COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO.: 2015-CA-000745

LEXINGTON-FAYETTE URBAN COUNTY HUMAN RIGHTS COMMISSION and GAY AND LESBIAN SERVICES ORGANIZATION — APPELLANTS

vs.

HANDS ON ORIGINALS, INC. — APPELLEE

Appeal from the Fayette Circuit Court
Civil Action No. 14-CI-04474

BRIEF OF APPELLEE HANDS ON ORIGINALS, INC.

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CERTIFICATE REQUIRED BY CR 76.12(6)

I hereby certify that on the 5th day of February, 2016, true and accurate copies of this brief were served by first-class U.S. Mail, postage prepaid, to the Honorable James D. Ishmael, Jr., Fayette Circuit Court Judge, 120 North Limestone, Lexington, KY 40507, Edward E. Dove, 201 W. Short St., Ste. 300, Lexington, KY 40507; Richard G. Griffith, Elizabeth Muyskens, 300 W. Vine St., Ste. 2100, Lexington, KY 40507; Thomas Patrick Monaghan, 6375 New Hope R., New Hope, KY 40052; David B. Tachau, 3600 National City Tower, 101 S. Fifth Street, Louisville, KY 40202; Richard B. Katskee, Gregory M. Lipper, 1901 L. St., N.W., Ste. 400, Washington, D.C.; 20036; Christopher L. Thacker, 111 Church Street, Ste. 200, Lexington, KY 40507; Eugene Volokh, 405 Hilgard Ave., Los Angeles, CA 90095; Douglas Laycock, 580 Massie Rd., Charlottesville, VA 22903; Stephanie Barclay, Adele A. Keim, Luke Goodrich, 1200 New Hampshire Ave., N.W., Ste. 700, Washington, D.C. 20036; and Edward Metzger, III, 40 W. Pike Street, Covington, KY 41011. I also certify that the record on appeal has not been withdrawn from the Fayette Circuit Court Clerk.

Bryan H. Beauman

STATEMENT REGARDING ORAL ARGUMENT

Appellee Hands On Originals believes that oral argument would assist the Court in deciding the issues presented. This case raises important questions regarding fundamental constitutional principles, like expressive freedom, and a recently enacted state statute that protects the free exercise of religion. Oral argument is thus appropriate in this case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

The Lexington-Fayette Urban County Human Rights Commission (the Commission) issued an Order requiring Hands On Originals (HOO) and its Managing Owner Blaine Adamson to print messages that conflict with their religious beliefs. Yet that Order, as the Circuit Court concluded, violates the bedrock constitutional principle that everyone, including businesses and their owners, "should decide for [themselves] the ideas and beliefs deserving of expression[.]" *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013).

That constitutional principle, at issue because Mr. Adamson declined to produce advocacy materials for the Gay and Lesbian Services Organization (GLSO), protects all individuals, regardless of their beliefs. It is thus no surprise that "a lesbian owned and operated t-shirt company," BMP Email at 1 (Ex. 11),[1] and groups that "strongly support[] . . . gay rights," Cato Am. Br. 1, have publicly supported HOO. For just as surely as the First Amendment protects HOO against the GLSO's discrimination claim, it also forecloses a religious-discrimination claim against an LGBT printer who refuses to create materials that disparage gays and lesbians. Thus, a ruling for HOO upholds the freedom of *all* who are asked to produce expression that they consider objectionable.

COUNTERSTATEMENT OF THE CASE

The Commission's Statement of the Case does not include record citations, is not supported by substantial (or any) evidence in many of its assertions, and is incomplete for

[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.

purposes of addressing HOO's claims. HOO thus provides this counterstatement.

I. HOO's Expressive Operations and Religious Convictions

HOO is a small business that creates promotional materials (such as shirts) and communicates messages. Adamson Aff. ¶¶ 2, 6-7 (Ex. 1). Its work is expressive and artistic. *Id.* at ¶¶ 9-10; *see also id.* at ¶ 13 (HOO owns copyrights of artwork it produces).

Mr. Adamson and his two co-owners are Christians who strive to operate their business consistent with the Bible's teachings. Adamson Aff. ¶¶ 15-16 (Ex. 1); Schneider Aff. ¶¶ 5-6 (Ex. 401); Hoetker Aff. ¶¶ 5-6 (Ex. 402). HOO has a Christian Outfitters division, which creates promotional materials for Christian groups and events. Adamson Aff. ¶ 24 (Ex. 1). That division's purpose is to produce materials that communicate meaningful Christian messages. *Id.* at ¶ 25.

Mr. Adamson does not permit HOO to print items that convey or otherwise support messages inconsistent with his religious beliefs. Adamson Aff. ¶¶ 26-27 (Ex. 1). He thus instructs HOO's sale representatives that they are not to accept orders when (1) the messages on requested materials are inconsistent with his religious beliefs or (2) the requested materials promote an event or organization that conveys messages inconsistent with those beliefs. *Id.* at ¶ 27; Carter Aff. ¶ 3 (Ex. 201).

HOO regularly declines to print items for those message-based reasons, turning down at least thirteen orders for those reasons from 2010 through 2012. Adamson Aff. ¶ 30 (Ex. 1). Those declined orders include shirts promoting a strip club, pens promoting a sexually explicit video, and shirts containing a violent message. *See* HOO's Supplemental Resp. to Interrog. No. 15 (Ex. 9). It is standard practice within the industry to decline to print materials containing messages that the owners do not want to support. Adamson Aff. ¶ 32 (Ex. 1). Whenever HOO declines an order, it offers to connect the

customer to another company that will match HOO's price. *Id.* at ¶ 33.

While HOO declines some orders for message-related reasons, it has never declined to work with people because of their race, sex, sexual orientation, or other legally protected characteristic. *See* Adamson Aff. ¶ 26 (Ex. 1). On the contrary, HOO works with everyone, including gay and lesbian customers, *id.* at ¶ 49, and regularly hires gay and lesbian employees, *id.* at ¶ 50. HOO has posted on its website a policy that reflects this distinction between declining a request because of a message (which HOO does) and declining a request because of a person's protected status (which HOO does not do). *Id.* at ¶ 26; ROA 235 (Cir. Ct. Op. 3).

II. The GLSO's Ideological Expression and Advocacy

The GLSO is an advocacy group. Through its various programs and publications—such as its newsletter, magazine, and library—the GLSO speaks in favor of sexual relationships and activity outside of a marriage between a man and a woman. *See* Brown Dep. at 94-105 (Ex. 504). The GLSO seeks to "change attitudes" concerning these and similar issues. GLSO Bluegrass Gay Phonebook at 5 (Ex. 111).

The GLSO's members and its constituents "come[] from all walks of life and all [sexual] orientations." GLSO's 2012 JustFundKy Grant Application at 4 (Ex. 143). Indeed, 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).

III. The GLSO's Pride Festival and Pride Festival Shirts

Since 2007, the GLSO has hosted the Lexington Pride Festival, which is an advocacy event that, as the GLSO admits, encourages people to be proud about and celebrate sexual relationships and 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 event is not restricted to gays or lesbians; in fact, the attendees identify with diverse sexual orientations. Brown Dep. at 34 (Ex. 504).

GLSO-approved performers at the Pride Festival have expressed profanity and crass sexual messages during their performances. *See* Resps. from the 2011 Lexington Pride Festival Survey at 4-8 (Ex. 129) (indicating that performers used sexually explicit language during the 2011 Festival); Brown Dep. at 39-42, 87-88, 92-93 (Ex. A). GLSO-approved vendors at the Festival have included Hustler and other groups that distributed or communicated sexually explicit messages and materials. *See* Tuma Dep. at 6-7, 14-21 (Ex. 501); Tuma Dep. Exs. 2-5 (Ex. 501); Johnson Dep. at 5-6 (Ex. 502).

The GLSO purchases shirts for the Pride Festival in order to promote and market that event. Brown Dep. at 13-16 (Ex. 504). The logo selected for the 2012 Pride Festival was a large number "5" filled with rainbow colors and the words "Lexington Pride Festival." The GLSO has 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).

IV. Communications between the GLSO and HOO

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 a few 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 try to negotiate a lower price. *See* GLSO Webpage at 00016 (Ex. 103); Comm'n Intake Email at 2 (Ex. 104). After Mr. Lowe and Mr. Adamson exchanged messages, they finally spoke. *See* GLSO Webpage at 00016 (Ex. 103). This was the first time that Mr. Adamson learned of

the GLSO's request. Adamson Aff. ¶ 35 (Ex. 1). Mr. Lowe said that he needed shirts for the Pride Festival and that he would like to place an order. *Id.* at ¶ 34.

Mr. Adamson asked Mr. Lowe to tell him about the Pride Festival. Adamson Aff. ¶ 36 (Ex. 1). Mr. Lowe indicated that it was a gay pride festival in downtown Lexington. *Id.*; Lowe Dep. at 36-37 (Ex. B). Mr. Adamson also asked Mr. Lowe what would be printed on the shirts. Adamson Aff. ¶ 37 (Ex. 1). Mr. Lowe gave "a detailed description of the front 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); *see also* Lowe Dep. at 36-37, 41, 43-45, 84 (Ex. B).

Mr. Adamson 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 sexual activity outside of a marriage between a man and a woman. Adamson Aff. ¶ 43 (Ex. 1). He believes that he would disobey God if he were to authorize HOO to print that message. *Id.*

Mr. Adamson told Mr. Lowe that HOO could not print the shirts because those items "did not reflect the values of [HOO]" and HOO "did not want to support the festival in that way." Lowe Statement to Comm'n at 2-3 (Ex. 105); Lowe Dep. at 43-45 (Ex. B). Mr. Adamson then stated that "he wouldn't leave [Mr. Lowe] hanging." Lowe Statement to Comm'n at 3 (Ex. 105). So he offered to connect Mr. Lowe to another business that would print the shirts for the same price, but the GLSO declined that offer. Adamson Aff. ¶ 47 (Ex. 1); Lowe Dep. at 37, 43, 48 (Ex. B); Comm'n Intake Email at 2 (Ex. 104).

V. Other Printers for the Pride Festival Shirts

Another printing company named Cincy Apparel provided the shirts for the 2012

Pride Festival free of charge. Complainant's Resp. to Interrog. No. 9 (Ex. 108). This saved the GLSO $3,000. *See* GLSO Newsletter, May 2012, at 2 (Ex. 106).

Many other local and national printers were and are willing to produce shirts promoting the Pride Festival. Indeed, at the time these events occurred, the GLSO acknowledged that it was contacted by "nearly a dozen t-shirt printing companies, both local and national," that said "they would be happy to print [the] t-shirts for the Pride Festival." GLSO Newsletter, May 2012, at 2 (Ex. 106); Baker Dep. at 8-9 (Ex. 505).

VI. Procedural History

Later in March 2012, the GLSO filed its complaint with the Commission against HOO, alleging that HOO engaged in unlawful discrimination. After the Commission investigated and the parties filed motions for summary judgment, the hearing examiner issued a recommended decision against HOO in October 2014. ROA 26. After HOO filed objections to that, the Commission issued its "Order Adopting Recommended Summary Judgmeny [sic] of the Presiding Hearing Examiner" in November 2014. ROA 24.

In its Order, the Commission concluded that HOO had engaged in "unlawful discrimination," "permanently enjoined [HOO] from discriminating against individuals because of their . . . sexual orientation," and ordered HOO "to participate in diversity training." ROA 41 (Order 16).[2] The Commission settled on this outcome despite correctly acknowledging, first, that HOO "acts as a speaker" when it "prints a promotional item" for its customers and, second, that "this act of speaking is constitutionally protected." ROA 38-39 (Order 13-14).

HOO timely appealed the Commission's Order to Fayette Circuit Court. ROA 2.

[2] The Commission's own attorney acknowledged that this "diversity training" mandate "create[d] a whole new realm of constitutional arguments pertaining to freedom from expression and the free exercise of religion." ROA 50-51.

After carefully applying the standard of review in KRS 13B.150(2), the Circuit Court reversed and vacated the Commission's Order because, among other reasons, it is "[i]n violation of Constitutional and statutory provisions" and "[w]ithout support of substantial evidence on the whole record." ROA 248 (Cir. Ct. Op. 16). The Circuit Court's decision rests on three key conclusions. First, it held that the Commission's Order "violates the recognized constitutional rights of HOO and its owners to be free from compelled expression." ROA 239 (Cir. Ct. Op. 7) (capitalization omitted). Second, it concluded that the Order "violates HOO's and its owners' free exercise of religion protected by KRS 446.350." ROA 245 (Cir. Ct. Op. 13) (capitalization omitted). Third, it held that "[t]here is no 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"; rather, "HOO and its owners declined to print the t-shirts in question because of the[ir] MESSAGE." *Id.* (emphasis in original). The Circuit Court's decision should be affirmed.

ARGUMENT

I. The Standard of Review Is De Novo.

This Court must uphold the Circuit Court's decision if the Commission's Order is "[i]n violation of constitutional or statutory provisions," "[i]n excess of the . . . authority of the agency," "[w]ithout support of substantial evidence on the whole record," "[a]rbitrary, capricious, or characterized by abuse of discretion," or "[d]eficient as otherwise provided by law." KRS 13B.150(2).

In an appeal that originates with an administrative ruling, this Court reviews "issues of law," both constitutional and statutory, "on a de novo basis." *Aubrey v. Office of Attorney Gen.*, 994 S.W.2d 516, 518-19 (Ky. App. 1998). The legal issues reviewed de novo in this case include the interpretation of the public-accommodations ordinance. *Bd.*

of Educ. of Fayette Cty. v. Hurley-Richards, 396 S.W.3d 879, 885 (Ky. 2013) ("the reviewing court is not bound by an administrative body's interpretation").[3]

While deference ordinarily "extends to agency *fact-finding*," *id.* at 882, it does not apply here for two reasons. First, when reviewing a First Amendment compelled-speech claim like HOO raises, "a rule of federal constitutional law" requires appellate courts to "conduct an independent examination of the record as a whole, without deference to [lower tribunals]." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 567 (1995). Second, the Commission decided this case on summary judgment, a procedure that "involve[s] no fact finding" and is reviewed "*de novo*," *Caniff v. CSX Transp., Inc.*, 438 S.W.3d 368, 372 (Ky. 2014); thus, there is no basis for deferring to the Commission's rendition of the facts.

II. The Circuit Court Correctly Held that the Commission's Order Violates HOO's and its Owners' Constitutional Freedom from Compelled Expression.

A. The Freedom from Compelled Expression Applies in this Case.

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. The constitutional right to free speech "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 therefore 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.*

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[3] Although courts at times defer to an agency's statutory interpretation, *see* Comm'n Br. 3, deference is not appropriate here because the Commission, "per [its] practice," "accepted" the "recommended decision" of a "Hearing Officer" who is not a Commission member and lacks expertise in construing the ordinance. Comm'n Br. i. *See Hurley-Richards*, 396 S.W.3d at 885 n.9 (noting that deference was "inapplicable" because the agency decision was issued by an "*ad hoc* . . . [t]ribunal" that lacked "special expertise in administering the statute").

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 sexual-orientation public-accommodations laws to infringe these expressive freedoms. *See Hurley*, 515 U.S. at 572-73 (forbidding government from applying such a law to require parade organization 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 morality).

This constitutional protection exists for a lofty and sacrosanct purpose—to shield "the sphere of intellect" and the "individual freedom of mind" from governmental intrusion. *Wooley*, 430 U.S. at 714-15. It ensures that the government cannot force individuals or organizations to be "instrument[s] for fostering public adherence to an ideological point of view [they] find[] unacceptable.'" *Id.* at 715.

This right 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). Therefore, the "sale or dissemination" of expression is "protected under the First Amendment." *Mastrovincenzo v. City of New York*, 435 F.3d

78, 92 (2d Cir. 2006); *see also Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1063 (9th Cir. 2010) ("[T]he business of tattooing qualifies as purely expressive activity . . . and is therefore entitled to full constitutional protection").

The shirt promoting the GLSO's 2012 Pride Festival, which displayed the words "Lexington Pride Festival" and a rainbow-colored "5" logo, undoubtedly constitutes 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 the words "Tomorrow's Leaders" and a logo is speech). Even the GLSO concedes that its Pride Festival shirt communicates messages and thus qualifies as 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. Indeed, 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.*, *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (public broadcaster is a speaker when it "compil[es] . . . the speech of third parties"); *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, for example, not just a designer of a logo, but also a creator of a shirt bearing that logo. *See Brown v. Entm't Merchants 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.*, --- F.3d ---, No. 14-15354, 2015 WL 9487716, at *3 (11th Cir. Dec. 29, 2015) ("[E]xpression frequently encompasses a sequence of acts by different parties . . . . The First Amendment protects [them all]."); *Anderson*, 621 F.3d at 1061-62 (similar). Thus, "[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*, 2015 WL 9487716 at *2-3; *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 Order that HOO "acts as a speaker" when it "prints a promotional item" for its customers and that "this act of speaking is constitutionally protected." ROA 38-39 (Order 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 convey expression. *Riley*, 487 U.S. at 795-801; *Pac. Gas*, 475 U.S. at 19 (plurality). But the Commission cannot satisfy that standard, as explained in Section (II)(B) below. *See infra* at 18-22.

1. *Hurley* Dictates that HOO Must Prevail.

Hurley involved a government's attempt to apply its sexual-orientation public-accommodations law to an organization that widely offered its speech to the public, 515 U.S. at 562, and permitted gays and lesbians to access its speech, *id.* at 572, but declined to use that speech to advance some messages, *id.* The U.S. Supreme Court *unanimously* held that the government could not apply that law to force that organization to convey

unwanted messages. *See id.* at 572-73. That decision, as the Circuit Court held, controls here and forbids the Commission from applying the ordinance to HOO under these circumstances. ROA 243 (Cir. Ct. Op. 11). Three reasons demonstrate why this is so.

First, both *Hurley* and this case involve compelled access to communicative mediums that by their nature express messages. The public-accommodations statute in *Hurley* compelled access to "a form of expression"—a parade. 515 U.S. at 568. Likewise, the ordinance here compels access to expression—HOO's promotional printing.

Second, the application of the public-accommodations statute in *Hurley* forced the parade organization "to alter the expressive content of [its speech]." *Id.* at 572-73. Here too, this application of the public-accommodations law requires HOO to alter its speech by creating promotional materials that it would not otherwise print.

Third, *Hurley* affirmed that entities like the parade organization and HOO do not discriminate against gays and lesbians when they serve LGBT individuals but decline to promote messages of LGBT advocacy groups. *Id.* at 572. In *Hurley*, the Court explained that the parade organization did not "exclude homosexuals as such"—indeed, "openly gay, lesbian, or bisexual individuals" were welcome to "participat[e] . . . in various units admitted to the parade." *Id.* Rather, the organizers declined an advocacy group's request to participate as a "unit carrying its own banner," *id.* at 572, because they did not want to support the group's message promoting "social acceptance" of LGBT causes, *id.* at 574. Similarly here, HOO gladly serves all *customers*, including gays and lesbians, but cannot print *messages* that conflict with its owners' beliefs, including some messages requested by LGBT advocacy groups like the GLSO. Adamson Aff. ¶¶ 26, 30, 49 (Ex. 1) (indicating that one of HOO's customers is a lesbian singer who performed at the Pride

Festival). *Hurley* establishes that this is not discrimination against gays and lesbians.

Despite these similarities, the Commission tries to distinguish *Hurley*. It primarily argues that, unlike this case, *Hurley* did not involve a business—"a traditional public accommodation (ie: [sic] restaurant, hotel, store, etc.)." Comm'n Br. 8. But *Hurley* itself expressly states that the right to be free from compelled speech is "*enjoyed by business corporations generally*," including "professional publishers" that (like HOO) print speech that originates with others. 515 U.S. at 574 (emphasis added); *see also supra* at 9-10.

The Commission also claims that *Hurley* does not control because (1) HOO is not engaged in "expressive activity" when it prints promotional materials and (2) HOO's expression is not affected by this application of the ordinance. Comm'n Br. 8. But HOO refutes the first point in Section (II)(A), *supra* at 10-11, and the second point in Section (II)(A)(2), *infra* at 13-14. Hence, the Commission has failed to distinguish *Hurley*.[4]

2. The Commission's Order Adversely Affects HOO's Speech.

The Commission implies that HOO needs to show that its speech will be affected to prevail on its compelled-speech claim. Comm'n Br. 8. Yet the Commission's cramped view is wrong because the government violates the prohibition on compelled speech whenever it invades the "freedom of mind" by requiring a citizen to express or disseminate speech with which he disagrees. *See Wooley*, 430 U.S. at 714.

Nevertheless, the Commission's Order, which requires HOO to create messages that its owners consider objectionable, adversely affects HOO's speech in at least three ways. First, the Order requires HOO to convey unwanted messages written on the shirts that it is forced to print. Adamson Aff. at ¶ 60 (Ex. 1). Second, requiring HOO to print

[4] The Commission unpersuasively attempts to distinguish *Dale* on the same grounds that it tries to distinguish *Hurley*. *See* Comm'n Br. 9-11.

the Pride Festival shirts would force it to communicate messages that directly conflict with its religious beliefs. *See id.* at ¶ 43. This inconsistency between expression and belief would pressure HOO to speak out against the messages printed on the Pride Festival shirts. *See id.* at ¶ 64. But such pressure to "respon[d]" to compelled speech "is antithetical to the free[dom of expression] that the First Amendment seeks to foster." *Pac. Gas*, 475 U.S. at 16 (plurality). Third, the Commission's Order establishes that so long as HOO remains in business, it must print messages that conflict with its owners' beliefs. This pressures the owners to close their business and forfeit their constitutional right to create shirts with meaningful Christian messages. *See* Adamson Aff. at ¶ 25 (Ex. 1); *Tornillo*, 418 U.S. at 256-57 (noting that one unconstitutional effect of compelled speech is pressure on the speaker to "blunt[]" or "reduce[]" its other expression).

3. The Commission's "Perceived Endorsement" Arguments Are Misplaced.

The Commission contends that "there is little chance that people would assume anything printed on a t-shirt by HOO was an idea or message endorsed by HOO." Comm'n Br. 9. But it matters not what "a bystander would think" because "th[at] is not the test." *Frudden*, 742 F.3d at 1204-05. Rather, the test is whether an individual is forced "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley*, 430 U.S. at 715. That standard is violated whenever the government overrides an individual's freedom to decide which ideas are deserving of expression by requiring him to convey speech with which he disagrees. *See id.* This is true regardless of whether others perceive him as an endorser of the message.[5]

[5] If the Commission's argument were correct, students could be forced to recite the Pledge of Allegiance so long as their fellow students do not believe that they endorse the pledge's message. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Nonetheless, the undisputed evidence contradicts the Commission's claim that observers will not think that HOO supports the messages it prints. "It is standard practice within the . . . industry to decline to print materials containing messages that the owners do not want to support." Adamson Aff. ¶ 32 (Ex. 1) (citing examples). Indeed, HOO has a longstanding practice of referring orders whenever Mr. Adamson does not want to promote a customer's message. *Id.* at ¶¶ 33, 47. In light of these facts, observers would understand that HOO does in fact support the messages it prints.

As part of the Commission's "perceived endorsement" arguments, it asserts that the public, if aware that the ordinance requires HOO to create unwanted speech, would not think that HOO supports the messages it prints. Comm'n Br. 9. Yet that argument, if valid, would eviscerate compelled-speech protection by allowing the government to defeat a compelled-speech claim simply by pointing out that the unwanted speech is legally required. But that logic conflicts with every major U.S. Supreme Court case finding a compelled-speech violation because in all those cases the government attempted to use the force of law to compel the speech at issue.

Pressing its "perceived endorsement" arguments further, the Commission claims that "HOO could post a sign at its place of business and on its website that the messages printed on its promotional items are not endorsed by the owners." Comm'n Br. 9; *see also id.* at 12 (noting that HOO can put a disclaimer on its website). But such a disclaimer is never sufficient where, as here, a person is forced to produce materials conveying ideas that he deems objectionable. That person is necessarily an unwilling "instrument for fostering public adherence to an ideological point of view he finds unacceptable," *Wooley*, 430 U.S. at 715, and he is forced (in violation of the Constitution) "to affirm in

one breath that which [he] den[ies] in the next," *Hurley*, 515 U.S. at 576.[6]

4. *Rumsfeld* Does Not Control Here.

The Commission seeks to analogize this case to *Rumsfeld v. FAIR*, 547 U.S. 47 (2006). *See* Comm'n Br. 11-12. But the law schools in *Rumsfeld*, unlike HOO, were not required to convey messages that they considered objectionable. Although the law schools disagreed with a specific military policy, they did not object to the logistical information that they were compelled to send to students. *Rumsfeld*, 547 U.S. at 60-62. Here, however, the Commission's Order requires HOO to produce expression that its owners disagree with. It thus implicates core compelled-speech concerns.

This distinction shows why HOO's freedom "to speak any message that it wants" does not obviate the compelled-speech violation. Comm'n Br. 12. Where, as in this case (but unlike in *Rumsfeld*), the government compels a speaker to express messages that he disagrees with, the speaker's freedom to otherwise express his views does not undo the violation. "[I]f the government were freely able to compel speakers to propound . . . messages with which they disagree, protection of a speaker's freedom would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Hurley*, 515 U.S. at 575-76 (quotation marks and alterations omitted).

Moreover, the Commission incorrectly suggests that the government may require a speaker to express an unwanted message so long as he is free to avoid that compulsion by ceasing all his speech. *See* Comm'n Br. 12. That principle would turn compelled-

[6] Notably, in two of the disclaimer cases that the Commission discusses—*Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980)—none of the parties raising compelled-speech arguments alleged that they disagreed with the messages they were forced to host or facilitate. *See Hurley*, 515 U.S. at 580 (noting that "[t]he principle of speaker's autonomy was simply not threatened" in *PruneYard* because the "owner did not even allege that he objected to the content of the pamphlets").

speech jurisprudence on its head. That a government order compelling speech might lead the speaker to "reduce[]" or eliminate its other constitutionally protected speech is an unconstitutional effect of the order—not a cure for its unconstitutionality. *See Tornillo*, 418 U.S. at 256-57. In fact, if the Commission's argument were correct, *Rumsfeld* would empower the government to compel unwanted speech as an indirect means of silencing a speaker's desired expression. The Constitution permits no such thing.

5. Neither *Spence* Nor *Craig* Are Relevant or Persuasive.

The Commission suggests that this Court should apply the two-prong test from *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (per curiam), to determine whether HOO's speech rights are at issue here. *See* Comm'n Br. 5. Courts use that "expressive conduct" test—which asks (1) whether a purported speaker intends to convey a message and (2) whether it is likely that viewers will understand the intended message—to assess whether conduct like flag burning qualifies as expression. *See Spence*, 418 U.S. at 410-11. But HOO is not trying to transform conduct into speech. Rather, it claims what the GLSO already admits—that the words and design on the Pride Festival shirt are speech that communicates a message. *See supra* at 10. The *Spence* test thus does not apply here.[7]

The Commission's reliance on *Craig v. Masterpiece Cakeshop, Inc.*, --- P.3d ---, No. 14CA1351, 2015 WL 4760453 (Colo. App. Aug. 13, 2015), is also misplaced. The court there, in addition to a footnote expressly distinguishing this case, *id.* at *7 n.8, stated that constitutional "speech protection may be implicated" where a wedding cake

[7] Regardless, the *Spence* test is satisfied. First, "the compulsion aspect of [a] compelled speech claim . . . satisf[ies] any intent requirement under *Spence*." *Cressman v. Thompson*, 719 F.3d 1139, 1154 n.15 (10th Cir. 2013). Second, the ideological messages about sexual relationships and activity that the GLSO admits the Pride Festival shirt communicates would surely "be understood by those who view[] it." *Spence*, 418 U.S. at 411.

conveys a "message celebrating same-sex marriage." *Id.* at *13. While the wedding cake requested in *Craig* did not include any "design" or "written descriptions," *id.* (or plastic figures of two men on top of the cake, as the Commission mistakenly asserts, *see* Comm'n Br. 5), the GLSO gave HOO a detailed description of what would be printed on the Pride Festival shirts, *see* Lowe Statement to Comm'n at 2 (Ex. 105); Lowe Dep. at 43-45 (Ex. B); and admits that those shirts displayed messages that HOO deems objectionable, *see* Brown Dep. at 27-28 (Ex. A); Lowe Dep. at 52-53 (Ex. B). Thus, even the *Craig* court's reasoning acknowledges that this case is different from that one.

B. The Commission's Order Does Not Satisfy Strict Scrutiny.

To satisfy strict scrutiny, the Commission must show that applying the ordinance under these circumstances advances a compelling interest *and* is a "narrowly tailored means of serving [that] compelling . . . interest." *Pac. Gas*, 475 U.S. at 19 (plurality). The Commission has not satisfied either of those requirements.

1. The Commission Lacks a Compelling Interest in Applying the Ordinance under these Facts.

Placing a protected classification in a nondiscrimination law is not a trump card authorizing the government to override constitutional rights. To be sure, in some instances, the government can demonstrate through evidence a compelling interest in enforcing nondiscrimination laws against specific individuals. But in other situations, it cannot. *See, e.g.*, *Hurley*, 515 U.S. at 572-73; *Dale*, 530 U.S. at 659. Strict scrutiny, which requires a fact-specific analysis based on actual evidence, separates permissible applications of nondiscrimination laws from the impermissible. *See* Becket Am. Br. 7-8.

"[T]he strict scrutiny test . . . look[s] beyond broadly formulated interests justifying the general applicability of government mandates," and instead scrutinizes the

specific interest in applying the law to the party before the court and "the asserted harm of granting specific exemptions to [that party]." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006); *see also* Becket Am. Br. 10 (discussing the "more focused" analysis in *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994)). Thus, the relevant governmental interest here is not a generalized interest "in safeguarding specified classes of individuals from . . . being denied equal access to public accommodations." ROA 35 (Order 10). Instead, the Court must scrutinize the government's specific interest in requiring a promotional printer that serves gays and lesbians to produce speech for advocacy groups that its owners deem objectionable.

The U.S. Supreme Court's analysis in *Hurley* is instructive. There, the Court discussed the statute's general purpose of "prevent[ing] any denial of access to (or discriminatory treatment in) public accommodations" based on "sexual orientation." 515 U.S. at 578. But the Court focused its analysis on the law's "apparent object" when "applied to expressive activity in the way it was done [t]here." *Id.* Following *Hurley*'s lead, this Court must similarly focus on the government's specific interest in applying the ordinance to HOO under the particular facts of this case.

Six reasons demonstrate why, as the Circuit Court held, the Commission does not have a compelling interest in enforcing the ordinance here. ROA 247 (Cir. Ct. Op. 15). *First*, unlike most applications of the ordinance, this one would require a business to create speech. But as *Hurley* explained, permitting the government to compel speech would "allow exactly what the [constitutional] rule of speaker's autonomy forbids," 515 U.S. at 578; thus, the Commission does not have a compelling interest in applying the ordinance here. *Second*, like the parade organization in *Hurley*, HOO does not

invidiously discriminate against gays and lesbians. *See id.* HOO works with everyone, including members of the LGBT community, but must decline requests (regardless of the requester's identity) to produce speech that conflicts with its owners' beliefs. *Third*, everyone who contacts HOO will obtain the promotional materials that they request because if HOO cannot print the requested items, it will directly connect the customer to another company. Adamson Aff. ¶¶ 33, 47 (Ex. 1). HOO thus ensures that everyone has access to promotional printing.

Fourth, the Commission has not shown that sexual-orientation discrimination is such a pressing concern in Lexington that it justifies overriding HOO's constitutional rights. In fact, the evidence shows that the opposite is true. Aside from this case, in the sixteen years since the sexual-orientation ordinance was enacted, only *three* complaints alleging sexual-orientation discrimination have been filed, and *none* of them were supported by probable cause. Comm'n Amended Resp. to Req. for Prod. No. 10 (Ex. 17). *Fifth*, HOO does not have a monopoly on promotional printing.[8] As the GLSO admits, at least "a dozen t-shirt printing companies . . . would [have] be[en] happy to print [the] t-shirts for the Pride Festival," GLSO Newsletter, May 2012, at 2 (Ex. 106); Baker Dep. at 8-9 (Ex. 505); and one such company did in fact print those shirts for free, *see* Complainant's Resp. to Interrog. No. 9 (Ex. 108). *Sixth*, the Commission has introduced no evidence to support its claim (at Comm'n Br. 18) that a ruling for HOO will result in widespread instances of businesses refusing to serve members of protected classes. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718-19 (1981) (criticizing

[8] *See* Richard A. Epstein, *Public Accommodations under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 Stan. L. Rev. 1241, 1243 (2014) (noting that the strongest case for applying public-accommodations laws is "against monopolists").

the government for the absence of evidence to support a similar claim of "widespread" harm). On the contrary, "[m]arket forces . . . tend to discourage [business] owners from restricting" their customers, *Desilets*, 636 N.E.2d at 240, particularly when, as HOO experienced, those businesses are likely to endure boycotts, negative publicity, and lost customers for adhering to their convictions, *see* Adamson Aff. ¶ 57 (Ex. 1); Boycott HOO Facebook Page (Ex. 117).

The Commission also claims a governmental interest in ensuring that groups like GLSO do not experience hurt feelings from declined requests. Comm'n Br. 14. But that interest is not compelling when, as is true here, the alleged cause of a person's subjective offensive is another's decision not to create or facilitate speech. *Hurley* recognizes that "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are . . . hurtful." 515 U.S. at 574. Thus, an interest in preventing hurt feelings is not a compelling basis for infringing expressive freedoms. *See also* Becket Am. Br. 12-14 (discussing *Dale* and *Snyder v. Phelps*, 131 S. Ct. 1207 (2011)).

2. The Commission Cannot Satisfy Narrow Tailoring under these Facts.

The Commission's Order is not narrowly tailored "[i]f a less restrictive alternative would serve the [g]overnment's purpose." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). This narrow-tailoring inquiry, like the compelling-interest analysis, focuses on the specific facts of the case. *See Gonzales*, 546 U.S. at 430-31. Here, a number of less restrictive alternatives would permit the government to further its asserted goals without infringing HOO's rights. For example, rather than punishing HOO under the ordinance, the government could adopt "educational campaigns" that promote nondiscrimination, using persuasion instead of compulsion to achieve its goals. *See 44*

Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507-08 (1996) (plurality). Alternatively, while continuing to enforce the ordinance in most situations, the government could allow organizations to decline to produce speech for message-based reasons. Or the government could permit businesses to decline requests to create expression so long as they refer those customers to willing printers. These readily available alternatives establish that the Commission's Order is not narrowly tailored to the government's asserted purposes.

III. The Circuit Court Correctly Held that the Commission's Order Violates HOO's and its Owners' Free Exercise of Religion Protected by KRS 446.350.

KRS 446.350 provides that "[t]he 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." The Circuit Court correctly held that the Commission's Order violates this statute. ROA 245-47 (Cir. Ct. Op. 13-15).

Four prerequisites of a KRS 446.350 claim are satisfied here: (1) a small business like HOO may assert a claim under that statute; (2) HOO's decision not to print the Pride Festival shirts was motivated by its religious beliefs; (3) those religious beliefs are sincerely held; and (4) the Commission's Order substantially burdens HOO's religious exercise. HOO established all these factors in its briefing below, *see* ROA 119-22, 188-89; the Circuit Court agreed, *see* ROA 246 (Cir. Ct. Op. 14); and the Commission has not challenged them on appeal. Thus, for all the reasons explained by the Circuit Court and in HOO's briefing below, this Court should conclude that HOO has satisfied those factors. *See* ROA 246 (Cir. Ct. Op. 14); ROA 119-22, 188-89; Becket Am. Br. 5-6; *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (finding that a requirement to "engage in conduct that

seriously violates" one's beliefs imposes a substantial burden on free exercise).

On appeal, the Commission's cursory KRS 446.350 argument focuses on its claim that the statute is not applicable because it became effective in 2013 after the GLSO filed its complaint in 2012. Comm'n Br. 17. This argument ignores (1) well-established case law and (2) the plain language and operation of KRS 446.350. First, it is well established that when an "intervening statute . . . affects the propriety of prospective relief, application of the new provision is not retroactive" and is "unquestionably proper." *Landgraf v. USI Film Products*, 511 U.S. 244, 273 (1994); *see also* Becket Am. Br. 3-4 & 4 n.1 (collecting analogous cases). Because the Commission's Order imposes prospective relief (an injunction), *see* ROA 41 (Order 16), KRS 446.350 undoubtedly applies. Second, KRS 446.350 applies whenever "[g]overnment" action "substantially burden[s] a person's freedom of religion." Here, the government action that substantially burdens religious exercise is the Commission's 2014 Order directing HOO to violate its religious beliefs. Because that Order issued after KRS 446.350's enactment, HOO may raise that statute as a basis for overturning the Commission's Order. *See* Adamson Aff. at ¶¶ 58-59 (Ex. 1). For these reasons, KRS 446.350 plainly applies to this case.[9]

Because KRS 446.350 applies and the prerequisites of a KRS 446.350 claim are satisfied, the Commission must satisfy strict scrutiny "by clear and convincing evidence." KRS 446.350. But as the Circuit Court held below, and as HOO explained above, *see*

[9] The Commission also asserts that HOO cannot prevail on its KRS 446.350 claim because it contends that the ordinance is a "neutral law of general applicability." Comm'n Br. 18. But even if that characterization of the ordinance were true (which it is not), that would not defeat HOO's KRS 446.350 claim. Indeed, the very reason that the legislature enacted that statute, in response to the Kentucky Supreme Court's ruling in *Gingerich v. Commonwealth*, was to provide free-exercise protection against "statutes of general applicability." 382 S.W.3d 835, 844 (Ky. 2012); *see also* Becket Br. at 3.

supra at 18-22, the Commission has not established "a compelling governmental interest to enforce in this case." ROA 247 (Cir. Ct. Op. 15). Thus, HOO must prevail.[10]

IV. The Commission's Order Violates HOO's and its Owners' Free Exercise of Religion Protected under the Federal and State Constitutions.

Both the United States and Kentucky Constitutions protect the right to free exercise of religion. *See* U.S. Const. amend. I; Ky. Const. § 5; Ky. Const. § 1. Strict scrutiny applies to HOO's constitutional free-exercise claims for two reasons. First, HOO has invoked a hybrid of rights, both its free-exercise rights and its free-speech rights (discussed in Section (II)). Such hybrid claims are "subject to strict scrutiny." *Triplett v. Livingston Cty. Bd. of Educ.*, 967 S.W.2d 25, 32-33 (Ky. App. 1997). Second, the Commission has exhibited a lack of neutrality toward religious beliefs like HOO's (1) by stating that it "hope[s] to see a change in attitude[s]" of people with those beliefs, *see* Comm'n Meeting Minutes at 4 (Ex. D), and (2) by mandating that HOO submit to diversity training to reshape those beliefs, *see* ROA 41 (Order 16). Government conduct that lacks neutrality "must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Because strict scrutiny is not satisfied, *see supra* at 18-22, HOO has established these constitutional claims.

V. The Commission's Order Misconstrues the Public-Accommodations Ordinance by Concluding that HOO Discriminated Based on Sexual Orientation.

A proper interpretation of the ordinance must differentiate between *unlawfully* refusing services because of a protected characteristic of a customer and *lawfully*

[10] HOO's compelled-speech and KRS 446.350 claims, both of which the Circuit Court resolved in HOO's favor, *see* ROA 239-47 (Cir. Ct. Op. 7-15), provide independently sufficient bases for upholding that court's ruling. Other claims that HOO raised below, *see* ROA 127-33, but that the Circuit Court did not reach, *see* ROA 247 (Cir. Ct. Op. 15), provide alternative bases for affirming the court below. Two of those are discussed below.

declining to produce speech because of a disagreement with its message. *See* Am. Ctr. Law Justice Am. Br. 1-6. Indeed, as the Commission's representative admitted under oath, "[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). This desire not to promote a message is precisely why HOO declined to create the requested shirts. Thus, HOO did not engage in unlawful discrimination.

Six undisputed facts confirm HOO's message-based motivation. First, HOO has served and employed—and will continue to serve and employ—individuals who identify as gay or lesbian (including a lesbian singer who performed at the 2012 Pride Festival). *See* Adamson Aff. ¶¶ 49-50 (Ex. 1). Second, HOO would print materials for the GLSO if the requested items did not contain or promote messages that conflict with HOO's deeply held beliefs. *See* Resp't's Resp. to Interrog. No. 5 (Ex. 163). Third, it was not until Mr. Adamson heard "a detailed description" of what would be printed on the shirt that he declined the GLSO's request. Lowe Statement to Comm'n at 2 (Ex. 105); Lowe Dep. at 43-45 (Ex. B). Fourth, Mr. Adamson never asked Mr. Lowe about his sexual orientation, and that information was not disclosed to him. Complainant's Supplemental Answers to Resp't's Reqs. for Admis. at Nos. 2-3 (Ex. 107). Fifth, some members of the GLSO, including its named representative in this case, do not identify as gay or lesbian. Baker Dep. at 13 (Ex. 505); Brown Dep. at 94 (Ex. 504). Sixth, HOO's decision not to print shirts promoting the Pride Festival is consistent with its prior practice of declining to produce materials for various message-based reasons. Adamson Aff. ¶¶ 26-30 (Ex. 1).

CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court's ruling.

Respectfully submitted this the 5th day of February, 2016.

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