COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
SUPREME COURT CASE NO. 2017-SC-00278
COURT OF APPEALS CASE NO
2015-CA-00745

LEXINGTON-FAYETTE URBAN COUNTY HUMAN RIGHTS COMMISSION — **APPELLANT/ MOVANT**

v. ON APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT CASE NO. 14-CI-4474

HANDS ON ORIGINALS, INC. — **APPELLEE/ RESPONDENT**

BRIEF OF THE STATES OF ARKANSAS, ALABAMA, KANSAS, LOUISIANA, MISSOURI, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of this **Brief of *Amici Curiae*** by first class U.S. mail, postage prepaid, this 7th day of February, 2018 upon the following: Hon. James D. Ishmael, Jr., Fayette Circuit Court Judge, Fayette County Courthouse, 120 North Limestone, Lexington, Kentucky 40507; counsel for appellants Edward E. Dove, Esq., 201 West Short Street, Suite 300, Lexington, KY 40507, and counsel for appellees Bryan H. Beauman, Esq., Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Suite 1500, Lexington, KY 40507, and James A. Campbell, 15100 N 90th St, Scottsdale, AZ 85260.

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This case is about a small business that objected to printing (and thereby endorsing) messages contrary to its owners' core religious beliefs. While there were many other businesses that would have been happy to disseminate the same message, the Lexington-Fayette Urban County Human Rights Commission ("Commission") decided that business was not entitled to refuse to disseminate a message with which it disagreed. But contrary to that decision, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein." *West Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). Hands On Originals ("HOO") and its owners were so forced. The Commission interpreted a local discrimination ordinance as requiring HOO to print t-shirts supporting the Lexington Pride Festival, an event that is contrary to their sincere religious beliefs, on the basis that refusal would amount to discrimination on the basis of sexual orientation.[1] While state and local governments have an interest in protecting their citizens from discrimination, they may not compel those citizens to convey their government's preferred message. The Commission's order did just that and violated HOO's First Amendment right to be free from compelled speech, as well as its right to free exercise of religion.

I. *Wooley* and *Hurley* establish that HOO may not be forced to print messages with which it disagrees.

The Commission ordered HOO and its Christian owners to print t-shirts conveying a message supporting a gay pride festival—a message with which they strongly disagree. The Commission agreed in its order that HOO "acts as a speaker" when it "prints a promotional

[1] The Amici agree with Appellee and the Court of Appeals below that HOO's refusal to print t-shirts supporting the Lexington Pride Festival did not violate the ordinance at issue—*i.e.*, that HOO did not discriminate on the basis of sexual orientation or identity. However, an in-depth analysis of such a local ordinance is beyond the scope of this brief.

item" and that "this act of speaking is constitutionally protected." ROA 38-39. Yet the Commission would have this Court ignore the bedrock principle that the government may not force HOO (and its owners) to convey a message with which it disagrees. Indeed, *Wooley v. Maynard* establishes that the government cannot compel—as the Commissions seeks to do here—citizens to disseminate the government's preferred message, and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* that the government cannot avoid this principle merely on the grounds that it is purportedly seeking to enforce an anti-discrimination ordinance. Therefore, this Court should affirm the order of the Court of Appeals reversing the Commission's unconstitutional order in this case.

A. The Commission's order compels speech in violation of the First Amendment.

"The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (*quoting Barnette*, 319 U.S. at 637). This "individual freedom of mind" embodies citizens' "First Amendment right to avoid becoming the courier" for messages they do not wish to communicate. *Id*. at 717. Importantly, "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Id*. at 715.

HOO's role in creating items expressing certain messages, including the t-shirts at issue here, undoubtedly qualifies as speech under the First Amendment. Indeed, the Commission admitted as much in its order, agreeing that when HOO "prints a promotional item, it acts as a speaker, and that this act of speaking is constitutionally protected." ROA 38-39. The Commission does not appear to have changed its position on appeal (apparently preferring to simply ignore the issue in its brief). The lack of any dispute about whether

HOO's role qualifies as speech both differentiates and makes this case much simpler than *Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. 2015), *cert. granted, sub nom. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, (No. 16-111), where there is debate as to whether creating a custom wedding cake is protected speech at all.

The issue here, then, is whether the Commission's order compels HOO to speak. It clearly does. The Commission found that HOO's refusal to print t-shirts bearing the words "Lexington Pride Festival 2012," the number "5," and a series of rainbow-colored circles around the "5" for the Gay and Lesbian Services Organization ("GLSO") constituted discrimination on the basis of sexual orientation and gender identity in violation of Lexington-Fayette Urban County Government local Ordinance 201-99; Section 2-33 (the "Fairness Ordinance"). ROA 41. It "permanently enjoined" HOO "from discriminating against individuals because of their actual or imputed sexual orientation or gender identity." *Id*. It is therefore fair to say that, if the Commission's order stands, HOO is required to print t-shirts conveying all sorts of messages that contradict the Christian beliefs of its owners, such as advocating the acceptance of same-sex relationships, the recognition of same-sex marriage, and many others.

The Commission's order abridges HOO's "individual freedom of mind" because it forces HOO to convey the messages that the Commission directs it to convey. The Court in *Wooley* held that requiring drivers to display the state motto on their license plates required them "to be an instrument for fostering public adherence to an ideological point of view [they] find[] unacceptable," which is unconstitutional. *Wooley*, 430 U.S. at 715. Yet the Commission's order would force HOO and its owners to be much more than passive "instrument[s]" in disseminating a message that they believe is contrary to their Christian

beliefs—instead, they must *actively* participate in printing the message on t-shirts. The Court described the law at issue in *Wooley* as "in effect requir[ing] that [drivers] use their private property as a 'mobile billboard' for the State's ideological message." *Id*. Here, the Commission went even further by requiring HOO to create the "billboard" by which the Commission's preferred message is disseminated. Such compulsion of speech is anathema to the freedom of mind guaranteed by the First Amendment and cannot stand.

B. Governments do not have special license to compel speech via anti-discrimination ordinances.

The Commission argues that a different result is warranted here because this case concerns an anti-discrimination ordinance. But *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* holds otherwise. 515 U.S. 557 (1995). There the Court upheld the right of parade organizers not to allow a gay-rights group to march because the organizers did not want to endorse its message. Like here, *Hurley* involved a state law right to equal treatment in public accommodations. Like the law at issue in *Hurley*, the Fairness Ordinance generally prohibits a public accommodation from discriminating against individuals based upon, *inter alia*, their sexual orientation or gender identity. The United States Supreme Court has explained that "[p]rovisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley*, 515 U.S. at 572.

To be sure, states, including Amici, and local governments, have a strong interest in preventing invidious discrimination in the context of a public accommodation. But, as the Court held in *Hurley*, public accommodations laws cannot be used to compel speech. It is unconstitutional to apply a public accommodations law "to expressive activity . . . to require

speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Hurley*, 515 U.S. at 578. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* at 579. The Commission's order compelling HOO to create a t-shirt conveying a message selected by GLSO plainly "interfere[s]" with speech because it requires HOO and its owners to communicate a message that is contrary to their core beliefs.

The Commission's decision in this case, like the state court's decision in *Hurley*, is a "peculiar" application of public accommodations law. *Hurley*, 515 U.S. at 572. The record in this case is clear that HOO and its owners do not object to serving customers based on their sexual orientation or gender identity; they object to producing items that express their approval or validation of acts that are contrary to their deeply held beliefs, regardless of the sexual orientation of the customer who purchases the items. It is one thing to compel a business to serve people on an equal basis without regard to sexual orientation; it is quite another thing to compel a person to print t-shirts that communicate a message that he or she believes to be profoundly wrong. Unlike the typical application of state nondiscrimination laws, "this use of [government] power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. As in *Hurley*, the Commission apparently believes HOO's views are misguided. But the Commission can express its view without regulating citizens' speech.

The Commission's attempt to distinguish *Hurley* on the grounds that HOO is a "commercial business" is unavailing. Neither *Hurley* nor other First Amendment cases

support the notion that the right against compelled speech is diminished in the commercial context. In fact, the Court has extended the protection of the compelled speech doctrine to commercial businesses in the case of newspapers, *see, e.g.*, *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), and non-media corporations, *see, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986). And the Court has consistently held that commercial speech is fully entitled to First Amendment protection, recognizing that "a speaker is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Fed'n of the Blind of North Carolina*, 487 U.S. 781, 801 (1988); *see also Simon & Schuster, Inc. v. Members the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (holding that an author who writes for money is fully protected by the First Amendment); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 789 (2011) (holding that commercially distributed video games are fully protected speech); *United States v. Stevens*, 559 U.S. 460, 465-69 (2010) (striking down a restriction on the commercial creation and distribution of material depicting animal cruelty); *Citizens United v. FEC*, 558 U.S. 310, 372 (2010) ("The First Amendment underwrites the freedom to experiment and to create in the realm of thought."); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (striking down portion of law that banned photographic reproductions of currency). That HOO and its owners sell the t-shirts and other items they print messages on does not render them unworthy of First Amendment protections.

The Commission is likewise incorrect that *PruneYard Shopping Ctr. v. Robins* or *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.* ("*FAIR*") requires a different result, as neither involved compelled speech. In *PruneYard*, the shopping mall was not required to engage in any kind of speech—it simply could not stop others from speaking. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980). Here, the Commission's order

does require HOO to engage in speech because it must create t-shirts conveying messages with which it strongly disagrees.

Similarly, in *FAIR*, the universities were not required to disseminate any message—either their own or someone else's. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (noting that the law does not "require[] them to say anything"). The Court held that "[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is." *Id*. at 62. This is because requiring an institution to send scheduling e-mails does not interfere with anyone's "individual freedom of mind." *Wooley*, 430 U.S. at 714 (citing *Barnette*, 319 U.S. at 637). Indeed, the universities disagreed with the presence of the military recruiters on campus, not the content of the scheduling emails. Here, the Commission forced HOO to create messages with specific communicative content—messages that they do not agree with, and are indeed contrary to their belief system.

In sum, that the Commission's order purported to enforce an anti-discrimination ordinance does not cure the fact that it compels HOO to speak in violation of the First Amendment. Under the US Supreme Court's precedents, the Commission's application of the Fairness Ordinance is unconstitutional, and it cannot survive.

C. The Commission's order would fail any potential standard of review this Court may apply.

To be very clear, the US Supreme Court's compelled-speech doctrine mandates that the Commission's order fail, no matter the governmental interest in such an application. Nevertheless, were this Court to apply any level of scrutiny and weigh the governmental

interests served by the Commission's order, *see, e.g.*, *O'Brien*, *Texas v. Johnson*, 391 U.S. 367 (1968), and *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam) (expressive conduct analysis), the order would nonetheless fail.

The Commission's order is not justified by any state interests that public accommodations laws are intended to serve. Public accommodations laws, when constitutionally applied, serve several legitimate state interests. They ensure that protected classes have adequate access to goods and services in the marketplace. *See, e.g., Katzenbach v. McClung*, 379 U.S. 294, 299-300 (1964) (describing the effects of racial segregation on the economy); ROA 39-40. They can also protect individuals from "humiliation and dignitary harm." *Elane Photography, LLC., v. Willock*, 309 P.3d 53, 64 (N.M. 2013).

But the Commission's order does not meaningfully advance either of these interests. The advocacy group at the center of this dispute derives no meaningful marketplace benefit from compelling HOO to print t-shirts for the festival it hosts. There are numerous businesses in the Lexington area that print t-shirts; indeed, the record reflects that HOO offered to refer GLSO to one of them. There is every indication that, if not for the Commission's order, HOO would continue to refer out prospective customers who request items HOO finds objectionable.

The result of the Commission's order also fails meaningfully to protect any individuals from humiliation and dignitary harm. The GLSO, the complainant below, is an organization, not an individual. It has no sexual orientation. Moreover, the record reflects that Aaron Baker, a non-transgendered man in a married, heterosexual relationship who nevertheless functioned at all relevant times as the President of the GLSO, spearheaded the complaint in this case.

In any case, governments have alternative means of accomplishing the goal of promoting the dignity of individuals seeking to express their pride in their sexual orientation or identity. And even merely expressive conduct subject to *O'Brien* cannot be regulated unless the regulation is narrowly tailored, *i.e.*, "that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 622 (1994) (*quoting Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). It would be easy for the Commission to create or facilitate a database of businesses that do not object to creating works for advocacy groups such as GLSO. Such resources already exist in the private sector in the context of weddings. *See, e.g.*, Pridezillas, A Wedding Resource for the LBGT Community (2013), https://perma.cc/U8U4-WFCH. In fact, HOO here offered to refer GLSO to another company that would have printed the t-shirts for the pride festival.

Perhaps most straightforwardly, state and local governments could define "public accommodations" in the manner done by the federal government and not capture businesses that selectively choose clients and the messages they endorse. *See* 42 U.S.C. § 2000a (applying accommodation statute only to establishments such as hotels, restaurants, and stadiums); *see also Amy Lynn Photography Studio, LLC v. City of Madison*, No. 2017-cv-00555 (Dane Cty. Ct. Aug. 11, 2017) (affirming that Wisconsin's similar anti-discrimination law does not apply in similar circumstance to this case).

Critically, the Commission cannot be allowed to define the governmental interest here as "anti-discrimination" broadly speaking. Not only would such a sweeping definition open the door for government-compelled speech, it would be beyond the scope of this case. As the record shows, HOO will print t-shirts for individuals no matter their sexual orientation—it

simply will not print t-shirts supporting an event such as the Lexington Pride Festival, no matter who requests them. The situation here thus parallels the "peculiar way" that the state in *Hurley* interpreted its law when no individual had been discriminated against because of their sexual orientation, but only because of the message at stake. 515 U.S. at 572-73 (making "speech itself" the "public accommodation").

Of course, public accommodations laws also express the government's view that certain biases are disfavored, with the hope of ultimately "produc[ing] a society free of the corresponding biases." *Id*. at 578-79. Although that may be a laudable goal, the US Supreme Court has held that it is a "decidedly fatal objective" for applying a public accommodations law to "expressive conduct." *Id*. at 579. The notion that one person's speech should be limited or compelled "to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment . . . ." *Id.* The government can make its views known without coercing HOO to spread the message. State and local governments can protect against invidious discrimination and still accommodate First Amendment rights. *See Curran v. Mt. Diablo Council of Boy Scouts*, 952 P.2d 218 (Cal. 1998) (narrowly defining scope of public accommodation law to avoid constitutional problems); *U.S. Jaycees v. Iowa Civil Rights Comm'n*, 427 N.W.2d 450, 454-55 (Iowa 1988) (same). *See also PruneYard*, 447 U.S. at 87 (1980) (states have interest in regulating speech at "business establishment[s] that [are] open to the public to come and go as they please," but not necessarily other businesses that are selective about their clientele and, as here, the messages they choose to print). Although the Commission gave lip service to HOO's First Amendment rights, it nonetheless punished HOO and its owners for refusing to express a

particular message. The Commission had no compelling reason to apply its public accommodations law in this fashion.

Consider for instance the very sort of public accommodations anti-discrimination law involved in this case. As interpreted by the Commission, the ordinance applies not just to printing companies but also to other businesses creating expressive works, such as freelance writers, singers, and painters. Thus, for instance, a freelance writer who objects to Scientology would be violating the Fairness Ordinance (which bans religious as well as sexual orientation discrimination) if he refused to write a press release announcing a Scientologist event. An actor would be violating the ordinance if he refused to perform in a commercial for a religious organization of which he disapproves. Yet all such requirements would unacceptably force the speakers to "becom[e] the courier[s] for . . . message[s]" with which they disagree, *Wooley*, 430 U.S. at 717. All would interfere with creators' "right to decline to foster . . . concepts" that they disapprove of. *Id*. at 714; *see also id.* at 715 (recognizing people's right to "refuse to foster . . . an idea they find morally objectionable"). And all would interfere with the "individual freedom of mind," *Id.* at 714, by forcing printing companies, writers, actors, painters, singers, and photographers to express sentiments that they see as wrong.

II. Compelling HOO and its owners to create t-shirts advocating support for an event contrary to their deeply held religious beliefs violates the right to free exercise of religion.

Not only does the Commission's order violate HOO's freedom of speech, it impermissibly burdens HOO's owners' free exercise of religion.[2] The Commission

[2] Amici agree with Appellee and Judge Lambert's concurring opinion that, under the reasoning of *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014) applied to KRS 446.350, Kentucky's Religious Freedom Restoration Statute, the Commission's application of the Fairness Ordinance cannot stand.

concluded without analysis that, although HOO and its owners' objections to printing the pride festival t-shirt were based on sincerely held religious beliefs, the Fairness Ordinance does not substantially burden the exercise of those beliefs and is supported by a compelling government interest. Moreover, after citing *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Commission concluded that the Fairness Ordinance survives rational basis review.

Strict scrutiny, not rational basis review, applies here. *Smith* preserved strict-scrutiny review for generally applicable laws in "hybrid situation[s]," involving both free-exercise rights and other rights. 494 U.S. at 882. For example, some "cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion." *Id.* (comparing *Wooley*, 430 U.S. at 705). *Smith* thus envisioned that free-speech and parental rights claims can be bolstered by a Free Exercise Clause claim; "a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." *Id.* (comparing *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). Those are all instances where "the conduct itself must be free from governmental regulation." *Id.*

Some courts have argued that the "other constitutional protection[]," *id.* at 881—besides the Free Exercise Clause claim—must be an independently viable claim. But requiring the "other" claim to stand on its own is nonsensical. It would make the Free Exercise Clause claim superfluous and, essentially, render the Clause a dead letter. Erasing part of the First Amendment cannot be the correct solution, and is surely not the result *Smith* sought to achieve. The best account of *Smith*'s explanation is to allow free-exercise concerns

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However, given the numerous variations of RFRA among several of Amici and other states, such a discussion is beyond the scope of this brief.

to raise any substantial claim regarding a companion fundamental right (such as free speech) to the level of a violation.

Not only has HOO alleged a substantial compelled speech claim, that claim is enhanced in this case by its interplay with HOO and its owners' right to the free exercise of religion. The Commission seeks to force HOO to broadcast a message that is contrary to its owners' deeply held religious beliefs. So, as *Smith* presaged, this is a case dealing with "the communication of religious beliefs" because of the compelled speech's affront to the religious beliefs of HOO's owners; it therefore goes beyond *Smith*'s general rule that individuals must conform their behavior to neutral laws of general applicability, where hybrid rights are not in play. 494 U.S. at 879-82. At the least, this case presents a hybrid right situation in which HOO cannot be compelled to speak in ways that are inextricably tied to the religious views of its owners.

As noted above, the Commission has advanced no compelling interest in applying the Fairness Ordinance to require HOO to print t-shirts such as those supporting the Lexington Pride Festival requested by GLSO. *See supra* 8. Moreover, as noted, the government has less restrictive means available for ensuring that advocacy organizations can find business to print items conveying their desired messages. *See supra* 8-10. The very existence of those less restrictive means show that the Fairness Ordinance, as applied by the Commission, impermissibly burdens both free-speech rights (it cannot satisfy even *O'Brien*'s relaxed standard) and free-exercise rights (it cannot satisfy the strict scrutiny applicable in this hybrid-rights context).

CONCLUSION

For the foregoing reasons, the Commission's order cannot stand. The Commission's purported application of an anti-discrimination law to HOO's refusal to print messages contrary to its owners' Christian beliefs constitutes a threat to First Amendment rights everywhere. This Court should send a strong message to state and local governments across the country that these rights must be respected.

Respectfully submitted,

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