COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2017-SC-000278

LEXINGTON-FAYETTE URBAN COUNTY
HUMAN RIGHTS COMMISSION — MOVANT

v.

HANDS ON ORIGINALS, INC. — RESPONDENT

RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

Respondent Hands On Originals (HOO) submits this Response to Movant Lexington-Fayette Urban County Human Rights Commission's (the Commission) Motion for Discretionary Review.

INTRODUCTION

Rarely are cases that involve expressive freedom, religious liberty, and LGBT rights so clear cut that they unite people with opposing ideological perspectives. But this case does. Lesbian print-shop owners, LGBT advocates, and groups that support gay rights have joined with free-speech and religious-liberty groups, and they all agree that the Commission cannot force HOO to print messages that conflict with its owners' beliefs. Such a straightforward legal question with consensus across ideological lines does not warrant this Court's attention.

In particular, three reasons, each of which is discussed below, demonstrate why this Court should deny the Commission's request for discretionary review. First, the Court of Appeals decided this case based on the well-established distinction between unlawfully refusing services because of a customer's protected *status* and lawfully declining to produce speech because of its *message*. This distinction has such deep roots

in the law that even the Commission's Executive Director affirmed it under oath in this very case. This Court need not second-guess or upend that settled legal principle. Second, although the Court of Appeals did not reach the constitutional compelled-speech question that the Circuit Court addressed, that First Amendment doctrine confirms that the Court of Appeals was correct in ruling for HOO. Indeed, longstanding First Amendment jurisprudence discussed by the Circuit Court establishes that the Commission cannot apply its ordinance to compel HOO to print messages that its owners do not want to promote. Third, the Commission has not identified any "special reasons" for this Court to grant discretionary review. *See* CR 76.20. Try as it might, the Commission has not shown a need for Commonwealth-wide guidance on the legal issues raised in its motion.

COUNTERSTATEMENT OF THE CASE

The Commission's brief recitation of the facts does not include record citations, and some of its asserted facts are baseless and without evidentiary support. This counterstatement, in contrast, accurately portrays the facts as established in the record.

HOO is a small business that creates promotional materials (such as shirts) and communicates messages. Adamson Aff. ¶¶ 2, 6-7 (Ex. 1).[1] HOO's Managing Owner, Blaine Adamson, and his two co-owners are Christians who operate their business consistently with the Bible's teachings. *Id.* at ¶¶ 15-16. Adamson does not permit HOO to print items that convey or otherwise support messages inconsistent with his religious beliefs. *Id.* at ¶¶ 26-27. HOO thus regularly declines to print items for message-based reasons, turning down at least thirteen orders for those reasons from 2010 through 2012,

[1] The Circuit Court Clerk's certification of the record on appeal does not assign numerical pagination to the exhibits that HOO filed below in support of its Motion for Summary Judgment on January 13, 2015. Nevertheless, those filings are certified in the record on appeal "in separate volumes." Unless otherwise indicated, the citations to exhibit numbers or letters in this brief refer to the label ascribed to those exhibits in the separately tabbed volumes filed below and certified in the record on appeal.

orders that included shirts promoting a strip club and shirts containing a violent message. *Id.* at ¶ 30; HOO's Supplemental Resp. to Interrog. No. 15 (Ex. 9). Whenever HOO declines an order, it offers to connect the customer to another company that will match HOO's price. Adamson Aff. ¶ 33 (Ex. 1).

Although HOO declines some orders for message-related reasons, it has never refused to work with people because of their race, sex, sexual orientation, or other legally protected characteristic. *See id.* at ¶ 26. HOO works with everyone, including gay and lesbian customers, *id.* at ¶ 49, and regularly hires gay and lesbian employees, *id.* at ¶ 50. HOO has a policy, which is on its website, that reflects this distinction between declining a request because of a message (which HOO does) and refusing a request because of a person's protected status (which HOO does not do). *Id.* at ¶ 26.

The Gay and Lesbian Services Organization (GLSO) advocates for LGBT issues. *See* Brown Dep. at 94-105 (Ex. 504). But its members "come[] from all walks of life and all [sexual] orientations." GLSO's 2012 JustFundKy Grant Application at 4 (Ex. 143). In fact, Aaron Baker, the GLSO's former president, is married to a person of the opposite sex and does not identify as gay. Baker Dep. at 13 (Ex. 505); Brown Dep. at 94 (Ex. 504).

Since 2007, the GLSO has hosted the Lexington Pride Festival, an event that the GLSO admits encourages people to celebrate sexual activity outside of a marriage between a man and a woman. Complainant's Answers to Resp't's Req. for Admis. No. 13 (Ex. 125); Brown Dep. at 29 (Ex. A). The GLSO purchases shirts for the Festival in order to promote that event. Brown Dep. at 13-16 (Ex. 504). The logo for the 2012 Festival was a large number "5" filled with rainbow colors and the words "Lexington Pride Festival." The GLSO conceded that this logo communicates that people should be proud about

engaging in sexual relationships other than marriages between a man and a woman. *See* Brown Dep. at 27-28 (Ex. A); Lowe Dep. at 52-53 (Ex. B).

In February 2012, at the request of a coworker, HOO Sales Representative Kaleb Carter sent an email to a representative of the GLSO named Brad Shepherd, quoting him a price for shirts. Carter Aff. ¶ 5 (Ex. 201). The two exchanged emails, but did not finalize an order. *See* Carter/Shepherd Emails at 00002-00004 (Ex. 202).

In March 2012, GLSO representative Don Lowe called HOO to negotiate a lower price. *See* GLSO Webpage at 00016 (Ex. 103). After Lowe and Adamson exchanged messages, they finally spoke. *See id.* This was the first time that Adamson learned of the GLSO's request for Pride Festival shirts. Adamson Aff. ¶ 35 (Ex. 1).

Lowe said that he needed shirts for the Pride Festival. *Id.* at ¶ 34. Adamson asked Lowe to tell him about the Festival, and Lowe said that it was a gay pride festival in Lexington. *Id.* at ¶ 36. Adamson then asked Lowe what would be printed on the shirts, Adamson Aff. ¶ 37 (Ex. 1); and Lowe gave "a detailed description . . . with the Pride 5 logo [consisting of] a large five with the colors of the rainbow in dots inside and the wording Lexington Pride Festival 5." Lowe Statement to Comm'n at 2 (Ex. 105).[2]

Adamson immediately concluded that producing the shirts would require HOO to create speech—the words "Lexington Pride Festival" with a rainbow-colored 5—expressing that people should take pride in sexual relationships or activity outside of a marriage between a man and a woman. Adamson Aff. ¶ 43 (Ex. 1). He believes that he would disobey God if HOO were to print that message. *Id.* So he told Lowe that HOO could not print the shirts because of his religious beliefs. Lowe Statement to Comm'n at

[2] The Commission is thus wrong to assert that immediately "[a]fter hearing about GLSO and the Pride Festival, Adamson declined to do business with GLSO." Mot. for Rev. at 3. Adamson asked about—and Lowe told him—the message that would be on the shirt before declining the order.

2-3 (Ex. 105).[3] Adamson then stated that "he wouldn't leave [Lowe] hanging." *Id.* at 3. So he offered to connect Lowe to another business that would print the shirts for the same price, but the GLSO declined that offer. Adamson Aff. ¶ 47 (Ex. 1).

Later in March 2012, the GLSO filed a complaint with the Commission. After the parties filed motions for summary judgment, the Commission determined that HOO had engaged in "unlawful discrimination" and ordered HOO "to participate in diversity training." Comm'n Order at 16. The Commission reached this conclusion despite acknowledging that HOO "acts as a speaker" when it "prints a promotional item" for its customers and that "this act of speaking is constitutionally protected." *Id.* at 13-14.

The Fayette Circuit Court reversed and vacated the Commission's Order. Cir. Ct. Op. at 16. Its decision rests on three key bases: first, "the recognized constitutional rights of HOO and its owners to be free from compelled expression," *id.* at 7 (capitalization omitted); second, "HOO's and its owners' free exercise of religion protected by KRS 446.350," *id.* at 13 (capitalization omitted); and third, its conclusion that HOO "declined to print the t-shirts in question because of the[ir] MESSAGE" and the absence of "evidence in this record that HOO or its owners refused to print the t-shirts in question based upon the sexual orientation of GLSO or its members." *Id.*

The Court of Appeals affirmed that decision in a 2-1 ruling. The lead opinion found no evidence demonstrating that HOO declined to print the Pride Festival shirts because of the "sexual orientation" of any individual. Ct. App. Op. at 15. Rather, HOO declined the request because of the messages on the shirts. And after noting that "the symbolism of th[e] design" on the shirt "clearly imparted a *message*," *id.* at 16, the lead

[3] The Commission inaccurately claims that Adamson said "he could not support an event that encouraged homosexual behavior." Mot. for Rev. at 3. Not a single piece of evidence suggests that Adamson said "homosexual behavior" to Lowe.

opinion explained that nothing in Lexington's ordinance prohibits HOO from declining to promote a "*viewpoint* or *message*," *id.* at 18. The concurring opinion took a different approach, concluding that "KRS 446.350, Kentucky's Religious Freedom Restoration Statute," prohibits the government from forcing HOO to print messages that violate its owners' religious beliefs, particularly when HOO connects potential customers with those messages to another local print shop. *Id.* at 19-21 & n.7. In contrast, the dissenting opinion said that HOO's decision not to print the Pride Festival shirts "was discriminatory against GLSO and its members based upon sexual orientation." *Id.* at 23. But the dissent did not consider the Circuit Court's alternative holdings (both of which HOO raised) that the First Amendment's compelled-speech doctrine and KRS 446.350 forbid the government from forcing HOO to print messages in conflict with its owners' convictions. *See id.* at 23-26.

ARGUMENT

I. The Court of Appeals correctly held that HOO did not violate the Ordinance.

The Court of Appeals and the Circuit Court appropriately differentiated between unlawfully refusing services because of a customer's protected *status* and lawfully declining to produce speech because of its *message*. This status/message distinction is deeply rooted in the law. *See, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572-74 (1995) (concluding that parade organizers did not discriminate against "homosexuals as such" when they declined an LGBT group's request to "carry[] its own banner" because they did not want to support the group's message but otherwise welcomed "openly gay, lesbian, or bisexual individuals" to "participat[e] . . . in various units admitted to the parade"); *World Peace Movement of*

Am. v. Newspaper Agency Corp., 879 P.2d 253, 257–58 (Utah 1994) ("[T]he [Nondiscrimination] Act prohibits [a publisher] from denying its advertising services on the basis of the religion of the person seeking those services. Nevertheless, under the plain language of the Act, a publisher may discriminate on the basis of content even when content overlaps with a suspect classification like religion."); *Bono Film & Video, Inc. v. Arlington Cnty. Human Rights Comm'n*, 72 Va. Cir. 256, *1-2 (2006) (discussing a case in which an audio-video company refused to reproduce a video entitled "Gay and Proud" because the owner objected to its message, and noting the human-rights commission's conclusion that its nondiscrimination law "protects individuals from discrimination based on their sexual orientation, and does not prohibit content based discrimination").

Even the Commission's own representative in this case admitted under oath that "[i]f [a] company does not approve of the [requested] message[,] that is a valid non-discriminatory reason to refuse the work." Jack Minor, *T-Shirt Company in Crosshairs*, World News Daily, at 2 (Ex. 165); *accord* Sexton Dep. at 32-34, 47-48 (Ex. C). Since HOO declined to create the requested shirts because of the message on them and not because of the sexual orientation of the customer, the courts below properly held that HOO did not violate the ordinance.

The Commission has not cited any evidence showing that HOO's decision was motivated by the sexual orientation of any individual. HOO will print for everyone—including gays, lesbians, and the GLSO—so long as the requested message is not contrary to its owners' religious beliefs. *See* Resp't's Resp. to Interrog. No. 5 (Ex. 163). Indeed, HOO has served and employed—and will continue to serve and employ—gays and lesbians. *See* Adamson Aff. ¶¶ 49-50 (Ex. 1). Notably, HOO has printed materials for

a lesbian singer who performed at the 2012 Pride Festival. *See id.* at ¶ 49.

In addition to this evidence showing that HOO was not motivated by anyone's sexual orientation, the record conclusively demonstrates that HOO acted because of the message on the Pride Festival shirts. HOO has a longstanding practice of declining to produce materials for message-based reasons. Adamson Aff. ¶ 30 (Ex. 1). And in this case, Adamson did not decline the order immediately when he learned that it was for the GLSO. Rather, he asked Lowe what would be on the shirts, and Lowe gave him "a detailed description" of its contents. Lowe Statement to Comm'n at 2 (Ex. 105). It was only then that HOO declined the GLSO's request. The Commission's own representative testified that these facts tend to show that HOO was motivated by the message rather than the customer's sexual orientation. Sexton Dep. at 41 (Ex. C).

Even prominent LGBT advocates agree with the Court of Appeals' decision. Professor John Corvino, author of *Debating Religious Liberty and Discrimination*, wrote that the Court of Appeals "was correct" to hold that HOO was not "guilty of sexual orientation discrimination." John Corvino, *Why Print Shops Shouldn't Be Forced to Make LGBTQ Pride T-Shirts*, Slate, May 15, 2017, http://slate.me/2rYHCwB. He explained that HOO "was not refusing to sell the very same items to LGBTQ individuals . . . that it sells to other customers; it was refusing to sell a particular design"—"to write a message"—that it would not write for or sell to anyone. *Id.* That is not sexual-orientation discrimination.

The Commission is thus wrong to claim that the law is "unsettled . . . in the Commonwealth" when a public accommodation "denies service to [an] individual or a group due to their sexual orientation or the message they present." Mot. for Rev. at 4. The

law is clear: if a business declines a request because of a customer's sexual orientation, that is unlawful; but if a creator of speech declines an order because of the message presented, that is permissible. There is no need for this Court to weigh in on this settled question.

Attempting to manufacture a basis for review, the Commission mischaracterizes the Court of Appeals' decision, claiming that it "would allow businesses to intentionally discriminate against and [sic] individual or groups residing in their community." Mot. for Rev. at 5. This is flatly false. The decision below permits businesses that create expression to decline to promote messages that they do not want to support. But it gives no one a license to discriminate against individuals based on their protected characteristics.

Another mischaracterization is that the Court of Appeals allegedly held that "the 'Fairness Ordinance' is not enforceable by the [Commission's] administrative process." Mot. for Rev. at 5. That is baseless. The Court of Appeals never once suggested that Lexington's public-accommodation law "is not enforceable." The court simply said that HOO did not violate the ordinance in this instance.

The Commission also distorts the standard of review that applies to the question whether "HOO violated the LFUCG Fairness Ordinance." Mot. for Rev. at 4. Whether the facts in the record establish that HOO violated the ordinance is a legal issue. *See Bd. of Educ. of Fayette Cty. v. Hurley-Richards*, 396 S.W.3d 879, 885 (Ky. 2013) (explaining that "the application of [an agency's] facts to the legal standard" in the governing statute is a "matter of law"). Such questions of law are "subject to de novo review on appeal." *Id.* Therefore, the Commission's second question presented, which asks whether the

Court of Appeals' conclusion that "HOO violated the LFUCG Fairness Ordinance [was] arbitrary and capricious," is thoroughly flawed. Mot. for Rev. at 4. The arbitrary-and-capricious standard does not apply to that legal question.

II. The First Amendment's compelled-speech doctrine confirms the Court of Appeals' resolution of this case.

The First Amendment's compelled-speech doctrine also forbids the Commission from ordering HOO to print the GLSO's message. The Court of Appeals did not reach that issue, *see* Ct. App. Op. at 2, but the Circuit Court included it as one of the bases for its decision, *see* Cir. Ct. Op. at 7-13. That constitutional doctrine provides further support for the Court of Appeals' decision affirming the Circuit Court's ruling.[4]

Both the United States and Kentucky Constitutions protect freedom of expression from government coercion. U.S. Const. amend. I; Ky. Const. § 8; Ky. Const. § 1. That "includes both the right to speak freely and the right to refrain from speaking." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The government thus cannot force its citizens to convey messages that they deem objectionable or punish them for declining to convey such messages. *See, e.g.*, *Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986) (plurality) (forbidding government from requiring a business to include a third party's expression in its billing envelope); *Wooley*, 430 U.S. at 717 (forbidding government from requiring citizens to display state motto on license plates); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (forbidding government from requiring a newspaper to include an article). Nor may the government apply a sexual-orientation public-accommodation law to infringe these expressive freedoms. *See Hurley*,

[4] The religious-freedom guarantees of KRS 446.350, as the Circuit Court and the Court of Appeals' concurrence concluded, provide additional grounds to resolve this case in HOO's favor. *See* Cir. Ct. Op. at 13-15; Ct. App. Op. at 19-21. But due to space constraints, HOO does not address that issue in detail in this response.

515 U.S. at 572-73 (forbidding government from applying such a law to require parade organizers to facilitate the message of an advocacy group); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (forbidding government from applying such a law to force the Boy Scouts to accept a leader who openly disagreed with the group's position on sexual morality).

The right to be free from compelled speech is "enjoyed by business corporations" like HOO. *Hurley*, 515 U.S. at 574; *see also Citizens United v. FEC*, 558 U.S. 310, 342 (2010) (collecting cases); *Pac. Gas*, 475 U.S. at 16 (plurality). "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak" on behalf of a customer. *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 801 (1988).

The Pride Festival shirt, which displayed the words "Lexington Pride Festival" and a rainbow-colored logo, is undoubtedly expression. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 18-19 (1971) (jacket with a phrase is speech); *Frudden v. Pilling*, 742 F.3d 1199, 1203-06 (9th Cir. 2014) (school uniform with words and a logo is speech). Even the GLSO conceded that the shirt communicates messages and thus is speech. *See* Brown Dep. at 27-28 (Ex. A); Lowe Dep. at 52-53 (Ex. B).

HOO's role in producing expressive shirts qualifies it as a speaker under well-established constitutional jurisprudence. Individuals and organizations are constitutionally protected speakers when they produce or distribute messages that originate with others, even if they earn money for doing so. *See, e.g.*, *Hurley*, 515 U.S. at 569-70 (parade organization that compiles the "multifarious voices" of others is a speaker); *Riley*, 487 U.S. at 795-98 (professional fundraisers paid to deliver customers'

messages are speakers); *Wooley*, 430 U.S. at 715 (motorists forced to display state motto on license plate are speakers); *Tornillo*, 418 U.S. at 258 (newspaper is a speaker when it compiles writings of third parties on its editorial page); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964) (newspaper is a speaker when its customers pay it to print an ad).

In fact, all involved in the process of creating and disseminating expression are protected speakers, including not just a designer of a logo, but also a creator of a shirt bearing that logo. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 n.1 (2011) (finding no constitutional distinction between "creating" or "distributing" speech); *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015) ("[E]xpression frequently encompasses a sequence of acts by different parties . . . . The First Amendment protects [them all]."); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010) (similar). Therefore, "[p]ublishers disseminating the work of others," *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 925 (6th Cir. 2003), and businesses that apply tattoos designed or chosen by their customers, *Buehrle*, 813 F.3d at 977-78; *Anderson*, 621 F.3d at 1061-63; are fully protected by the First Amendment. So too is a promotional printer like HOO. Even the Commission admitted in its ruling below that HOO "acts as a speaker" when it "prints a promotional item" for its customers and that "this act of speaking is constitutionally protected." Comm'n Order at 13-14.

The most stringent level of constitutional review—strict scrutiny—applies to government action that compels a business to convey expression or that punishes it for declining to do so. *Riley*, 487 U.S. at 795-801; *Pac. Gas*, 475 U.S. at 19 (plurality). Under that standard, the government's action is unconstitutional unless it advances a

compelling interest *and* is a "narrowly tailored means of serving [that] compelling [government] interest." *Id.* Notably, the U.S. Supreme Court has twice applied constitutional review when evaluating similar applications of sexual-orientation public-accommodation laws, and in both instances the Court held that constitutional scrutiny was not satisfied. *See Hurley*, 515 U.S. at 578-79; *Dale*, 530 U.S. at 657-59. As the *Hurley* Court explained, forcing an organization "to modify the content of [its] expression" "allow[s] exactly what the [First Amendment] forbids," and thus the government has no legitimate—let alone compelling—interest in doing that. 515 U.S. at 578. The same is true here, and as a result, the First Amendment forbids the Commission from compelling HOO to print messages that its owners deem objectionable.

Failing to uphold this constitutional protection threatens expressive freedom for people of all ideological stripes. If HOO loses, as Professor Corvino has explained, no legal protection would exist for "the baker who declines to write 'Homosexuality is a detestable sin'; the print shop owner who declines to make 'White Pride' T-shirts; [and] the billboard designer who declines to erect an 'Abortion is murder' display." Corvino, *supra*. Because expressive freedom crosses ideological lines, it is no surprise that HOO has received support from "a lesbian owned and operated t-shirt company," BMP Email at 1 (Ex. 11), and groups that "strongly support[] . . . gay rights," Cato Am. Br. 1. But if this constitutional freedom does not shield HOO, neither does it protect others. All of our expressive freedom rises and falls together.

The Court of Appeals' dissenting opinion did not even address the compelled-speech issue, choosing instead to discuss whether the speech that the GLSO wanted on the Pride Festival shirts was within "the protections of the First Amendment"—a

constitutional issue that the parties did not dispute. Ct. App. Op. at 25-26. In doing this, the dissent ignored HOO's argument and the Circuit Court's conclusion that the First Amendment forbids the Commission from compelling HOO to express the GLSO's message. Because the dissent overlooked that dispositive issue, its analysis is unpersuasive. The compelled-speech doctrine thus reinforces the outcome that the Court of Appeals reached and confirms that this Court need not grant review.

III. The Commission has not identified any other special reasons for review.

The Commission presents one additional argument why this Court should grant review—namely, that the municipalities that have enacted similar ordinances in the Commonwealth need guidance for future cases like this one. But a number of factors demonstrate that this argument does not provide a "special reason" to grant review. First, as explained above, the Court of Appeals' decision rests on the long-established distinction between declining a request because of its message and refusing a customer because of his protected-class status. Municipalities within the Commonwealth need no guidance on that. Second, this case is the only one of its kind that has ever been litigated in the Commonwealth, and thus it does not call for this Court's attention. Third, that these sexual-orientation nondiscrimination ordinances exist only in a few municipalities, and not in state law, demonstrates that the interpretation of those laws is not a legal question of utmost importance in Kentucky and is not necessary to "giv[e] the Commonwealth direction on how to respond to issues similar to the one presented" here. Mot. for Rev. at 5.

CONCLUSION

For the foregoing reasons, this Court should decline to review this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel hereby certifies that on July 11, 2017, a true and accurate copy of the foregoing document was served first-class mail, postage prepaid, upon the following:

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