COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2017-SC-000278
COA NO. 2015-CA-000745-MR

LEXINGTON FAYETTE URBAN COUNTY HUMAN RIGHTS COMMISSION AND AARON BAKER FOR GAY AND LESBIAN SERVICES — **APPELLANTS**

v.

Appeal from Fayette Circuit Court
Hon. James D. Ishmael, Jr., Judge
Action No. 14-CI-04474

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

BRIEF FOR *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF APPELLEE

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CERTIFICATE OF SERVICE

I certify that on February 7, 2018, the original and 9 copies hereof were served by hand delivery upon Susan Stokley Clary, Honorable Clerk of the Supreme Court of Kentucky, 209 Capital Building, 700 Capital Avenue, Frankfort, KY 40601, and that true and accurate copies of the foregoing were served first-class by U.S. Mail, postage prepaid, upon: Hon. James D. Ishmael, Jr., Fayette Circuit Court, Robert F. Stephens Circuit Courthouse, 120 N. Limestone, Lexington, KY 40507; Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; 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.

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STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

The question in this case is whether Americans will be allowed to live according to diverse moral views about sex, or whether the government will instead pick one "correct" moral view and punish those who disagree. Fortunately, the Kentucky General Assembly has already addressed this question by enacting the Religious Freedom Act, KRS § 446.350—a law specifically designed to protect individuals of diverse religious views.

Appellee Hands On Originals (Hands On) is a small, closely-held printing business. The owner of Hands On willingly hires and serves LGBT individuals, and he has never declined to hire or serve anyone because of that person's race, sex, or sexual orientation. But, in accordance with standard industry practice, the owner of Hands On will not print messages that contradict his core beliefs. So, for example, just as pro-choice printers have declined to print pro-life messages, and LGBT printers have declined to print anti-gay messages, the owner of Hands On has declined to print shirts promoting a strip club, pens promoting sexually explicit videos, and shirts endorsing violence.

In 2012, the president of the Gay and Lesbian Services Organization (GLSO), who is hetero-sexual, asked Hands On to print shirts featuring the name and logo of the local Pride Festival. Because the owner of Hands On believes that sex is designed for traditional marriage, and because the Pride Festival promotes a contradictory view, the owner could not in good conscience print the shirts. Instead, he offered to refer GLSO to another printer who would print the shirts for the same price. GLSO received many offers to print the shirts and ultimately received them for free.

But in response to GLSO's complaint, the Lexington-Fayette Urban County Human Rights Commission (Commission) ordered Hands On's owner to print shirts that contradict his beliefs and to attend "Diversity Training" to dissuade him from acting on his religious views. This Order

not only tramples the freedom of speech, but also violates Kentucky's Religious Freedom Act, KRS § 446.350—as Judge Lambert correctly concluded. *Lexington Fayette Urban Cty. Human Rights Comm'n v. Hands On Originals, Inc.*, No. 2015-CA-000745, slip op. at 19 (Ky. Ct. App. May 12, 2017) ("Op."). It is undisputed that the Order imposes a substantial burden on the owner's religious exercise. And the Commission has failed to offer *any* evidence—let alone the clear and convincing evidence required by law—that forcing the owner of a closely-held, expressive business to create messages that violate his core religious beliefs is necessary to accomplish a compelling government interest, particularly when the same services are readily available from many other willing vendors. The Commission has not even alleged that GLSO faces any significant obstacle to full participation in society. And the Supreme Court has consistently held that the government lacks a compelling interest in shielding individuals from encountering opposing views—even when those views are emotionally distressing.

Just as a pro-choice printer has a right to decline to print a religious message attacking Planned Parenthood, and a gay photographer has a right to decline to photograph a religious anti-gay rally, a Christian printer who believes in traditional marriage has a right to decline to print materials contradicting that view. The law protects the freedom of individuals in a pluralistic society to disagree, and the Court of Appeals' ruling should be affirmed.

ARGUMENT

I. KRS § 446.350 Applies to the Commission's Order.

Kentucky's Religious Freedom Act, KRS § 446.350, provides:

> Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

This law was enacted by an overwhelming majority in response to a decision by this Court holding that laws burdening religious freedom were subject only to rational basis review. *Gingerich v. Commonwealth*, 382 S.W.3d 835, 841 (Ky. 2012). It is modeled on the federal Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 *et seq.*, and, like its federal counterpart, it is designed to provide "very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014).

Both laws provide that if the government substantially burdens a person's religious exercise, it must justify its action as the least restrictive means of accomplishing a compelling government interest. Both laws protect the ability of owners to run their business consistent with their religious beliefs. *Id.* at 2759; KRS § 446.010(33). But Kentucky's law goes further: it defines a substantial burden to include even "indirect" burdens; it requires the government to justify its infringement of each "specific act or refusal to act"; and it requires the government to do so by "clear and convincing evidence." KRS § 446.350. Federal cases are therefore relevant. But KRS § 446.350 offers even greater protection for religious exercise.

Judge Lambert, the Circuit Court, and the Commission (in its original Order) all correctly held that KRS § 446.350 applies to this case. On appeal, the Commission simply ignores this law. But "the judgment of a lower court can be affirmed for any reason in the record." *Mark D. Dean, P.S.C. v. Commonwealth Bank & Tr. Co.*, 434 S.W.3d 489, 495 (Ky. 2014). KRS § 446.350 provides a strong and narrow ground for affirmance.

II. The Commission's Order Violates KRS § 446.350.

A. The Commission has substantially burdened the religious beliefs of Hands On and its Owner.

To establish its prima facie case under KRS § 446.350, Hands On must demonstrate that the government has "substantially burdened" a "specific act or refusal to act" that is "motivated by a

sincerely held religious belief." The Commission admits that Hands On was motivated by a sincerely held religious belief. *See* Commission Order, HRC No. 03-12-3135 ("Order") at 8. And, before the Court of Appeals, "the parties agree[d] that the fairness ordinance substantially burdens HOO's owners' religious beliefs." Op. 20.

The parties' agreement on this issue is consistent with the relevant law. KRS § 446.350 defines "burden" to include "*indirect burdens* such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities." KRS § 446.350 (emphasis added). Similarly, the Supreme Court has held that "indirect" burdens are substantial when they place "pressure upon [religious adherents] to forego th[eir] [religious] practice[s]." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

Here, the Commission ordered Hands On to engage in conduct that violates its religious beliefs. It has charged Hands On with "unlawful discrimination" and ordered Hands On to print objectionable messages in the future. Order at 16. If Hands On does not comply, the Commission can list Hands On as an organization that has "engaged in an unlawful practice," initiate an enforcement proceeding in Kentucky circuit court, and impose "damages for injury caused by an unlawful practice including compensation for humiliation and embarrassment." KRS § 344.230; KRS § 344.340. The direct order to violate religious beliefs, backed by significant government penalties, obviously places "pressure upon [Hands On] to forego [its] [religious] practice[s]." *Sherbert*, 374 U.S. at 404. Thus, the substantial burden standard is "easily satisfied." *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015).

Beyond that, the Commission has ordered Hands On to "participate in diversity training." Order at 16. The point of this training is to convince the owner of Hands On to act differently in the future. As the Commission's own attorney admitted, this requirement "may create a whole new

realm of constitutional arguments pertaining to freedom [of] expression and the free exercise of religion." Commission's Response ¶ 13 (Ex. F).[1]

The Commission has suggested that Hands On can avoid any burden on its religious practices if it simply ceases to "operate[] . . . as a public accommodation." Order at 14. But that would force Hands On's owner to choose between his religious beliefs and his livelihood. As the Supreme Court has said, "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [Hands On] for [its] [religious exercise]." *Sherbert*, 374 U.S. at 404. That is the quintessential substantial burden. *See also Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2777 (rejecting the argument that a family business could avoid a substantial burden by "dropping insurance coverage"). Thus, Hands On has easily shown a substantial burden.

B. The Commission has failed to present clear and convincing evidence satisfying strict scrutiny.

Once a substantial burden has been shown, the burden shifts to the government to satisfy strict scrutiny. Under KRS § 446.350, the Commission must "prove[] by *clear and convincing evidence* that it has a compelling governmental interest in infringing the *specific* act or refusal to act and has used the least restrictive means to further that interest." KRS § 446.350 (emphasis added). The Commission has not satisfied that burden here.

1. Strict scrutiny requires a fact-specific analysis based on concrete evidence, not broad generalities.

In his dissenting opinion, Judge Taylor argues that "religious beliefs or conduct may be burdened or limited where the compelling government interest is to eradicate discrimination." Op. 22

[1] "Ex." followed by a *number* refers to exhibits Hands On filed with its summary judgment motion in the Commission. "Ex." followed by a *letter* refers to exhibits Hands On filed with its summary judgment motion in the Circuit Court.

(citing *Bob Jones Univ. v. United States,* 461 U.S. 574 (1983)). In other words, he suggests that the government prevails any time it invokes a broad interest in, as the Commission puts it, "prohibit[ing] discrimination based on the sexual orientation by a public accommodation." Br. 2. But the Supreme Court has already unanimously held that anti-discrimination norms sometimes give way to religious freedom rights. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012) (holding that the application of antidiscrimination laws to interfere with religious hiring practices was unconstitutional). And under RFRA, the Supreme Court has emphasized that strict scrutiny requires courts to "look[] beyond broadly formulated interests" and instead "scrutinize[] the asserted harm of granting *specific exemptions* to *particular religious claimants*." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (emphasis added). In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), for example, the Supreme Court did not analyze the government's interest in compulsory public education generally. It assessed the government's interest in making the specific *Amish* children before the court attend *one more year* of public education instead of trade-oriented education provided by their families. *Id.* at 214-15.

Here, as in *Gonzalez* and *Yoder*, the compelling interest analysis must take into account the specific nature of Hands On's conduct. For example, Hands On has employed at least six gay or lesbian individuals and regularly provides its services to the LGBT community. *See* Adamson Aff. ¶ 49-50 (Ex. 1). Hands On has never declined to hire or serve anyone because of any legally protected characteristic, and it has a firm company policy against such discrimination. *Id*. ¶ 26; Order at 2. Hands On simply cannot print messages that contradict its religious beliefs.

Hands On notifies the public on its website that "it is the prerogative of Hands On Originals to refuse any order that would endorse positions that conflict with the convictions of the ownership."

Order at 2. This policy has led Hands On to reject a wide range of orders—at least 12 orders over a 3-year period—including shirts promoting a strip club, pens promoting sexually explicit videos, and shirts endorsing violence. Hands On's Supplemental Resp. to Interrog. No. 15 (Ex. 9). Such policies are standard industry practice—as LGBT-owned printing companies have attested. *See* BMP T-Shirts Email to Blaine Adamson at 1 (Ex. 11) ("We are a lesbian owned and operated t-shirt company . . . and we support your right to refuse to print the t-shirts for the local Pride organization."); TheBlaze, Lesbian Business Owner Defends Christian Printer's Rights, YouTube (Nov. 7, 2014), https://www.youtube.com/watch?v=68sIlntWHmI.

Further, when Hands On declined to print the Pride Festival's message in this case, Hands On offered to connect GLSO with another printer who would provide the order at the same price. Adamson Aff. ¶ 47 (Ex. 1). The Pride Festival received many offers to print the shirts and ultimately received them for free. GLSO Newsletter, May 2012, at 2 (Ex. 106); Complainant's Resp. to Interrog. No. 9 (Ex. 108).

Thus, here the Commission must justify forcing the owner of a closely-held, expressive business to create expressive items that contradict his sincerely-held religious beliefs, when the same items are readily available for the same price from many vendors in the same community. And the Commission cannot simply *assert* that it has a compelling interest in this sort of compulsion. It must "prove[]," by "clear and convincing evidence," that it has a compelling interest in "infringing th[is] specific act." KRS § 446.350; *see also O Centro*, 546 U.S. at 437 (government must "*offer[] evidence* demonstrating that granting the [religious adherent] an exemption would cause the kind of . . . harm recognized as a compelling interest") (emphasis added). But the Commission has not offered *any evidence*—much less clear and convincing evidence—in this case.

2. The interest served by public accommodation laws—removing pervasive barriers to equal citizenship—would not be undermined by accommodating Hands On here.

Beyond failing to offer any evidence, the Commission has failed to show that the basic interests furthered by public accommodation laws would be undermined by accommodating Hands On here. As the Supreme Court has recognized, one of the foundational justifications for public accommodation laws is to "remov[e] the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984). But when a public accommodation law collides with other fundamental rights, courts must balance those rights "on one side of the scale, and the State's interest on the other." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000). In such a case, the government must make a particularized showing that eliminating the specific type of discrimination at issue is necessary to overcome a significant structural barrier to an individual's full participation in society. In the absence of such a showing, fundamental rights like speech or free exercise must prevail. *See id.*; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995).

For example, in *Hurley*, the unanimous Supreme Court held that the government failed to make a particularized showing sufficient to satisfy strict scrutiny, even when a public accommodation (a local parade) refused to include a group that supported gay rights. 515 U.S. at 574-80. In reaching this conclusion, the Court considered the following factors: (1) the public accommodation "disclaim[ed] any intent to exclude homosexuals as such," but simply objected to including a message endorsing homosexuality; (2) the public accommodation was not "an abiding monopoly of access," because the gay rights group had a "fair shot" at obtaining its own parade permit; and (3) the government did "not show[]" that the public accommodation "enjoy[ed] the capacity to 'silence the voice of competing speakers.'" *Id.* at 572-78.

This case presents an even easier scenario than *Hurley*. Here, far from "exclud[ing] homosexuals as such," Hands On regularly employs and serves LGBT individuals. And more than just having a "fair shot" at obtaining the same service, the Pride Festival had multiple offers to print the shirts at the same price and even received them for free. Nor can the government come close to claiming GLSO is at risk of being "silenc[ed]" by Hands On, as demonstrated by the fact that GLSO has hosted more pride festivals, continued its successful LGBT advocacy efforts, and helped spawn a boycott of Hands On. *See* Adamson Aff. ¶ 57 (Ex. 1); Boycott Hands On Originals Facebook Page (Ex. 117).[2]

The Massachusetts Supreme Court required a similar particularized showing by the government when the government attempted to enforce a nondiscrimination law against religious objectors who declined to rent housing to unmarried couples. *Attorney General v. Desilets*, 636 N.E.2d 233, 240 (Mass. 1994). There, the court rejected a general interest in "eliminating discrimination" and noted that "the analysis must be more focused." *Id.* at 325. Specifically, "the Commonwealth must demonstrate that it has a compelling interest in the elimination of discrimination *in housing* against an unmarried man and an unmarried woman who have a sexual relationship and *wish to rent accommodations to which [the anti-discrimination law] applies*." *Id.* at 325-26 (emphasis added). The court noted that the government did not show "proof" that accommodating the religious objectors would "significantly imped[e] the availability of rental housing for people who are

[2] The Commission tries to distinguish *Hurley* by arguing that it involved a "private parade not a commercial parade." Br. at 11. But that doesn't help the Commission demonstrate a compelling interest here. If anything, it makes the Commission's case weaker: This case involves access to fungible goods that can easily be obtained elsewhere and in fact were obtained for free; but *Hurley* involved access to a one-of-a-kind parade that could not be replicated—so the plaintiffs were permanently excluded. Yet the Supreme Court still held that the government lacked a compelling interest. Cf. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received.").

cohabiting," because "[m]arket forces often tend to discourage owners from restricting the class[es] of people to whom they would rent." *Id.* at 329. Thus, the government failed to demonstrate a "compelling interest . . . strong enough to justify the burden placed on the defendants' exercise of their religion." *Id.* at 330. Here, too, the Commission has offered no evidence—and certainly not "clear and convincing evidence"—that accommodating Hands On would significantly impede the ability of LGBT individuals to obtain shirts in Kentucky.[3]

Indeed, the facts of *Hurley* and *Desilets* stand in stark contrast with the facts of *Bob Jones University v. United States*, 461 U.S. 574, 592-93 (1983), where the government demonstrated pervasive obstacles to citizenship that were caused by invidious racial discrimination in education. The Court noted that, at the time, "racial segregation in primary and secondary education prevailed in many parts of the country," where there had been significant "stress and anguish" and a "history of efforts to escape from the shackles of the 'separate but equal' doctrine." *Id.* at 592-95. As one scholar has noted:

> There remains . . . a crucial difference between the race-based discrimination against African Americans in the Jim Crow South and *any* other form of discrimination or exclusion in our country. The pervasive impediments to equal citizenship for African Americans have not been matched by any other recent episode in American history. Our country has harmed many people . . . . But the systemic and structural injustices perpetrated against African Americans—and the extraordinary remedies those injustices warranted—remain in a class of their own.

John D. Inazu, *A Confident Pluralism*, 88 S. Cal. L. Rev. 587, 603 (2015). That is likely why no court has ever extended the rationale of *Bob Jones* beyond the context of race. [4]

[3] Illinois and Michigan have adopted the same approach as Massachusetts. *See Jasniowski v. Rushing*, 685 N.E.2d 622 (Ill. 1997) (reversing a ruling requiring a religious landlord to lease to a cohabiting couple); *McCready v. Hoffius*, 459 Mich. 1235 (Mich. 1999) (same).

[4] The Supreme Court itself has recognized a difference between race discrimination and support for traditional marriage. When the Court struck down bans on same-sex marriage, both the majority and dissent went out of their way to state that many who support traditional marriage do

To be sure, the government could in some cases make a showing of structural barriers sufficient to overcome a religious objection in the context of discrimination that does not involve racial classifications. For example, the *Desilets* court indicated the government could have prevailed if it had presented evidence showing a "significant housing problem" where "a large percentage of units are unavailable to cohabitants." 636 N.E.2d at 240. And the government would likely win a case where a religious objection would deny someone an important service due to an "abiding monopoly of access." *Hurley*, 515 U.S. at 578. But here, the Commission has not even attempted to introduce any evidence demonstrating that GLSO faces such structural barriers to full participation in society. Nor could it, when Hands On does not discriminate against gays and lesbians as a class, Hands On offers fungible goods widely available elsewhere for the same price (even for free), and there is no evidence of widespread business objections to providing similar goods or services.

3. The Supreme Court has never recognized a compelling government interest in shielding individuals from opposing viewpoints.

Rather than offering any evidence of a structural barrier, the Commission invokes a generalized interest in "remov[ing] the daily affront and humiliation involved in discriminatory denials" of service. Br. at 6-7. In other words, the Commission seeks to prevent individuals from experiencing emotional distress that can accompany a denial of service from those who have different views. While this may be a rational basis for a nondiscrimination law, *see Daniel v. Paul*, 395 U.S. 298, 307 (1969), the Supreme Court has consistently held that protecting people from emotional distress—even far more acute distress than is present here—is not a compelling government interest sufficient to trump First Amendment rights.

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so out of "decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). But the Court did the opposite when it struck down bans on interracial marriage in *Loving v. Virginia*, stating that there was "no legitimate overriding purpose" for the bans other than "invidious racial discrimination." 388 U.S. 1, 11 (1967).

For example, it is difficult to imagine more excruciating humiliation and emotional harm than that endured by the father who saw Westboro Baptist Church picketers with signs stating "God Hates Fags," "You're Going to Hell," and "God Hates You" at the funeral of his son, a Marine "killed in Iraq in the line of duty." *Snyder v. Phelps*, 562 U.S. 443, 448 (2011). A jury found this conduct so outrageous, and the father's emotional distress so acute, that it awarded over $10 million in damages. *Id.* at 450, 456.

Despite this significant distress, the Supreme Court in an 8-1 decision upheld the "bedrock principle underlying the First Amendment" that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 458 (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989)); *see also Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977). Any other result would "effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen v. California*, 403 U.S. 15, 21 (1971).

Nor does the goal of alleviating emotional distress give the government a trump card in the context of public accommodations. In *Dale*, it was very emotionally distressing for a gay scoutmaster to be expelled from the Boy Scouts; indeed, unlike this case, which involved an arms-length business transaction, Dale was expelled from a program that had been a major part of his life since childhood. *Dale*, 530 U.S. at 665. Yet the Court explained that "public or judicial disapproval" of the organization's conduct "does not justify the State's effort to compel the organization to accept members" where such acceptance would violate rights protected by strict scrutiny. *Id.* at 661; *see also Hurley*, 515 U.S. at 574 (exclusion of the LGBT group was "hurtful," but protected).

In *Snyder* and *Dale*, the plaintiffs could point to emotional harm caused by groups that wished to completely exclude or even condemn them; that is not the case here. Hands On willingly serves and employs LGBT individuals; it simply cannot promote the Pride Festival's political message.

And although *Snyder* and *Dale* were constitutional cases, the Supreme Court has held that, whether strict scrutiny is triggered by the constitution or by RFRA, "the consequences are the same." *O Centro*, 546 U.S. at 429-30. The government must make the same particularized showing that it failed to make here.

Finally, when considering harms in the public accommodation context, courts must weigh the harm on both sides—not just the emotional distress of the aggrieved customer, but the financial harm and government coercion imposed upon the owners of the establishment. *Dale*, 530 U.S. at 659. As one gay-rights advocate and scholar put it: "[T]he burden on individuals like [Hands On's owners] outweighs the burden on individuals like [GLSO's leaders]," who have "no difficulty finding [a substitute source for the desired service]," while business like Hands On might be forced to "abandon [their] business." Andrew Koppelman, *Gay Rights*, *Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. Cal. L. Rev. 619, 629-30 (2015).

In the dissenting opinion below, Judge Taylor argued that "gay marriage and same sex relationships are now recognized under [*Obergefell*] as a fundamental right. Regardless of personal or religious beliefs, this is the law that courts are duty bound to follow." Op. 24 (internal citation omitted); see also Br. at 16 (relying on *Obergefell*). But the problem the Court recognized in *Obergefell* was *not* the existence of multiple good-faith views about marriage and sexual identity, but rather the enshrining of a *single* view into law which can be used to "demean[]" and "stigmatize[]" those who did not accept it, treating them as "outlaw[s]" and "outcast[s]." 135 S. Ct. at 2600, 2602. Indeed, the Court in *Obergefell* emphasized that the freedom to form one's own beliefs about deeply personal issues like sex—and to act on those beliefs—is protected by the Constitution as central to each citizen's own dignity and self-definition. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2593.

Justice Kennedy has elsewhere explained that this principle applies fully to religious citizens. For these citizens, living according to their religion "is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts." *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). This freedom includes not just the right to privately hold religious beliefs, but also the right to live by them—to "establish one's religious … self-definition in the political, civic, and *economic* life of our larger community." *Id.* (emphasis added). That freedom is precisely what KRS § 446.350 protects.

4. Enforcing public accommodations laws to punish objections to messages or events, rather than to prevent invidious class-based discrimination, endangers freedom for many groups across the political spectrum.

The Commission has also chosen to enforce its public accommodation law in a "peculiar" way that targets objections to particular messages or events, rather than focusing on invidious discrimination against a class of individuals "as such." *Hurley*, 515 U.S. at 572. The Supreme Court has noted that this type of "peculiar" enforcement is much more likely to collide with other important civil rights, such as speech, association, and free exercise. *Id.* at 573; *see also Dale*, 530 U.S. at 657 (as states have "expanded" their application of public accommodation laws, "the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased").

A more targeted interpretation of public accommodation laws would safeguard civil rights for people of all political persuasions, including LGBT groups. For example, GLSO admits that it would reject a religious organization that wanted to set up a booth condemning homosexuality at the Pride Festival. Brown Dep. at 58-59 (Ex. A). Such conduct should be protected, just as a pro-choice printer's refusal to print religious pro-life messages should be protected, and just as a gay photographer's refusal to photograph a religious anti-gay rally should be protected. But if the

Commission's current interpretation of the law were applied in an even-handed way, the Commission would have to treat objections to hostile religious messages as equivalent to invidious anti-religious discrimination. Sexton Dep. at 13-16 (Ex. C).

In our pluralistic society, the law should not be used to coerce ideological conformity simply to shield some groups from encountering people who disagree with them. Rather, on hotly contested moral issues, the law should "create a society in which both sides can live their own values." Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 877 (2014).

CONCLUSION

The decision of the Court of Appeals should be affirmed on the ground that the Commission's Order violates KRS § 446.350.

Respectfully submitted,

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