

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NORTH CAROLINA, *et al.*,

Defendants.

Case No. 1:16-cv-00425 (TDS-
JEP)

**UNOPPOSED MOTION BY 68 COMPANIES FOR LEAVE TO FILE AN
AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF**

Pursuant to Local Rule 7.5, Accenture; Affirm, Inc.; Airbnb, Inc.; American Airlines; Apple Inc.; Biogen Inc.; Bloomberg L.P.; Boehringer Ingelheim USA; Box; Brocade Communications Systems, Inc.; Capital One Financial Corporation; Cisco Systems, Inc.; Consumer Technology Association (CTA); Corning Incorporated; Cummins Inc.; Dropbox, Inc.; eBay, Inc.; E.I. du Pont de Nemours & Company; Etsy, Inc.; Everlaw, Inc.; Expedia, Inc.; FiftyThree, Inc.; Galxyz, Inc.; Gap Inc.; General Electric Company; Glassdoor, Inc.; Grokker; Hilton Worldwide; Honor; IBM Corporation; IKEA North America Services, LLC; Instacart; Intel Corporation; John Hancock Financial; Levi Strauss & Co.; LinkedIn Corporation; Logitech Inc.; Marriott International; Massachusetts Mutual Life Insurance Company; Microsoft Corporation; Mitchell Gold + Bob Williams; Morgan Stanley; Nextdoor; NIKE; OppenheimerFunds,

Inc.; Orbitz Worldwide; PayPal; Pepo Inc.; Quotient; RBC Capital Markets, LLC; Red Hat; Replacements, Ltd.; Salesforce; Slack; SV Angel LLC; Symantec Corporation; TD Bank, N.A.; Teespring; The Dow Chemical Company; Thermo Fisher Scientific Inc.; ThirdLove; Tumblr; UnifyID, Inc.; United Airlines, Inc.; Williams-Sonoma, Inc.; Yelp Inc.; ZestFinance; and Zynga Inc. (collectively, “proposed *amici*”), by and through the undersigned counsel, respectfully move this Court for leave to file the attached *amicus curiae* brief in support of Plaintiff’s Motion for a Preliminary Injunction. ECF Nos. 73 & 74. Undersigned counsel have conferred with counsel for all parties, and none opposes this motion.¹

NATURE OF THE MATTER BEFORE THE COURT

In a specially-convened session on March 23, 2016, the North Carolina legislature passed, and Governor Pat McCrory signed into law, the Public Facilities Privacy and Security Act—also known as House Bill 2 (hereinafter, “H.B. 2”)—a sweeping enactment undisputedly intended to reverse a Charlotte ordinance that prohibited

¹ This motion is being filed close in time to the United States’ motion for a preliminary injunction in an effort to comply with Local Rule 7.5(c). Pursuant to Local Rule 7.5(d), no party or party’s counsel authored either this motion or the proposed *amicus curiae* brief in whole or in part, and no party or person other than proposed *amici* contributed money towards the preparation and submission of either this motion or the proposed *amicus curiae* brief. Pursuant to Local Rule 7.5(e), proposed *amici* are filing corporate disclosure statements simultaneously herewith. For purposes of this motion and the attached proposed *amicus curiae* brief, counsel at Tin, Fulton, Walker & Owen are sole counsel for Biogen Inc., Boehringer Ingelheim USA, Consumer Technology Association (CTA), Corning Incorporated, Etsy, Honor, IBM Corporation, Logitech Inc., Morgan Stanley, RBC Capital Markets LLC, SV Angel LLC, Symantec Corporation, TD Bank, N.A, and ThirdLove. Gibson, Dunn & Crutcher does not represent those companies in these proceedings.

discrimination against lesbian, gay, bisexual, and transgender people in places of public accommodation including refusing transgender individuals access to single-sex facilities that correspond to their gender identity. H.B. 2 mandates that, in all state and local government owned buildings, including public schools, airports, and agencies in North Carolina, transgender individuals must use only those single-sex facilities that correspond to the gender on their birth certificates. H.B. 2 further nullifies local ordinances around the State that had expanded protections for lesbian, gay, bisexual, and transgender (“LGBT”) persons, and prospectively prohibits cities and municipalities from passing anti-discrimination legislation that goes beyond the protections afforded by state law.

Plaintiff United States has moved for a preliminary injunction that bars the enforcement of Section 1.3 of H.B. 2, which requires public schools and agencies in the State to deny transgender persons access to multiple-occupancy bathrooms and changing facilities consistent with their gender identity. ECF Nos. 73 & 74. In analyzing that motion, this Court must consider, among other things, whether and how the proposed relief accords with the public interest. *See, e.g., Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 254, 261 (4th Cir. 2003).² To aid the Court’s public interest analysis, proposed *amici* seek leave to submit the attached *amicus curiae* brief to detail the negative effects of H.B. 2 on *amici*’s business endeavors both in and outside of North Carolina and

² While the propriety of a motion for a preliminary injunction turns on four factors, *see Newsom*, 354 F.3d at 254, proposed *amici*’s brief focuses on the public interest prong of the Court’s analysis.

further to demonstrate, through *amici*'s experiences as employers and operators of public accommodations, that the risk to public safety hypothesized by H.B. 2's proponents is wholly illusory.

STATEMENT OF FACTS

Proposed *amici* adopt, and respectfully refer the Court to, the statement of facts contained in Plaintiff's Motion for a Preliminary Injunction. ECF No. 74 at 3-10.

QUESTION PRESENTED

Whether this Court should grant this motion for leave to file an *amicus curiae* brief in support of the United States in these proceedings.

PROPOSED AMICI'S INTEREST IN THIS LITIGATION

Proposed *amici* include some of the largest companies in the United States, many of which are located or operate in North Carolina. They include retailers, technology companies, airlines, manufacturers, media companies, financial companies, pharmaceutical companies, and marketers, all of whom are committed to equality and fairness for their employees and customers, and share a desire to attract and retain a talented workforce from within North Carolina and around the country. Many proposed *amici* employ or serve transgender persons subject to H.B. 2, and all proposed *amici* are concerned about the stigmatizing effects of H.B. 2 and its implications for the transgender community in and outside of North Carolina.

For some *amici* that conduct business in North Carolina, H.B. 2—and the naked, invidious discrimination that it condones—is already damaging their ability to recruit and

retain a diverse workforce and is imposing a substantial disincentive to investment and commerce in the State, directly impacting their bottom line. Yet H.B. 2's effects reach far beyond North Carolina's boundaries: By compelling transgender persons in North Carolina to deny their gender identity when using public facilities, H.B. 2 stigmatizes them and conveys a clear message—with the full force of State law—that they are second-class citizens whose gender identity is underserving of solicitude or respect. This inescapably tends to legitimize discrimination against transgender persons generally. And that deeply undermines proposed *amici's* anti-discrimination policies and their efforts to create inclusive and welcoming organizations. Proposed *amici* strongly believe that this is contrary to the public interest and weighs heavily in favor of Plaintiff's motion for preliminary injunctive relief.

Proposed *amici* include the following employers, organizations, and associations:

1. Accenture
2. Affirm, Inc.
3. Airbnb, Inc.
4. American Airlines
5. Apple Inc.
6. Biogen Inc.
7. Bloomberg L.P.
8. Boehringer Ingelheim USA
9. Box

10. Brocade Communications Systems, Inc.
11. Capital One Financial Corporation
12. Cisco Systems, Inc.
13. Consumer Technology Association (CTA)
14. Corning Incorporated
15. Cummins Inc.
16. Dropbox, Inc.
17. E.I. du Pont de Nemours & Company (“DuPont”)
18. eBay, Inc.
19. Etsy, Inc.
20. Everlaw, Inc.
21. Expedia, Inc.
22. FiftyThree, Inc.
23. Galxyz, Inc.
24. Gap Inc.
25. General Electric Company
26. Glassdoor, Inc.
27. Grokker
28. Hilton Worldwide
29. Honor
30. IBM Corporation

31. IKEA North America Services, LLC
32. Instacart
33. Intel Corporation
34. John Hancock Financial
35. Levi Strauss & Co.
36. LinkedIn Corporation
37. Logitech Inc.
38. Marriott International
39. Massachusetts Mutual Life Insurance Company
40. Microsoft Corporation
41. Mitchell Gold + Bob Williams
42. Morgan Stanley
43. Nextdoor
44. NIKE
45. OppenheimerFunds, Inc.
46. Orbitz Worldwide
47. PayPal
48. Pepo Inc.
49. Quotient
50. RBC Capital Markets, LLC
51. Red Hat

52. Replacements, Ltd.
53. Salesforce
54. Slack
55. SV Angel LLC
56. Symantec Corporation
57. TD Bank, NA
58. Teespring
59. The Dow Chemical Company
60. Thermo Fisher Scientific Inc.
61. ThirdLove
62. Tumblr
63. UnifyID, Inc.
64. United Airlines, Inc.
65. Williams-Sonoma, Inc.
66. Yelp Inc.
67. ZestFinance
68. Zynga Inc.

ARGUMENT

Whether to grant a motion for leave to participate as *amicus curiae* rests in the district court's sound discretion. *See, e.g., Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008); *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp.

720, 728 (D. Md. 1996); *cf. United States v. von NotHaus*, No. 5:09CR27-RLV, 2014 WL 5817559, at *4 (W.D.N.C. Nov. 10, 2014) (exercising discretion to admit and consider arguments raised in *amicus* brief). *Amicus* briefs are typically “allowed at the trial level where they provide helpful analysis of the law, they have a special interest in the subject matter of the suit, or existing counsel is in need of assistance.” *Bryant*, 923 F. Supp. at 728 (citations omitted). Likewise, “permitting persons to appear . . . as friends of the court . . . may be advisable where third parties can contribute to the court’s understanding.” *Harris v. Pernsley*, 820 F.2d 592, 603 (3d Cir. 1987).

Here, the Court is poised to rule on a matter of exceptional importance that will affect proposed *amici*, their employees, their customers, and all transgender persons living in North Carolina. As set forth above, proposed *amici*’s brief will advise the Court of the adverse social and economic effects of H.B. 2 on businesses in and outside of North Carolina—in particular, adverse effects on proposed *amici*’s employee morale and recruitment efforts—as well as proposed *amici*’s own experience with non-discrimination policies that permit transgender persons to use the facilities that correspond to their gender identity. Proposed *amici* are uniquely well-suited to address these topics. *See Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003) (district courts frequently welcome *amicus* briefs “when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide” (internal quotation marks omitted)). These matters bear directly on the question whether the relief sought by the United States is in the public interest, which is integral to analysis

of a request for preliminary injunctive relief. *See Newsom*, 354 F.3d at 261. Proposed *amici*'s participation will not enlarge the issues before the Court, but instead will illuminate facts, studies, and the economic effects of H.B. 2, thereby "contribut[ing] to the court's understanding," *Harris*, 820 F.2d at 603, and addressing "a special interest in the subject matter of the suit," *Bryant*, 923 F. Supp. at 728.

Pursuant to Local Rule 7.5(c), proposed *amici* have filed this motion for leave to participate and the attached *amicus* brief as close in time as practicable to Plaintiff's Motion for a Preliminary Injunction and within the seven days typically provided by Federal Rule of Appellate Procedure 29. Proposed *amici* have done so in order to give the Court time to consider and rule on this motion.

CONCLUSION

For the foregoing reasons, proposed *amici* respectfully request that this Court grant their motion for leave to file an *amicus curiae* brief in support of the United States in these proceedings.

Dated: July 8, 2016

/s/ Theodore B. Olson

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2016, I caused the foregoing Unopposed Motion by 68 Companies for Leave to Participate as *Amici Curiae* in Support of Plaintiff, Proposed *Amicus Curiae* Brief of 68 Companies Opposed to H.B. 2 and in Support of Plaintiff, and Proposed Order to be filed with the Clerk of the Court for the United States District Court for the Middle District of North Carolina via the Court's CM/ECF system. I further certify that service was accomplished on all parties via the Court's CM/ECF system.

/s/ S. Luke Largess_____

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**AMICUS CURIAE BRIEF BY 68 COMPANIES OPPOSED TO H.B. 2 AND IN
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INTRODUCTION AND STATEMENT OF INTEREST

Amici curiae include some of the largest companies in the United States, many of which are located or operate in North Carolina.¹ They include retailers, technology companies, airlines, manufacturers, media companies, financial companies, pharmaceutical companies, marketers, and others, all of whom are committed to equality and fairness for their employees and customers, and share a desire to attract and retain a talented workforce from within North Carolina and around the country. Many *amici* employ or serve transgender persons subject to Session Law 2016-3, colloquially known as House Bill 2 (hereinafter, “H.B. 2.”), and all *amici* are concerned about the stigmatizing and degrading effects of H.B. 2 for transgender persons in and outside of North Carolina.

Amici respectfully submit this *amicus curiae* brief in support of Plaintiff’s motion for a preliminary injunction of H.B. 2. ECF Nos. 73 & 74.² As explained in Plaintiff’s motion, H.B. 2 was enacted on March 23, 2016, and requires, in all buildings owned or operated by state or local governments (including numerous schools, airports,

¹ A complete listing of *amici curiae* is provided in Appendix A to this brief.

² Pursuant to Local Rule 7.5(d), *amici* hereby certify that no counsel for a party authored this brief, in whole or in part, and no person other than *amici* and their counsel made any monetary contribution to fund the preparation or submission of this brief. For purposes of this *amicus curiae* brief, counsel at Tin, Fulton, Walker & Owen are sole counsel for Biogen Inc., Boehringer Ingelheim USA, Consumer Technology Association (CTA), Corning Incorporated, Etsy, Honor, IBM Corporation, Logitech Inc., Morgan Stanley, RBC Capital Markets LLC, SV Angel LLC, Symantec Corporation, TD Bank, N.A, and ThirdLove. Gibson, Dunn & Crutcher does not represent those companies in these proceedings.

universities, and government offices), that all transgender persons in North Carolina use only those multiple-occupancy, single-sex facilities that correspond to the gender on their birth certificate, rather than the facilities that correspond to their gender identity. In so doing, H.B. 2 denies the dignity of transgender persons and forces them to deny a core feature of their personhood whenever they set foot on state or local government property.

In analyzing Plaintiff's motion, this Court must consider, among other factors, whether the proposed relief accords with the public interest. *See Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at *9 (4th Cir. Apr. 19, 2016). To aid the Court's analysis of the public interest prong, this brief addresses the stigmatizing, degrading, and discriminatory effects of H.B. 2 on the estimated 44,000 transgender people living in North Carolina, as well as transgender persons across the United States; H.B. 2's adverse social and economic effects for companies conducting business in North Carolina and across the United States; and the lack of evidence to support North Carolina's proffered justification for the law. By stigmatizing and demeaning transgender persons and placing the imprimatur of the State behind discrimination against them, H.B. 2 undermines *amici's* corporate non-discrimination policies, harms *amici's* employees and customers, and hampers *amici's* ability to build and maintain the diverse and inclusive workplaces that are essential to the success of their businesses.

In light of these significant adverse effects—and the absence of evidence that possibly could justify such measures—*amici* respectfully submit that the public interest weighs heavily in favor of the preliminary injunction sought by the United States.

STATEMENT OF FACTS³

In a one-day, specially-convened session, North Carolina's legislature passed, and Governor Patrick McCrory signed, a sweeping law intended to reverse a Charlotte ordinance that, in part, permitted transgender people to use public restrooms and changing facilities based on their gender identity, rather than the gender on their birth certificates. In addition to prohibiting transgender persons, when in a state or local government building, from using any single-sex bathroom or changing facility that does not conform to their "biological gender," the law nullifies ordinances that would have expanded non-discrimination protections for members of the LGBT community. N.C. Gen. Stat. §§ 115C-521.2, 143-760; *see also* N.C. Gen. Stat. §§ 143-422.2, 143-422.11.⁴

This lawsuit concerns H.B. 2's provisions related to bathrooms and other sex-segregated facilities (hereinafter, "bathrooms"). On May 9, 2016, the United States filed a complaint against the State of North Carolina, Governor Patrick McCrory in his official capacity, the North Carolina Department of Public Safety, the University of North Carolina, and the Board of Governors of the University of North Carolina. ECF No. 1. The United States seeks a declaratory judgment that H.B. 2's bathroom provisions violate Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, and its

³ *Amici* adopt, and respectfully refer the Court to, the statement of facts contained in Plaintiff's Motion for Preliminary Injunction. ECF No. 74 at 3-10.

⁴ H.B. 2's other legal implications have not been challenged in these proceedings and are not addressed in this brief.

implementing regulations, 28 C.F.R. Pt. 54 (2000), 34 C.F.R. Pt. 106 (2010); and the Violence Against Women Reauthorization Act of 2013, 42 U.S.C. § 13925(b)(13). The United States also seeks an injunction. ECF No. 1 at 12-13. On July 5, 2016, the United States moved to preliminarily enjoin enforcement of H.B. 2. ECF Nos. 73 & 74.

ARGUMENT

I. Diversity And Inclusion Are Essential Features Of *Amici*'s Businesses.

Diversity and inclusion are essential features of *amici*'s businesses, and recruiting and retaining lesbian, gay, bisexual, and transgender employees is a critical component of their diversity missions. That commitment is widely reflected among many of the largest businesses in the United States. Indeed, hundreds of businesses prohibit discrimination based on gender identity: Fully three-fourths of the Fortune 500, and 92% of the companies surveyed by the Human Rights Campaign in the United States in 2016, provide explicit gender identity non-discrimination protections. *See* Human Rights Campaign Foundation, *Corporate Equality Index 2016*, at 4, <http://tinyurl.com/p2mfq9m>.⁵

Amici have adopted and implemented these policies because they are good for their employees, customers, and communities, and also benefit their bottom lines. While *amici* know firsthand the various advantages these policies confer, empirical studies confirm that LGBT-friendly policies are tied to increases in firm value, productivity, and

⁵ *See also* Human Rights Campaign, Employer Database, <http://www.hrc.org/apps/cei/> (last visited June 30, 2016).

profitability. See Catalyst Information Center, *Why Diversity Matters* 6 (2013), <http://tinyurl.com/o2hqrzd>. One recent study by Credit Suisse, for example, demonstrated that a set of 270 companies that openly support and embrace LGBT employees outperformed a Morgan Stanley-operated market capitalization weighted index known as “MSCI ACWI” by 3.0% per annum between 2010 and 2016, with returns on equity and cash flow returns that were 10% to 21% higher. See Credit Suisse, *Credit Suisse ESG Research, LGBT: The Value of Diversity* (2016), <http://tinyurl.com/h4fdnz3>.⁶ In another study, the Williams Institute at the UCLA School of Law reviewed thirty-six research studies and found 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.” M.V. Lee Badgett, *et al.*, Williams Institute, *The Business Impact of LGBT-Supportive Workplace Policies* 23 (2013) (hereinafter “Williams Institute 2013”), <http://tinyurl.com/kz6774e>.

In addition to monetary gains, diverse and inclusive workplaces have been found to be more receptive to new ideas and opportunities. See Feng Li & Venky Nagar, *Diversity and Performance*, 59 *Mgmt. Sci.* 529, 531 (2013). And because employees

⁶ See also, e.g., Janell L. Blazovich, *et al.*, *Do Gay-Friendly Corporate Policies Enhance Firm Performance?* 35-36 (Apr. 29, 2013), <http://tinyurl.com/zxxelak> (“[F]irms with gay-friendly policies benefit on key factors of financial performance, which . . . increase the investor perception of the firm as proxied by stockprice movements.”); Forbes Insights, *Global Diversity & Inclusion: Fostering Innovation Through a Diverse Workforce* 4, 11 (2011) (hereinafter “Forbes Insights”), <http://tinyurl.com/3f9n2nq> (comprehensive study of 300 senior diversity officers at companies worldwide with revenues of at least \$500 million).

“are required to suppress far less,” they “can bring far more of themselves to their jobs,” thereby “increas[ing] the total human energy available to the organization.” Deloitte Point of View, *Only Skin Deep? Re-examining the Business Case for Diversity* 7 (2011) (internal quotation marks omitted), <http://tinyurl.com/hs3wef6>. Diverse workforces also help attract new clients and customers, not only among those who themselves identify as LGBT, but among consumers who are attracted to LGBT-friendly companies. See Forbes Insights at 11-12.

In all of these respects, diversity and inclusion are integral aspects of *amici*'s operations and critical to *amici*'s ability to compete in an increasingly varied and global marketplace. Yet, H.B. 2 threatens to undermine *amici*'s efforts to attract and retain diverse employees and customers by stigmatizing and demeaning transgender individuals and legitimizing discrimination on the basis of gender identity.

II. H.B. 2 Is An Affront To *Amici*'s Non-Discrimination Policies.

In recognizing diversity's numerous benefits, the Supreme Court repeatedly has observed that “[e]nsuring that public institutions are open and available to all segments of American society . . . represents a paramount government objective.” *Grutter v. Bollinger*, 539 U.S. 306, 330, 331-32 (2003) (internal quotation marks omitted). Diversity is equally important to *amici*, and North Carolina's H.B. 2 not only undermines it by alienating and degrading transgender persons, but stands as an affront to *amici*'s policies promoting fairness and equality for their employees and customers.

A. H.B. 2 Stigmatizes Transgender Individuals And Encourages Discrimination In The Broader Community.

H.B. 2 discriminates against the roughly 44,000 transgender people in North Carolina by denying them access to single-sex facilities that accord with their gender identity but not their biological sex whenever they set foot in a facility owned or operated by any agency or arm of the State or a local government.⁷ In so doing, H.B. 2 sends a resounding message to the public that transgender persons—people simply trying to live their lives consistent with their gender identity—are “other” or outcasts whose gender identity and human dignity are undeserving of recognition and respect on government property. By targeting bathrooms and locker rooms, precisely those public facilities that are divided by gender, H.B. 2 also puts transgender persons in the humiliating position of having to publicly deny and disclaim their gender identity, a core component of who they are and one they fight to have recognized every day of their lives. It is no accident that H.B. 2’s anti-transgender message and effects have prompted some commentators to coin it “the most anti-LGBT legislation in the country.” PBS NewsHour, *How North Carolina Signed a Bill Dubbed the Most Anti-LGBT Law in the U.S.* (Mar. 24, 2016), <http://tinyurl.com/jg42ygp> (statement of Charlotte Mayor Jennifer Roberts).⁸

⁷ See Christy Mallory & Brad Sears, Williams Institute, *Discrimination, Diversity, and Development: The Legal and Economic Implications of North Carolina’s HB2* 4, 7 (2016) (hereinafter “Williams Institute 2016”), <http://tinyurl.com/gtuelbq>.

⁸ Because North Carolina permits persons to change the sex on their birth certificate only after sex-reassignment surgery, see N.C. Gen. Stat. § 130A-118(b)(4), H.B. 2 also disproportionately affects those who cannot afford or are medically unable to have such surgery; for those persons, H.B. 2 ensures a lifetime of state-sponsored stigmatization.

Proponents of the law, including Governor McCrory, have expressly acknowledged that it was meant to reverse a Charlotte ordinance that would have, in part, allowed transgender people to use the bathroom corresponding to the gender with which they identify, irrespective of the gender on their birth certificates. *See* Press Release, Gov. Pat McCrory, Governor McCrory Takes Action to Ensure Privacy in Bathrooms and Locker Rooms (Mar. 23, 2016), <http://tinyurl.com/hfapsd7> (“McCrory Mar. 23 Statement”) (decrying the Charlotte ordinance as “def[ying] common sense and basic community norms by allowing, for example, a man to use a woman’s bathroom, shower or locker room”).

In that respect, H.B. 2 bears troubling similarities to the facts in *Romer v. Evans*, 517 U.S. 620 (1996), in which the Supreme Court invalidated a Colorado constitutional amendment that repealed local ordinances banning discrimination on the basis of sexual orientation and prohibited local governments from enacting new ordinances to protect “homosexual persons or gays and lesbians.” *Id.* at 624. Much like Colorado’s Amendment 2, H.B. 2 repealed Charlotte’s ordinance concerning transgender bathroom use and prospectively prohibits pro-LGBT ordinances that diverge from state law. *Compare* Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3, *with Romer*, 517 U.S. at 624. And while the State now defends H.B. 2 as treating all people alike (i.e., in accordance with their biological sex), Colorado, too, defended its amendment as merely putting “gays and lesbians in the same position as all other persons.” *Id.* at 632. In addition, whereas the Supreme Court concluded in *Romer* that Colorado’s imposition

of a “broad and undifferentiated disability on a single named group” marked the amendment as inspired by “animus toward the class it affects,” *id.*, here, the State’s decision to withdraw from transgender persons alone the possibility of protection by municipal governments similarly signals that the dignity and gender identities of transgender individuals are unworthy of solicitude and respect. In broadcasting that message under color of State law, H.B. 2 legitimizes discrimination against transgender persons, humiliates them by denying their gender identities, and encourages LGBT discrimination in the broader community. In all of these respects, H.B. 2 does immeasurable and irreparable harm and is contrary to the public interest. *Cf. Grimm*, 2016 WL 1567467, at *9-12.

B. H.B. 2 Is Based On Pretextual Concerns About Safety In Public Facilities.

In addition to stigmatizing and demeaning transgender persons, the proffered justifications for H.B. 2 are utterly baseless. Specifically, in defending H.B. 2, Governor McCrory and the law’s supporters have attempted to justify the law as necessary to protect public safety, particularly, a need “to protect men[,] women[,] and children when they use a public restroom, shower or locker-room,” Press Release, Gov. Pat McCrory, Governor McCrory Releases Video Message (Mar. 29, 2016), <http://tinyurl.com/zlr7vkn>, and as necessary to avoid the prospect of “a man . . . us[ing] a woman’s bathroom, shower or locker room,” McCrory Mar. 23 Statement, or “people who would take advantage of [the ability to use public facilities that conform to one’s gender identity] to do harm to others,” Press Release, Gov. Pat McCrory, Myths vs. Facts (Mar. 25, 2016),

<http://tinyurl.com/jbgyerb> (Answer #9); *see also* ECF No. 32 ¶ 13. Several of H.B. 2’s supporters in North Carolina’s legislature have linked the ability of transgender people to use restrooms consistent with their gender identity to “a heightened risk of sexual predation” and explicitly invoked an interest in “protecting all North Carolina women and girls.” ECF No 9 at 2.

Putting aside the fact that a concern about protecting “women and girls” would have called for a response much more targeted than H.B. 2, *cf. Romer*, 517 U.S. at 632 (noting the Colorado amendment’s overbreadth in light of the state’s proffered purpose), the suggestion that permitting transgender persons to use bathrooms corresponding to their gender identity somehow exposes women and girls to a heightened risk of sexual predation is both offensive and wholly unsubstantiated. *Cf. Whole Woman’s Health v. Hellerstedt*, ___ S. Ct. ___, 2016 WL 3461560, at *20 (June 27, 2016) (holding state laws unconstitutional where they had a “virtual absence of . . . benefit[s]” but imposed many burdens). The Fourth Circuit has already seen through and rejected a similar assertion: When a school board cited “amorphous safety concerns” to defend its policy that excluded a transgender boy from the boys’ bathroom, the court of appeals concluded that there was no evidence that the child’s “use of the boys’ restroom creates a safety issue.” 2016 WL 1567467, at *8 n.11. So, too, here: When asked in an interview to identify any specific evidence underlying his safety concerns, Governor McCrory was unable to offer *a single piece of evidence*. *See The Kelly File, NC Governor Responds to “Bathroom Bill” Backlash*, Fox News (Apr. 28, 2016), <http://tinyurl.com/jkkperm>. Similarly

unsubstantiated (and farcical) is the implication that transgender persons—who are simply trying to live in accordance with their gender identity—would tolerate the discrimination to which they are subject simply to access particular bathrooms or the people who use them. Transgender persons do not choose their gender identity, and they certainly do not choose to use bathrooms to commit predatory or abusive acts. *See* Will Doran, *Equality NC Director: No Public Safety Risks in Cities with Transgender Anti-Discrimination Rules*, PolitiFact North Carolina (Apr. 1, 2016), <http://tinyurl.com/h78aeeen> (“evidence . . . overwhelmingly” supports the conclusion that there have been no public safety issues in communities with transgender anti-discrimination ordinances).

In fact, all *amici* have nondiscrimination policies that permit transgender individuals to use the company facilities or public accommodations consistent with the individual’s gender identity—policies that *amici* adopted out of respect for the dignity, autonomy, and privacy of their transgender employees and customers. *None* of these policies has resulted in an increase in sexual assaults or incidents of the kind invoked by H.B. 2’s supporters. Likewise, none of the 18 states that have laws allowing transgender people to use the facilities of their choice has experienced any increase in sex crimes in those facilities. *See* Stevie Borrello, *Sexual Assault and Domestic Violence Organizations Debunk ‘Bathroom Predator Myth,’* ABC News (Apr. 22, 2016), <http://tinyurl.com/zp3u2xf>.

Particularly in view of *amici*'s experience and those of jurisdictions that permit transgender persons to use the bathrooms and locker rooms that correspond to their gender identity, North Carolina's proffered "safety" concerns are at least as "amorphous," unsubstantiated, and speculative as those rejected by the Fourth Circuit in *Grimm*, if not wholly pretextual.

III. H.B. 2's Effects Extend Beyond North Carolina And Threaten To Harm *Amici*'s Ability To Conduct Their Businesses In And Outside Of The State.

The Supreme Court has repeatedly recognized the "substantial" benefits of diversity in public institutions and has tied that diversity directly to the needs of American businesses, remarking that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter*, 539 U.S. at 330; *see also Fisher v. Univ. of Tex. at Austin*, __ S. Ct. __, 2016 WL 3434399, at *10 (June 23, 2016) (promoting the "robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders" are "compelling" governmental interests (internal quotation marks omitted)). By stigmatizing transgender persons and sanctioning discrimination on the basis of gender identity under color of State law, H.B. 2's effects sweep far more broadly than transgender persons in North Carolina. Indeed, if H.B. 2 stands, it will tend to legitimize discrimination against all transgender persons and may even lead to similar laws in other jurisdictions where *amici* are located or operate. H.B. 2 also makes it difficult for companies, including many *amici*, to send employees to North Carolina without

undermining their own anti-discrimination policies and subjecting their employees to intolerable conditions. For that very reason, several State governments have instituted travel bans to North Carolina. *See infra* at 14.

In addition to its out-of-state effects, H.B. 2's effects on North Carolina, its companies, and its population are significant. Although the economic impact of H.B. 2 on North Carolina's economy has not yet been fully realized, commentators have estimated that the law puts at risk almost \$4.8 billion in federal funding and \$20 million in business investment. Williams Institute 2016 at 1. Those estimated losses are in addition to the \$40 million in business investment that has already been withdrawn from the State, resulting in a loss of over 1250 jobs. *Id.*⁹ These losses affect both the State of North Carolina and *amici* located in or doing business in the State.

A. H.B. 2 Discourages People From Traveling To And Doing Business In North Carolina, Thereby Harming *Amici* In The State And *Amici* Outside Of The State Who Wish To Send Employees There.

By singling out transgender persons and prohibiting them from using public facilities that correspond to their gender identity, H.B. 2 also discourages transgender individuals and their supporters from traveling to and doing business in North Carolina.

See, e.g., Karen Heller, *How North Carolina's Idyllic Hipster Haven Is Being Hurt by the*

⁹ *See also* Andrew Sorenson, *HB2 Has Cost NC 1750 Jobs, \$77 Million*, Time Warner Cable News (Apr. 22, 2016), <http://tinyurl.com/jxehmwb> (estimating that H.B. 2 had cost North Carolina more than 1750 jobs and more than \$77 million of investments and visitor spending); Elaina Athans, *Small-Business Owners Complain HB2 Hurting Profits*, ABC News (June 1, 2016), <http://tinyurl.com/gloexc> (explaining that “[t]he numerous concert, convention, and event cancellations [as a result of H.B. 2] are having a trickle-down effect” on the profits of some North Carolinian small businesses).

“Bathroom Bill” Boycott, Wash. Post (June 28, 2016), <http://tinyurl.com/jzcbymw> (explaining that “[o]ut-of-town visitors are essential” to certain business in Asheville, but that “after HB2, sales slumped in April, and again in May” as a result of tourists canceling trips); Greater Raleigh Chamber of Commerce, *Chamber Opposes HB2 and Calls for Immediate Repeal* (Apr. 19, 2016), <http://tinyurl.com/hqvt4rd> (“HB2 has already harmed business growth in Wake County Our Convention and Visitors Bureau is reporting over \$3.2 million in lost revenues, and much more is at risk.”). Indeed, among those buildings directly implicated by H.B. 2 are airports. It is thus no surprise that one of the immediate reactions to H.B. 2 was a series of travel bans by 21 localities, five states, and the District of Columbia that prohibit government-funded travel to North Carolina on the ground that H.B. 2 discriminates against transgender persons.¹⁰ See Williams Institute 2016 at 26-27. The California legislature is presently considering a similar ban. See A.B. 1887, 2015-2016 Leg., Reg. Sess. (Ca. 2016).¹¹

Businesses have also responded to H.B. 2 by withdrawing or canceling anticipated investments in North Carolina. PayPal, for example, announced that it will seek an

¹⁰ These states and localities include: Connecticut, New York State, Washington State, Minnesota, Vermont, New York City, Los Angeles, San Francisco, Atlanta, Seattle, Chicago, Philadelphia, Boston, Portland, Madison, Dane County, Wisc., Providence, Dayton, Cincinnati, Columbus, Franklin County, Oh., Cuyahoga County, Oh., Summit County, Oh., Royal Oak, Mich., Washtenaw County, Mich., Wilton Manors, Fla., and West Palm Beach. Williams Institute at 26-27 & nn.121-49.

¹¹ In addition to travel bans, Great Britain has issued a travel advisory to the LGBT community about traveling to North Carolina. Peter Holley, *Britain Issues Warning for LGBT Travelers Visiting North Carolina and Mississippi*, Wash. Post (Apr. 20, 2016), <http://tinyurl.com/znzs5hg>.

alternative location to Charlotte, North Carolina, for its new “global operations center” because H.B. 2 “perpetuates discrimination” based on gender identity and “violates the values and principles that are at the core of PayPal’s mission and culture.” 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), <http://tinyurl.com/zzdoy63>. PayPal’s operations center was expected to bring 400 skilled jobs to North Carolina, with an annual payroll impact of \$20 million. Ken Elkins & Ashley Fahey, *PayPal Inc. Opening Global Operations Center in Charlotte, Creating 400 Jobs and Investing \$3.6M*, Charlotte Bus. J. (Mar. 18, 2016), <http://tinyurl.com/hsk9dza>. Deutsche Bank has also frozen a planned North Carolina expansion that would have brought 250 jobs outside Raleigh. Jon Kamp & Valerie Bauerlein, *Deutsche Bank Freezes North Carolina Expansion, Citing Transgender Law*, Wall St. J. (Apr. 12, 2016), <http://tinyurl.com/orjftoj>.¹²

H.B. 2 is the explicit impetus for each of these developments, and all of them stand to harm *amici* located in or conducting business in North Carolina by discouraging potential partners, customers, or employees.

¹² More than 200 leading CEOs and business leaders have also signed an open letter calling on Governor McCrory and the North Carolina General Assembly to repeal provisions of H.B. 2. Letter from Human Rights Campaign and Equality North Carolina to the Office of the Governor, Pat McCrory, *available at* <http://tinyurl.com/h6cl35t>.

B. H.B. 2 Hampers The Ability Of *Amici* Located In Or Operating In North Carolina To Recruit Employees By Driving Talented Individuals Away From The State.

Amici recognize that “[a] diverse and inclusive workforce is crucial for companies that want to attract and retain top talent,” and “[c]ompetition for talent is fierce in today’s global economy.” Forbes Insights at 3. Put simply, in today’s global economy, diversity is a business imperative and *amici* accordingly expend substantial time and resources to recruit and retain diverse and inclusive workforces. For *amici* doing business in North Carolina, H.B. 2 impedes these efforts because it discourages talented transgender persons, families of transgender people, and supporters of transgender equality from seeking employment in or moving to North Carolina, and in this way places those *amici* at a competitive disadvantage vis-à-vis out-of-state competitors.

In order to cultivate and grow a diverse organization, employers must be able to recruit and retain the most qualified and talented workforce. LGBT-friendly policies have been shown to offer tangible advantages in employee recruitment and retention. In fact, research demonstrates that many LGBT and non-LGBT workers, in particular those who are younger and highly educated, prefer to work for companies with more supportive policies, and in states with more supportive laws. Williams Institute 2016 at 2, 38-39; *see also* Matt Motyl, *et al.*, *How Ideological Migration Geographically Segregates Groups*, 51 J. Experimental Soc. Psychol. 1 (2014), <http://tinyurl.com/j8pkoul> (individuals are moving from ideologically unfriendly communities to congruent communities); Pew Research Center, Data Trend: Gay Marriage, <http://tinyurl.com/zyl3s48> (70% of

millennials favor same-sex marriage) (last visited June 30, 2016). Likewise, Richard Florida, a leading scholar of urban studies, has observed that “members of the creative class—roughly 50 million people including scientists, engineers, and entrepreneurs, researchers and academics, architects and designers, artists, entertainers and professionals in business, media, management, health care and law” use diversity as a proxy for determining whether a city would provide a welcoming home. Human Rights Campaign Foundation, *2014 Municipal Equality Index: A Nationwide Evaluation of Municipal Law* 6 (2014), <http://tinyurl.com/h3fqlyx>.

Because H.B. 2 denies transgender persons’ gender identity as illegitimate, it damages North Carolina’s reputation as a state hospitable to and accepting of transgender persons. Accordingly, even when companies have LGBT non-discrimination policies and actively recruit transgender persons, prospective employees may be deterred from applying to or accepting a position in North Carolina on the ground that they, their children, or their neighbors will be subject to H.B. 2 and its degrading and stigmatizing effects. Employees and their families, after all, must live in the broader community, accessing libraries, schools, airports, stadiums, and even the department of motor vehicles. And a community that stigmatizes a class of persons generally will be unattractive to persons of that class and members of their families. In this way, H.B. 2 undermines *amici*’s recruitment efforts and their businesses, and that, *amici* submit, disserves the public interest.

C. H.B. 2 Harms *Amici*'s Employees And Customers.

In addition to alienating potential business partners and prospective employees, H.B. 2 harms many of *amici*'s existing employees and customers.

Amici's employees are their most valuable asset. For *amici* doing business in North Carolina, H.B. 2 treats their transgender employees as second-class citizens. It is well-established that stigma has “a corrosive influence on health” and can impair a person’s social relationships and self-esteem. Mark L. Hatzenbuehler, *et al.*, *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 Am. J. of Pub. Health 813, 815-16 (2013); *see also Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 974 (N.D. Cal. 2010) (“Structural stigma provides the context and identifies which members of society are devalued. It also gives a level of permission to denigrate or attack particular groups, or those who are perceived to be members of certain groups in society.”), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded on other grounds sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). By singling out a group for unequal treatment, H.B. 2 signals to *amici*'s transgender employees that they are less worthy than their co-workers and neighbors and that they must suppress a critical part of who they are in order to function and participate in public spaces. That message demeans transgender persons, diminishes employee morale, and may hamper the retention efforts of those *amici* operating in North Carolina.

If H.B. 2 prompts LGBT employees to leave North Carolina, businesses within the state will bear the costs. When an employee leaves a job, costs can be substantial and

include a loss in productivity due to the unfilled position, the costs of hiring and training a new employee, and the new employees' lower initial rates of productivity. Heather Boushey & Sarah Jane Glynn, *There Are Significant Business Costs to Replacing Employees*, Center for American Progress (Nov. 16, 2012), <http://tinyurl.com/krgv6nb>. A 2012 study concluded that businesses spend about one-fifth of an employee's annual salary to replace a worker, with the exception of executives and highly skilled positions, for which companies pay up to 213% of the annual salary. *Id.*

H.B. 2 also harms *amici* who serve consumers in North Carolina. Roughly 3.8% of American adults identify as LGBT, Frank Newport, *Americans Greatly Overestimate Percent Gay, Lesbian in U.S.*, Gallup (May 21, 2015), <http://tinyurl.com/nuhwnej>, and the buying power of LGBT consumers was estimated to increase by 20% between 2006 and 2012, Michaela Krejcová, *The Value of LGBT Equality in the Workplace*, GLAAD (Feb. 26, 2015), <http://tinyurl.com/j4lr2r9>. Moreover, studies suggest that LGBT customers tend to be loyal to brands that are LGBT-friendly. In a national survey conducted by Harris Interactive in 2011, nearly nine out of ten (87%) LGBT adults said they were likely to consider a brand providing equal workplace benefits for LGBT employees, while 23% of LGBT adults have switched products or services, even if they were costlier or less convenient, because a particular company was supportive of the LGBT community. *Id.* H.B. 2 makes it difficult for *amici* in North Carolina to attract and retain these customers.

By harming the employees and customers of many companies doing business in North Carolina, H.B. 2 threatens their businesses and their bottom lines. And these economic harms are compounded by the adverse social effects of a law that stigmatizes and degrades an entire cohort of people absent any evidence that it serves any countervailing benefit. *Cf. Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 24-25 (2008); *see also Giovanni Carandola, Ltd. v. Bason*, 303 F.3d 507, 520-21 (4th Cir. 2002) (affirming preliminary injunction). Accordingly, the balance of the equities firmly favors Plaintiff's requested injunctive relief. *See, e.g., Winter*, 555 U.S. at 25-26 (balancing Navy's public interest in conducting training exercises with possible harm to the plaintiffs' ecological, scientific, and recreational interests). Indeed, in light of the apparent lack of any reasoned justification for H.B. 2 and its significant adverse effects on North Carolina's economy, the business community, the public, and transgender persons, Plaintiff's Motion for a Preliminary Injunction should be granted.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff's Motion for a Preliminary Injunction.

Dated: July 8, 2016

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APPENDIX A
LISTING OF *AMICI CURIAE*

1. Accenture
2. Affirm, Inc.
3. Airbnb, Inc.
4. American Airlines
5. Apple Inc.
6. Biogen Inc.
7. Bloomberg L.P.
8. Boehringer Ingelheim USA
9. Box
10. Brocade Communications Systems, Inc.
11. Capital One Financial Corporation
12. Cisco Systems, Inc.
13. Consumer Technology Association (CTA)
14. Corning Incorporated
15. Cummins Inc.
16. Dropbox, Inc.
17. E.I. du Pont de Nemours & Company (“DuPont”)
18. eBay, Inc.
19. Etsy, Inc.
20. Everlaw, Inc.

21. Expedia, Inc.
22. FiftyThree, Inc.
23. Galxyz, Inc.
24. Gap Inc.
25. General Electric Company
26. Glassdoor, Inc.
27. Grokker
28. Hilton Worldwide
29. Honor
30. IBM Corporation
31. IKEA North America Services, LLC
32. Instacart
33. Intel Corporation
34. John Hancock Financial
35. Levi Strauss & Co.
36. LinkedIn Corporation
37. Logitech Inc.
38. Marriott International
39. Massachusetts Mutual Life Insurance Company
40. Microsoft Corporation
41. Mitchell Gold + Bob Williams

42. Morgan Stanley
43. Nextdoor
44. NIKE
45. OppenheimerFunds, Inc.
46. Orbitz Worldwide
47. PayPal
48. Pepo Inc.
49. Quotient
50. RBC Capital Markets, LLC
51. Red Hat
52. Replacements, Ltd.
53. Salesforce
54. Slack
55. SV Angel LLC
56. Symantec Corporation
57. TD Bank, NA
58. Teespring
59. The Dow Chemical Company
60. Thermo Fisher Scientific Inc.
61. ThirdLove
62. Tumblr

63. UnifyID, Inc.
64. United Airlines, Inc.
65. Williams-Sonoma, Inc.
66. Yelp Inc.
67. ZestFinance
68. Zynga Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2016, I caused the foregoing Proposed *Amicus Curiae* Brief of 68 Companies Opposed to H.B. 2 and in Support of Plaintiff to be filed with the Clerk of the Court for the United States District Court for the Middle District of North Carolina via the Court's CM/ECF system. I further certify that service was accomplished on all parties via the Court's CM/ECF system.

/s/ S. Luke Largess _____

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NORTH CAROLINA, *et al.*,

Defendants.

Case No. 1:16-cv-00425 (TDS-
JEP)

**PROPOSED ORDER GRANTING UNOPPOSED MOTION BY 68 COMPANIES
FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT
OF PLAINTIFF**

On July 8, 2016, Accenture; Affirm, Inc.; Airbnb, Inc.; American Airlines; Apple Inc.; Biogen Inc.; Bloomberg L.P.; Boehringer Ingelheim USA; Box; Brocade Communications Systems, Inc.; Capital One Financial Corporation; Cisco Systems, Inc.; Consumer Technology Association (CTA); Corning Incorporated; Cummins Inc.; Dropbox, Inc.; eBay, Inc.; E.I. du Pont de Nemours & Company; Etsy, Inc.; Everlaw, Inc.; Expedia, Inc.; FiftyThree, Inc.; Galxyz, Inc.; Gap Inc.; General Electric Company; Glassdoor, Inc.; Grokker; Hilton Worldwide; Honor; IBM Corporation; IKEA North America Services, LLC; Instacart; Intel Corporation; John Hancock Financial; Levi Strauss & Co.; LinkedIn Corporation; Logitech Inc.; Marriott International; Massachusetts Mutual Life Insurance Company; Microsoft Corporation; Mitchell Gold + Bob Williams; Morgan Stanley; Nextdoor; NIKE; OppenheimerFunds, Inc.; Orbitz

Worldwide; PayPal; Pepo Inc.; Quotient; RBC Capital Markets, LLC; Red Hat; Replacements, Ltd.; Salesforce; Slack; SV Angel LLC; Symantec Corporation; TD Bank, N.A.; Teespring; The Dow Chemical Company; Thermo Fisher Scientific Inc.; ThirdLove; Tumblr; UnifyID, Inc.; United Airlines, Inc.; Williams-Sonoma, Inc.; Yelp Inc.; ZestFinance; and Zynga Inc. filed an unopposed Motion for Leave to File an *Amicus Curiae* Brief in support of Plaintiff United States. It is hereby ORDERED that the Motion is GRANTED. The associated *amicus curiae* brief in support of Plaintiff's Motion for Preliminary Injunction is deemed filed as of this date.

SO ORDERED.

Dated: _____

Hon. Thomas D. Schroeder
United States District Judge