if not for the inability of some companies and non-profits to find all the qualified workers they need.”¹⁷

The result Appellants propose would also interfere with deployment of employees. Many Arizona companies have offices and employees located outside Phoenix but occasionally need to ask those employees to work in Phoenix—sometimes for a few weeks, sometimes longer—to work on projects. Employees in

¹⁶ Press Release, HARRIS POLL, *American Majority Sides with LGBT Rights, Though So-Called “Bathroom Bills” Cause Division* (Jan. 24, 2017), <https://tinyurl.com/y78cwz6c>; see also Betsy Cooper *et al.*, PUBLIC RELIGION RES. INST., *Beyond Same-sex Marriage: Attitudes on LGBT Nondiscrimination Laws and Religious Exemptions from the 2015 American Values Atlas* (Feb. 18, 2016), <http://tinyurl.com/y96t5vmp> (noting that roughly 71% of Americans support laws that would protect LGBT people from discrimination in jobs, housing, and public accommodations).

¹⁷ Wiles, *supra* note 1 (“The pace of hiring could be even higher in Arizona, except that some big employers report having trouble finding qualified candidates.”).

a same-sex relationship may be reluctant to work in a city where discrimination against same-sex couples is allowed.

3. The Potential Impact of Discrimination on Diverse Employees Is Significant.

Amici also urge the Court to appreciate the personal burden that discrimination has on diverse employees. As Justice Arthur Goldberg explained over 50 years ago in connection with racial discrimination in commerce:

Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality, he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring). Since then, the Supreme Court has “repeatedly emphasized [that] discrimination itself, by perpetuating ‘archaic and stereotypic notions’ or by stigmatizing members of the disfavored group as ‘innately inferior’ and therefore as less worthy participants,” can cause serious “injuries to those who are personally denied equal treatment solely because of their membership in a disfavored group.” *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (internal citations omitted). More recently, the Supreme Court recognized the similar human cost of

discrimination against LGBT people in *Obergefell*, noting that treating same-sex couples differently “impose[s] stigma and injury of the kind prohibited by our basic charter.” 135 S. Ct. at 2602. If this Court were to accept Appellants’ arguments, both the Court’s opinion itself and the resulting discrimination could have a profound effect on employees of all protected classes in this state.

4. Permitting Discrimination Would Undermine Arizona’s Economy.

Discrimination in public accommodation not only deprives persons of their individual dignity; it also “denies society the benefits of wide participation in political, economic, and cultural life.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984); *see also Heckler*, 465 U.S. at 744-45; *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-26 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 684-87 (1973) (plurality opinion). Discrimination can impose “an artificial restriction on the market” and interfere with the flow of merchandise. *Katzenbach v. McClung*, 379 U.S. 294, 299-300 (1964) (discussing the “many references to discriminatory situations causing wide unrest and having a depressant effect on general business conditions in the respective communities”).

Antidiscrimination laws such as Phoenix’s ordinance prevent “economic and social balkanization prevalent when businesses decide to serve only their own

‘kind.’” *See Craig*, 370 P.3d at 293-94.¹⁸ It follows that adverse economic effects are likely to flow where antidiscrimination laws do not exist or are ineffective because they are riddled with loopholes.¹⁹

If this Court were to hold that religious beliefs excuse discrimination against LGBT individuals and members of other protected classes, LGBT people and others may leave Phoenix for a more tolerant location, or may decide not to move here in the first place.²⁰ The Phoenix LGBT community is estimated to make up

¹⁸ *See, e.g.*, MICH. DEP’T OF CIVIL RTS., REPORT ON LGBT INCLUSION UNDER MICHIGAN LAW WITH RECOMMENDATIONS FOR ACTION, 74-90 (Jan. 28, 2013), <http://perma.cc/Q6UL-L3JR> (detailing the negative economic effects of anti-LGBT discrimination in places of public accommodation); Crosby Burns, CTR. FOR AM. PROGRESS, *The Costly Business of Discrimination* (Mar. 2012), <https://tinyurl.com/kqwwpc3> (same in the workplace).

¹⁹ Even a limited ruling in Appellants’ favor permitting discrimination by “artistic” wedding vendors would undermine the central purpose behind the law—protecting equal access to the commercial marketplace—and have adverse economic effects. Indeed, “[a]nyone who makes goods might be thought to engage in an artistic endeavor,” and “a vast array of individuals providing services” could be seen as engaging in “artistic or expressive” tasks. Mark Strasser, *Speech, Association, Conscience, and the First Amendment’s Orientation*, 91 DENV. U. L. REV. 495, 525, 529-30 (2014).

²⁰ *See, e.g.*, Matt Motyl *et al.*, *How Ideological Migration Geographically Segregates Groups*, 51 J. EXPERIMENTAL SOC. PSYCHOL. 1, 2 (2014), <https://tinyurl.com/yd7vwd4r> (observing that perceived similarity with communities may lead people to migrate away from dissimilar communities and toward similar communities); Russ Wiles, *Phoenix Fails to Rank in Top Third in U.S. News’ ‘Best Places to Live’ List*, ARIZ. REPUBLIC (Feb. 6, 2017), <https://tinyurl.com/y98zul27> (“When considering a move, people are concerned about . . . feeling like a part of their community[.]” (internal quotations and citations omitted)).

4.1% of the city's population,²¹ and it is better educated, better paid, and more likely to make purchases than its heterosexual counterpart at most retailers, according to the *First Annual State of LGBTQ in Arizona Report*.²² Nationally, LGBT adults represent \$917 billion in annual buying power.²³ When friends and family are added to the calculus, the amount of money that is at stake is staggering.²⁴

Moreover, many Arizona businesses, including a number of *amici*, rely on LGBT travel and tourism. In 2015, tourists spent \$21 billion in Arizona.²⁵ Of that, approximately \$878 million came from LGBT travelers.²⁶ If Phoenix were to permit discrimination against these tourists in places of public accommodation,

²¹ David Leonhardt & Claire Cain Miller, *The Metro Areas With the Largest, and Smallest, Gay Populations*, N.Y. TIMES (Mar. 20, 2015), <https://tinyurl.com/ychzl8ns>.

²² Brandon Brown, *Report: Phoenix LGBT Community Holds Economic Clout*, PHOENIX BUS. J. BLOG (Nov. 13, 2014, 5:36 AM), <https://tinyurl.com/ydbpw9gl>.

²³ Jeff Green, *LGBT Purchasing Power Near \$1 Trillion Rivals Other Minorities*, BLOOMBERG (July 20, 2016, 7:00 AM), <https://tinyurl.com/jzdaptl>.

²⁴ See WITECK COMMC'NS, *supra* note 7 (“Brands today recognize a growing proportion of younger consumers whose attitudes and buying behaviors are directly shaped by LGBT-friendly policies, campaigns and messages.”).

²⁵ Steven Totten, *Arizona Sees Boost in Tourism Economic Impact, Visitor Numbers*, PHOENIX BUS. J. (July 11, 2016, 4:00 PM), <https://tinyurl.com/y87d4tx2>.

²⁶ Appendix, Declaration of Nathaniel Curtis (Curtis Decl.) ¶ 3.

Phoenix and Arizona businesses will suffer. Surveys of LGBT people indicate that perceived LGBT-friendliness is an important consideration for LGBT tourists. For example, one survey found that more than 76% of LGBT respondents would not travel to a place that had a reputation for violence toward the LGBT community, and more than 57% of respondents would not travel to a state that passed anti-gay laws.²⁷

If religious-based discrimination against LGBT people is allowed, it will severely damage Phoenix's brand. This, in turn, will make it harder to attract jobs and investment in the area, including conferences, conventions, sporting events, and concerts.

Indeed, recent experience confirms as much. In February 2014, the Arizona Legislature passed Senate Bill 1062, which would have allowed business owners to deny service to LGBT customers based on their religious beliefs. Almost immediately, the negative effects were felt. Kirstin Jarnagin, then-Vice President of the Arizona Lodging and Tourism Association, reported that Arizona lost "untold amounts of tax dollars" in cancelled trips and lost investments due to the negative perception that the bill attached to the State's image.²⁸ Speaking to a

²⁷ *Id.* ¶ 6 & n.6 (citing COMMUNITY MARKETING, INC., *16th Annual Gay and Lesbian Tourism Report* (2011-2012), <https://tinyurl.com/76s4lb3>).

²⁸ Howard Fischer, CAPITOL MEDIA SERVICES, *Pressure Grows for Veto of Arizona's SB 1062*, TUCSON.COM (Feb. 23, 2014), <https://tinyurl.com/y76pg8wy>.

reporter before the bill was signed into law, Jarnagin stated that “We know of several large hotel projects and international events that were in the final stages of selecting Arizona. Now those potential job creators that would have injected millions into our economy are in jeopardy, if not already lost.”²⁹ The *Arizona Republic*’s Editorial Board predicted that the bill would “severely damage Arizona’s brand,” calling it “the antithesis of the openness and diversity prized by the high-tech industry.”³⁰ The AZTC and representatives from a wide swath of Arizona’s business community and tourism industry, including Intel, PetSmart, the Phoenix Suns and Phoenix Mercury, GoDaddy, KEO Marketing, Urias Communications, and Major League Baseball, echoed this sentiment, saying:

[T]his piece of legislation represents bad public policy and is already causing significant detrimental economic impact to the state of Arizona. . . . This legislation will greatly impact our ability to not only attract top talent to

²⁹ *Id.*; accord Blake Ellis, *Veto Follows Business Backlash Over Arizona Anti-Gay Bill*, CNN MONEY (Feb. 26, 2014), <https://tinyurl.com/medo8tu> (noting that four companies that were considering expanding to Arizona threatened to cancel their plans unless the bill was vetoed); Fernanda Santos, *Arizona Governor Vetoes Bill on Refusal of Service to Gays*, N.Y. TIMES (Feb. 26, 2014), <http://tinyurl.com/y98ogedb> (noting that the Hispanic National Bar Association announced that it would not hold its 2015 national convention in Phoenix as planned due to SB 1062).

³⁰ Editorial Board, *Gov. Brewer, Veto These Religious-Freedom Bills*, ARIZ. REPUBLIC (Feb. 20, 2014, 5:48 PM), <https://tinyurl.com/y88b33q4>.

move to Arizona, but will also greatly inhibit our ability to recruit businesses to relocate here.³¹

The CEOs of GPL, the Arizona Chamber of Commerce and Industry, the Greater Phoenix Chamber of Commerce, and the Southern Arizona Leadership Council also opposed the measure, citing similar reasons.³² In the end, then-Governor Brewer vetoed the bill, noting that “[t]he legislation seeks to protect businesses, yet the business community overwhelmingly opposes the proposed law.”³³

Last year, when North Carolina overrode local laws protecting LGBT people from discrimination and prohibited other cities from adopting similar ordinances, the economic backlash was immense. The state lost major entertainment events

³¹ Letter from AZTC and others to Governor Jan Brewer (Feb. 24, 2014), <https://tinyurl.com/yd8e7nr3>; see also, e.g., Tony Merevick, *Intel, Yelp Join Companies Urging Arizona Governor to Veto Anti-LGBT Bill*, BUZZFEED (Feb. 25, 2014, 12:55 PM), <https://tinyurl.com/y8xabcnub>; AZFAMILY.COM, *Opposition to SB 1062 Continues to Escalate*, CBS 5 (last updated Mar. 12, 2014, 3:13 PM), <https://tinyurl.com/y9ulnolv>.

³² Press Release, ARIZ. CHAMBER OF COMMERCE, *Statement by Business Leaders on SB 1062* (Feb. 24, 2014), <https://tinyurl.com/ycljymvl> (noting that the bill was “already clearly having a negative effect on our tourism industry, one of the largest sectors of the economy,” and that “[t]he bill could also harm job creation efforts and our ability to attract and retain talent”).

³³ Letter from Governor Jan Brewer to Arizona State Senate President Andy Biggs re: Senate Bill 1062 (Feb. 26, 2014), <https://tinyurl.com/y9m4z2ua>; see also Ellis, *supra* note 30.

and planned jobs expansions by PayPal and Deutsche Bank.³⁴ “Facing similar issues this year, Texas business leaders now estimate a loss of \$8.5 billion in GDP as well as 185,000 jobs lost if discriminatory legislation is enacted.”³⁵ Phoenix should not be forced to suffer a similar fate.

V. CONCLUSION

The Court should reject Appellants’ effort to gut Phoenix’s antidiscrimination law and ensure that Phoenix remains a city where discrimination is unlawful and people of all backgrounds, faiths, sexual orientations, and gender identities are welcome in the “marketplace, of commerce, [and] of public

³⁴ Press Release, Dan Schulman, President & CEO of PayPal, *PayPal Withdraws Plan for Charlotte Expansion* (Apr. 5, 2016), <http://tinyurl.com/zvk3spx>; Jon Kamp & Valerie Bauerlein, *PayPal Cancels Plan for Facility in North Carolina, Citing Transgender Law*, WALL ST. J. (Apr. 5, 2016 7:37 PM), <http://tinyurl.com/zzdoy63>; Jon Kamp & Valerie Bauerlein, *Deutsche Bank Freezes North Carolina Expansion, Citing Transgender Law*, WALL ST. J. (Apr. 12, 2016, 10:26 AM), <http://tinyurl.com/orjftoj>; see also, e.g., Shabab Ahmed Mirza *et al.*, CTR. FOR AM. PROGRESS, *North Carolina’s Discriminatory H.B.2 Threatens More Than Half Billion Dollars in Economic Activity* (Apr. 13, 2016, 8:00 AM), <https://tinyurl.com/jasokm2> (compiling a list of all events and conferences that were cancelled in North Carolina).

³⁵ HARRIS POLL, *supra* note 16; accord Jeff Green & Tim Higgins, *LGBT Inc.: Corporations Stand Up to State Governments in Defense of Civil Rights*, BLOOMBERG BUS. WEEK (Apr. 28, 2016), <https://tinyurl.com/ycnd9f4j> (detailing the efforts of large U.S. corporations to combat various state laws that would block civil LGBT protections); Christy Mallory & Brad Sears, WILLIAMS INST., *Discrimination, Diversity, and Development: The Legal and Economic Implications of North Carolina’s HB2* (May 2016), <https://tinyurl.com/y6wpzpj3> (same); Katy Steinmetz, *How Corporate America Became the LGBT Movement’s Key Ally*, TIME (Apr. 13, 2016), <https://tinyurl.com/h3qguan> (same).

accommodation.” *Elane Photography*, 309 P.3d at 80. A contrary result would not only undermine the values and principles of *amici*; it would harm the ability of Arizona businesses to recruit and retain the best employees, compete effectively in a national and global economy, and achieve full economic growth.

The Superior Court’s ruling should be affirmed.

July 17, 2017

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CERTIFICATE OF COMPLIANCE

This certificate of compliance concerns an amicus curiae brief and is submitted pursuant to Arizona Rule of Civil Appellate Procedure 16(b)(4). The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 5,809 words. The brief to which this Certificate is attached does not exceed the word limit that is set by Rule 14.

/s/ Daniel C. Barr

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APPENDIX

July 12, 2017 Declaration of Nathaniel CurtisApp29

Declaration of Nathaniel Curtis

Nathaniel Curtis declares:

1. I am an Associate Director in the Disputes and Investigations practice of Navigant Consulting in Phoenix Arizona.

2. I performed an economic input-output analysis to determine the current economic impact of LGBT tourism on the Arizona economy and the potential economic impact if LGBT tourism were to decline. Input-output analysis is a common and widely-accepted methodology for measuring the economic impacts of events or changes in an economy within a specified geographic area. A significant and sudden loss in tourism revenue would cause ripple effects through many sectors of the Arizona economy because of industrial interdependence.

3. In performing this analysis, I first identified the total amount of tourism dollars spent annually in Arizona (\$21 billion in 2015).¹ Prorating that amount based on the proportion of the U.S. population who identify as LGBT (4.2%)² provides an estimate of the amount of Arizona's annual tourism revenue that comes from LGBT travelers (\$878 million).³ Using this amount in the I-O model provides an estimate of how such spending affects the Arizona

¹ Dean Runyon Associates, ARIZ. OFFICE OF TOURISM, *Arizona Travel Impacts 1998-2015p* (June 2016), at 6.

² Gary J. Gates, WILLIAMS INST., *2014 LGBT Demographics: Comparisons among population-based surveys* (Sept. 2014), <https://tinyurl.com/y8mn6hjw>, at 4.

³ This assumption likely understates tourism revenue attributable to LGBT travelers. The U.S. Census Bureau reported that same-sex households have higher median income and smaller household size than mixed-gender households, which results in LGBT households generally having more disposable income than non-LGBT households. See U.S. CENSUS BUREAU, *Characteristics of Same-Sex Couple Households: 2005 to Present*, <https://tinyurl.com/ycp3dbwv> (last visited July 11, 2017). In addition, studies show that LGBT travelers go on vacations more frequently and spend more on vacations than non-LGBT travelers. See, e.g., D.K. SHIFFLET & ASSOCIATES, Press Release, *LGBT Leisure Travelers Identified as High Value Tourism Opportunity* (July 8, 2015), <https://tinyurl.com/y8cdwk73> (“LGBT travelers not only take more leisure trips, but they spend more money than their non-LGBT counterparts, according to a national study by D.K. Shifflet and Associates.”).

economy, as measured by jobs, wages and total economic output.

4. The I-O analysis uses four multipliers derived from complex economic models to measure the economic relationship between the tourism sector and affected industries in Arizona.⁴ The “Output” multiplier measures the value of goods and services produced in Arizona. The “Employment” multiplier describes the change in jobs caused by the economic event. The “Labor Income” multiplier describes the change in salary and wages to households caused by the economic event. The “Value Added” multiplier reflects the total change to the value of the Arizona economy caused by the event. The I-O multipliers vary depending on the nature of the economic event and the industries affected by the event.

5. The next step in the I-O analysis is to determine the industries affected by LGBT tourism dollars.⁵ Once LGBT tourism dollars are allocated to the appropriate industries, the multipliers determine the effects of the lost LGBT tourism revenue. The I-O analysis yields four categories (ripple effects) for each multiplier that are referred to as “effects.” The effects capture different parts of the economic impact. Table 1 defines the ripple captured by each multiplier-effect combination.

⁴ Navigant utilized IMPLAN data and software to complete the I-O analysis. IMPLAN is generally accepted by economists and municipalities as a reliable source for I-O multipliers and modeling.

⁵ Tourism is not tracked as a separate industry because tourism spending occurs in multiple industries such as food service, air travel, accommodations, and entertainment. The Bureau of Economic Analysis (“BEA”) tracks tourism spending at the national level using a “Travel and Tourism Satellite Account” (TTSA) so that economic analysis can be done on the tourism sector using a consistent mix of industry components.

Table 1: Effect Definitions

	<i>Employment</i>	<i>Labor</i>	<i>Value Added</i>	<i>Output</i>
<i>Direct Effect</i>	Tourism jobs	Wages	Industry production	Tourism dollars
<i>Indirect Effect</i>	Secondary jobs	Secondary wages	Bus. to bus. production	Bus. to bus. dollars
<i>Induced Effect</i>	Jobs from household purchases	Wages from household jobs	Production from household purchases	Household purchases
<i>Total Effect</i>	Sum of other effects	Sum of other effects	Sum of other effects	Sum of other effects

The results of the I-O analysis are summarized in Table 2.

Table 2: Economic Impact of Arizona 2014 LGBT Tourism

	<i>Employment (number of jobs)</i>	<i>Labor (household income)</i>	<i>Value Added (Gross State Product)</i>	<i>Total Output (Value of goods and services)</i>
<i>Direct Effect</i>	8,160.7	\$276,906,491	\$408,399,869	\$720,384,774
<i>Indirect Effect</i>	1,969.1	95,971,878	155,145,498	285,325,718
<i>Induced Effect</i>	2,720.8	122,784,636	215,011,687	379,591,868
<i>Total Effect</i>	12,850.6	\$495,663,004	\$778,557,054	\$1,385,302,361

6. Surveys of LGBT people indicate that perceived LGBT friendliness is an important consideration for LGBT tourists. For example, one survey found that more than 76% of LGBT respondents would not travel to a place that had a reputation for violence directed toward the LGBT community and more than 57% of respondents would not travel to a state that passed anti-gay laws.⁶


7. The I-O analysis is linear. As such, a 50% reduction in LGBT tourist spending would cause a 50% reduction in the economic impact of LGBT tourism in Arizona.

8. In addition to the economic impact from a decline in LGBT tourism to Arizona,

⁶ COMMUNITY MARKETING, INC., *16th Annual Gay and Lesbian Tourism Report* (2011-2012) at § 10, http://www.communitymarketinginc.com/documents/temp/CMI_16thLGBTTourismStudy.pdf.

there may also be negative economic impacts like those experienced by other states that limited LGBT rights and/or protections. These negative economic impacts could include: state-enforced travel bans to Arizona;⁷ decreased investment by businesses⁸; exclusion from consideration for sports events such as the Super Bowl and professional-sports All Star games⁹; and Major League Soccer rejecting the franchise bid by The Phoenix Rising to become one of two expansion teams in the MLS.¹⁰ The loss of any of these events would result in a negative economic impact far in excess of just the dollars spent. Because of the interdependence of localized industry in the state, jobs, household income and economic output would be lost.

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⁷ E.g., Sofia Lotto Persio, *California Travel Ban Extended to Four More States Over Anti-LGBT Laws*, NEWSWEEK (U.S.) (June 23, 2017), <http://www.newsweek.com/california-travel-ban-eight-states-lgbt-discrimination-homophobic-laws-628483>.

⁸ E.g., Dan Shulman, Press Release, *PayPal Withdraws Plan for Charlotte Expansion* (April 5, 2016), <https://www.paypal.com/stories/us/paypal-withdraws-plan-for-charlotte-expansion>; Katherine Peralta & Rick Rothacker, NEWS & OBSERVER, *Red Hat, Biogen, NCAA speak out on NC law restricting LGBT protections* (Mar. 24, 2016), <http://www.newsobserver.com/news/business/article68093347.html>.

⁹ E.g., Katherine Peralta & Rick Bonnell, CHARLOTTE OBSERVER, *NBA moves 2017 All-Star Game out of Charlotte over HB2; 2019 return possible* (July 21, 2016), <http://www.charlotteobserver.com/news/business/article91066222.html>.

¹⁰ See, e.g., Katherine Peralta, CHARLOTTE OBSERVER, *Burton and Marcus Smith in talks with pro soccer league to bring new team to Charlotte* (Dec. 15, 2016), <http://www.charlotteobserver.com/news/business/article121184193.html>.