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SUPREME COURT
2017-SC-00278

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SUPREME COURT

LEXINGTON-FAYETTE URBAN COUNTY HUMAN RIGHTS COMMISSION — APPELLANT

v.

HANDS ON ORIGINALS, INC. — APPELLEE

Court of Appeals No. 2015-CA-00745
Fayette Circuit Court No. 14-CI-04474

BRIEF OF APPELLEE HANDS ON ORIGINALS, INC.

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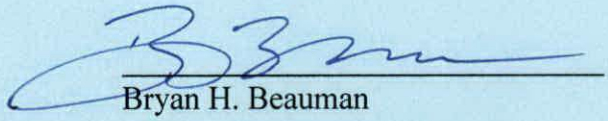
CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April, 2018, true and accurate copies of this brief were served via hand-delivery to Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601 and by first-class U.S. Mail, postage prepaid, to the Fayette Circuit Court, 3rd Division, 120 North Limestone, Lexington, Kentucky 40507; and Edward E. Dove, 201 West Short Street, Suite 300, Lexington, Kentucky 40507. I also certify that the record on appeal has not been withdrawn.



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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 the proper interpretation of a municipal public-accommodation ordinance, constitutional provisions that safeguard fundamental rights like expressive and religious freedom, and a state statute that protects the free exercise of religion. Oral argument would help the Court navigate these weighty issues.

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INTRODUCTION

The right to decide what to say and what not to say—to choose which ideas to express—is core to human freedom. It is indispensable to the "freedom of mind" and the integrity of the "intellect." *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977).

It explains why most recoil at the thought of forcing a Democrat to make signs for a Republican politician, a gay man to create posters opposing same-sex marriage, a Jewish woman to make shirts celebrating German pride, or anyone to create flyers for a cause at odds with their conscience. And it establishes why the Lexington-Fayette Urban County Human Rights Commission (Commission) cannot require Hands On Originals (HOO) and its Managing Owner, Blaine Adamson, to print messages that conflict with their faith, including the shirts sought by the Gay and Lesbian Services Organization (GLSO).

Lexington's ordinance, when properly interpreted, respects this freedom. It bans discrimination because of an individual's protected *status*. But it does not prohibit people like Adamson from declining to create speech with *messages* they deem objectionable. This status/message distinction resolves this case in HOO's favor because while HOO will not print some messages, it serves all people.

The Commission's contrary view conflicts with the ordinance's purpose of requiring equal treatment. Adamson already treats people equally—if he can in good conscience print a specific message, he will do so for anyone who requests it. What the Commission demands is that Adamson create speech that he will not make for anyone, effectively entitling the customer to preferred (not equal) treatment and forcing Adamson to expand the services he offers. No reasonable reading of the ordinance requires that.

If the ordinance were interpreted that way, it would violate HOO's expressive freedom. Both the federal and state constitutions guarantee that creators of expression—

including printers, publishers, and media outlets that produce speech originating with others—cannot be forced to create or disseminate speech that they disagree with. This is particularly true here, where Adamson and HOO decline some messages but serve all people. In these circumstances, the government cannot satisfy strict scrutiny.

Because this freedom protects everyone, regardless of their beliefs, HOO has received support from lesbian print-shop owners,[1] law professors and legal organizations that "strongly support[] . . . gay rights,"[2] LGBT advocates who oppose sexual-orientation discrimination,[3] and a substantial number of amici with varied views and interests. The Court should heed these voices and rule for HOO. It is the only outcome consistent with long-cherished constitutional freedoms and the pluralism that those freedoms embrace.

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[1] *See* BMP Email (Ex. 11) (attached at App'x A) (email that HOO received from "a lesbian owned and operated t-shirt company" supporting HOO's right not to print the shirts for the Pride Festival); The Blaze, *Lesbian Business Owner Defends Christian Printer's Rights*, YouTube (Nov. 7, 2014), https://bit.ly/2uDthsR (video of lesbian printers discussing this case—one of them says "we feel that this isn't a gay or straight issue, it's a human issue"). The certification of the record does not assign pagination to the exhibits that HOO filed below, so HOO will refer to them using their original designation. Most of those exhibits are part of the nine-volume administrative record filed with the Circuit Court on December 29, 2014. For the Circuit Court's convenience, HOO refiled the exhibits that it had already submitted to the Commission (which were designated with exhibit *numbers*)—as well as six additional exhibits (designated with exhibit *letters*)—in support of its Motion for Summary Judgment filed with the Circuit Court on January 13, 2015. *See* Cir. Ct. Certified Record at 137. Unless otherwise indicated, all exhibits cited in this brief are found in those volumes of exhibits filed on January 13, 2015. Also, for this Court's convenience, HOO has included portions of many key exhibits in an appendix to this brief. HOO indicates which exhibits those are as they are mentioned throughout this brief.

[2] Cato Institute Amicus Br. 1.

[3] *See* John Corvino, *Why Print Shops Shouldn't Be Forced to Make LGBTQ Pride T-Shirts*, Slate, May 15, 2017, https://slate.me/2rYHCwB (LGBT author of *Debating Religious Liberty and Discrimination* explaining that HOO is not "guilty of sexual orientation discrimination" because it did not decline "to sell the very same items to LGBTQ individuals . . . that it sells to other customers" but merely declined "a particular design"—"to write a message"—that it would not print for anyone).

COUNTERSTATEMENT OF THE CASE

The Commission's Statement of the Case does not include record citations, is unsupported in many of its assertions, and is incomplete for addressing HOO's claims.[4] HOO thus provides this counterstatement.

HOO's Expressive Work and Religious Beliefs. HOO is a small business that communicates messages through promotional materials like shirts.[5] As the Court of Appeals found, "the 'service' HOO offers is the promotion of *messages*." Ct. App. Op. 17. Its work is expressive, artistic, and carried out by HOO's five graphic-design artists.[6] These artists create original art for 55% to 65% of the items HOO prints.[7] And even when a customer provides initial artwork, HOO's artists refine the art to create a better image.[8]

Adamson and his two co-owners are Christians who seek to operate HOO consistently with the Bible's teachings.[9] *See* Ethics & Religious Liberty Comm'n Amicus Br. 4-9 (discussing how many major religions teach their followers to live out their faith as part of their work). HOO has a Christian Outfitters division, which creates promotional

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[4] The Commission's brief violates CR 76.12(4)(c)(iv) by failing to provide "ample references to . . . the record." And its brief violates CR 76.12(4)(c)(v) by failing to argue—let alone show—that each issue raised "was properly preserved for review." Kentucky appellate courts do not view these violations as mere technicalities easily overlooked. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010) ("Procedural rules do not exist for the mere sake of form and style. . . . Their importance simply cannot be disdained or denigrated") (quotation marks omitted). This Court should either strike the Commission's brief for these violations or review the issues raised "for manifest injustice only." *Id.*

[5] Adamson Aff. ¶¶ 2, 6-7 (Ex. 1) (attached at App'x I). The Commission included a copy of this affidavit in its brief's appendix. But it is unclear whether the Commission included the full affidavit. So HOO has attached the entire document to this brief at Appendix I.

[6] *Id.* at ¶¶ 9-10.

[7] *Id.* at ¶ 11; *see also id.* at ¶ 13 (HOO owns the copyright on its artwork).

[8] *Id.* at ¶ 14.

[9] *Id.* at ¶¶ 15-16; Schneider Aff. ¶¶ 5-6 (Ex. 401); Hoetker Aff. ¶¶ 5-6 (Ex. 402).

materials for Christian groups and "accounts for over 70% of HOO's revenue."[10] That division's purpose is to produce materials with "meaningful Christian messages."[11]

Inspired by its owners' faith, HOO also "operates a program with a nonprofit religious group named Adopt Uganda."[12] HOO provides unemployed women in Uganda with "steady income" by "hiring them to create hand-woven baskets."[13] HOO then gives those baskets to its customers "to spread awareness about the struggles in Uganda."[14]

The faith of HOO's owners not only motivates them to serve the marginalized, it also places limits on what HOO can do. HOO will not print items that convey or otherwise support messages inconsistent with its owners' religious beliefs.[15] Adamson tells his sale representatives that he is a Christian and that HOO does not print messages in conflict with his beliefs, and he instructs them to bring any questionable requests to him.[16] Among the messages that HOO will not print are those that support "sexual relationships or sexual activity outside of a marriage between one man and one woman."[17]

HOO regularly declines to print items for message-based reasons, turning down at least thirteen orders for those reasons from 2010 through 2012.[18] Those declined orders include shirts containing a violent message, shirts promoting a strip club, and pens

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[10] Adamson Aff. ¶ 24 (Ex. 1).

[11] *Id.* at ¶ 25.

[12] *Id.* at ¶ 22.

[13] *Id.*

[14] *Id.*

[15] *Id.* at ¶¶ 26-27.

[16] *Id.* at ¶¶ 27-28; Carter Aff. ¶ 3 (Ex. 201).

[17] Adamson Aff. ¶ 43 (Ex. 1).

[18] *Id.* at ¶ 30.

promoting a sexually explicit video.[19] It is standard practice within the industry to decline to print materials containing messages that the owners do not want to support.[20] But anytime HOO declines an order, it offers to connect the customer to another company that will create the item for the same price HOO would have charged.[21]

While HOO declines some orders for message-related reasons, it has never refused to work with anyone because of their sexual orientation or other protected characteristic.[22] On the contrary, HOO works with everyone, including selling to LGBT customers and hiring LGBT employees.[23] HOO's website announces that although it will not print messages "that conflict with the convictions of the ownership," it "conducts business with people of all genders, races, religions, sexual preferences, and national origins."[24]

The GLSO's Advocacy and Membership. The GLSO advocates certain ideas and advances specific causes of interest to some LGBT individuals. Among other things, it engages on legal policy issues, ranging from public-accommodation laws to religious-freedom laws.[25] And it expresses religious views about same-sex relationships.[26]

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[19] HOO's Supplemental Resp. to Interrog. No. 15 (Ex. 9) (attached at App'x H). The shirt with violent messages that HOO declined to print included the phrases "In Righteousness He Judges and Wages War" and "Sometimes Violence is the Only Answer" written in blood. *Id.* The pen request that HOO declined depicted a full-body picture of a woman in a bathing suit promoting a sexually explicit film. *Id.* Many other requests that HOO declined to print are identified in the interrogatory response attached at Appendix H.

[20] Adamson Aff. ¶ 32 (Ex. 1).

[21] *Id.* at ¶ 33.

[22] *Id.* at ¶ 26.

[23] *Id.* at ¶¶ 49-50.

[24] *Id.* at ¶ 26.

[25] *See, e.g.*, GLSO Newsletter, May 2011, at 2 (Ex. 157) (supporting public-accommodation laws); Brown Dep. Ex. 22 (Ex. 504) (calling for action on Kentucky's "Religious Freedom Bill"); Letter to Governor Beshear (Ex. 159) (similar).

The GLSO's members and constituents do not share the same sexual orientation; they "come[] from all walks of life and all orientations,"[27] and as the Commission admits, "include[] individuals in married, heterosexual relationships."[28] Indeed, Aaron Baker, the GLSO's former president and named representative in this case, is married to a person of the opposite sex and does not identify as gay.[29]

The GLSO's Pride Festival and Shirts. Since 2007, the GLSO has hosted the Lexington Pride Festival, which is an event that, as the GLSO admits, "encourages people to be proud about and celebrate same-sex relationships."[30] The Festival, however, is not restricted to gays or lesbians, but includes people of all sexual orientations.[31]

Performers at the Pride Festival have expressed profanity and crass sexual messages from the stage.[32] And Festival vendors have included Hustler and other groups that communicate sexually explicit messages and distribute sex-related items.[33]

The GLSO purchases shirts for the Pride Festival in order to raise money for the

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[26] Lowe Dep. at 77 (Ex. 503); *see, e.g.*, *Proud to be a Christian & Gay*, GLSO eNews, June 1, 2012, at 2 (Ex. 150); GLSO's LinQ Magazine, Aug. 2013, at 18-20 (Ex. 152) ("Christian + Gay = OK").

[27] GLSO's 2012 JustFundKy Grant Application at 4 (Ex. 143).

[28] Commission Brief 9 (Comm'n Br.).

[29] Baker Dep. at 13 (Ex. 505); Brown Dep. at 94 (Ex. 504).

[30] Complainant's Answers to Resp't's Req. for Admis. No. 13 (Ex. 125).

[31] Brown Dep. at 34 (Ex. 504).

[32] Resps. from the 2011 Lexington Pride Festival Survey at 7 (Ex. 129) (indicating that performers discussed sexual topics during the 2011 Festival, including "comments about sex, lining up for blow jobs," and "dildos"); Brown Dep. at 39-42, 87-88, 92-93 (Ex. A).

[33] Tuma Dep. at 6-7, 14-21 (Ex. 501) (testifying that Hustler sold a bear that said "I heart pussy," had pins that said "Got lube," and distributed "[v]arious adult novelties" like "lubricants," "dildos," and "vibrators"); Johnson Dep. at 5-6 (Ex. 502) (testifying that Romantix, an "[a]dult novelty retailer," distributed "condoms" and "samples of lube").

GLSO and to promote and market the Festival.[34] GLSO representatives wear the Pride Festival shirts at events and on television appearances promoting the Festival,[35] and they sell the shirts at events that promote the Festival.[36]

The logo for the 2012 Festival was a large rainbow-colored "5" surrounded by the words "Lexington Pride Festival."[37]

HOO 00008

The GLSO has conceded that this logo, which incorporates the "nationally recognized gay pride . . . symbol," communicates that people "should be proud about their same-sex relationships."[38]

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[34] Brown Dep. at 13-16 (Ex. 504).

[35] *Id.* at 14-16 (testifying that GLSO representative Paul Brown wore the shirt during two television interviews promoting the 2012 Festival and that he "wore it at the T-shirt launch" party); Brown Video (Ex. 123) (depicting one of the television interviews).

[36] Complainant's Resp. to Interrog. No. 10 (Ex. 108) (discussing the "t-shirt kick-off party" where shirts were sold); Pride Festival Chair Report, June 21, 2012 (Ex. 124) (mentioning other events where the shirts were sold).

[37] 2012 Pride Festival Logo (Ex. 203).

[38] Lowe Dep. at 51-53 (Ex. B) (attached at App'x D); *see also* Brown Dep. at 27-28 (Ex. A) (attached at App'x C) (agreeing that the "logo specifically communicate[s] the idea that people should have pride in their same-sex relationships").

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 GLSO representative named Brad Shepherd, quoting him a price for shirts.[39] The two exchanged a few emails, but Shepherd did not attempt to finalize an order.[40]

In March 2012, GLSO representative Donald Lowe called HOO to try to negotiate a "lower price."[41] After Lowe and Adamson exchanged messages, they finally spoke.[42] This was the first time that Adamson learned of the GLSO's request.[43] Lowe said that he needed shirts for the Pride Festival and that he would like to place an order.[44]

Adamson asked Lowe "what the Pride Festival is,"[45] and Lowe indicated that it was a gay pride festival in Lexington.[46] Adamson "also asked . . . Lowe what would be printed on the shirt,"[47] and 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."[48]

Adamson concluded that producing the shirts would require HOO to create speech—the words "Lexington Pride Festival" with a rainbow-colored "5"—expressing that

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[39] Carter Aff. ¶ 5 (Ex. 201).

[40] *See* Carter/Shepherd Emails at 00002-00004 (Ex. 202).

[41] GLSO Webpage at 00016 (Ex. 103); Comm'n Intake Email at 2 (Ex. 104).

[42] GLSO Webpage at 00016 (Ex. 103).

[43] Adamson Aff. ¶ 35 (Ex. 1).

[44] *Id.* at ¶ 34.

[45] *Id.* at ¶ 36.

[46] *Id.*; Lowe Dep. at 36-37 (Ex. B).

[47] Adamson Aff. ¶ 37 (Ex. 1).

[48] Lowe Statement to Comm'n at 2 (Ex. 105) (attached at App'x E); *see also* Lowe Dep. at 36-37, 41, 43-45, 84 (Ex. B) (testifying about this discussion).

"people should take pride . . . in sexual relationships or sexual activity outside of a marriage between one man and one woman."[49] He believes that he "would disobey God" if he were to authorize HOO to print that message.[50]

Adamson told Lowe that HOO could not accept the order because the shirt's message "did not reflect the values of [HOO]" and HOO "did not want to support the festival in that way."[51] Adamson then stated that "he wouldn't leave [Lowe] hanging."[52] So he offered to connect Lowe to another business that would print the shirts for the same price—an offer that the GLSO refused.[53] At no time did Adamson ever ask Lowe about his sexual orientation; nor did Lowe disclose that information.[54]

Other Printers for Pride Festival Shirts. Another printing company named Cincy Apparel created the shirts for the 2012 Pride Festival free of charge.[55] This saved the GLSO $3,000.[56] Many other printers are willing to produce shirts promoting the Pride Festival. In fact, the GLSO was contacted by "nearly a dozen t-shirt printing companies" that said "they would be happy to print . . . t-shirts for the Pride Festival."[57]

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[49] Adamson Aff. ¶ 43 (Ex. 1).

[50] *Id.* Adamson also determined that he could not in good conscience create speech promoting the Pride Festival because he knew that events like that express ideas about sexuality in conflict with his faith and typically include crude references concerning sex and related issues. *Id.* at ¶¶ 38-39, 44.

[51] Lowe Statement to Comm'n at 2-3 (Ex. 105) (attached at App'x E); Lowe Dep. at 43-45 (Ex. B).

[52] Lowe Statement to Comm'n at 3 (Ex. 105) (attached at App'x E).

[53] Adamson Aff. ¶ 47 (Ex. 1); Lowe Dep. at 37, 43, 48 (Ex. B).

[54] Complainant's Supp. Answers to Resp't's Reqs. for Admis. at Nos. 2-3 (Ex. 107).

[55] Complainant's Resp. to Interrog. No. 9 (Ex. 108).

[56] GLSO Newsletter, May 2012, at 2 (Ex. 106).

[57] *Id.*; *see also* Baker Dep. at 8-9 (Ex. 505) (accepting that as "an accurate quote").

Publicity and Lost Business. The GLSO admits that after it publicized HOO's decision not to print the Pride Festival shirts, "[t]he story went viral, was in the newspaper for several days, made [TV] media, spawned two Facebook groups, and saw a protest demonstration take place."[58] After one of the Facebook groups called for boycotts of HOO,[59] several of HOO's large customers stopped working with the company.[60]

Procedural History. In March 2012, the GLSO filed a discrimination complaint with the Commission. After the Commission investigated and the parties filed motions for summary judgment, the Hearing Examiner issued a recommended decision against HOO. *See* Summary Judgment Order (Oct. 6, 2014) (Record on Appeal (ROA) 26). The Commission then summarily adopted that recommended decision as its own. *See* Order Adopting Recommended Decision (Nov. 19, 2014) (ROA 24). HOO refers to the Hearing Examiner's ruling as the Commission's Order.

In that Order, the Commission concluded that HOO's decision not to print the requested shirts "constitutes unlawful discrimination against the members of the GLSO on the basis of sexual orientation." Comm'n Order 16 (ROA 41). The Commission denied all HOO's speech- and religion-based defenses, *id.*, despite correctly recognizing, 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." *Id.* at 13-14 (ROA 38-39). The Commission then "permanently enjoined [HOO] from discriminating" and ordered HOO "to participate in diversity training," *id.* at 16 (ROA 41), even though the

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[58] GLSO Draft Press Release, *HRC rules against Hands On Originals* (Ex. 115); *see also* GLSO Board Meeting Minutes, Apr. 5, 2012, at 2 (Ex. 116) (stating that the GLSO "Board members have represented at . . . the HOO protest[] and various media outlets").

[59] Boycott Hands On Originals Facebook Page (Ex. 117).

[60] Adamson Aff. ¶ 57 (Ex. 1).

Commission's own attorney warned that mandating "diversity training" would "create a whole new realm of constitutional arguments pertaining to freedom [of] expression and the free exercise of religion," Comm'n Resp. to HOO's Opposition to Hearing Examiner's Ruling ¶ 13 (attached at App'x F).

After HOO appealed, the Fayette Circuit Court reversed and vacated the Commission's Order. The Circuit Court's decision rested on three conclusions. First, 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." Cir. Ct. Op. 13 (ROA 245). Second, the Circuit Court concluded that the Commission's Order "violates the recognized constitutional rights of HOO and its owners to be free from compelled expression." *Id.* at 7 (capitalization omitted) (ROA 239). Third, the court held that the Order "violates HOO's and its owners' free exercise of religion protected by KRS 446.350." *Id.* at 13 (capitalization omitted) (ROA 245).

The Court of Appeals affirmed that ruling. Chief Judge Kramer's lead opinion held that "HOO did not violate the ordinance." Ct. App. Op. 2. She distinguished between declining a request because of its message, which does not violate the ordinance, and declining a request because of the requester's protected status, which would be unlawful. *Id.* at 13-15. "Nothing in the fairness ordinance," she concluded, prohibits HOO from declining an order because of its "*viewpoint* or *message*." *Id.* at 18. That is because "a message in support of a cause or belief . . . is a *point of view* and form of *speech* that could belong to any person, regardless of classification." *Id.* at 17. Thus, declining a message does not constitute unlawful discrimination based on a person's status. Chief

Judge Kramer found no evidence that HOO declined to print the Pride Festival shirts "*because* the individual in question had a specific sexual orientation." *Id.* at 15. Rather, HOO declined the GLSO's request because the shirts "clearly imparted a *message*" that its owners deem objectionable. *Id.* at 16. Finding no violation of the ordinance, Chief Judge Kramer did not consider any constitutional issues or KRS 446.350. *Id.* at 2.

Judge Lambert's 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' beliefs. *Id.* at 19-21. This violation of conscience is unwarranted here, she explained, because "HOO offered to find a printer who would do the work at the same price." *Id.* at 21 n.7. In contrast, Judge Taylor's dissent determined that HOO's decision not to print the shirts "was discriminatory against GLSO and its members based upon sexual orientation." *Id.* at 23. But the dissenting opinion did not analyze HOO's claim, or the Circuit Court's corresponding holding, that the constitutional freedom from compelled speech forbids the government from ordering HOO to print the Pride Festival shirts. *See id.* at 23-26.

ARGUMENT

This Court should uphold the Court of Appeals' decision vacating the Commission's Order for four independent reasons. First, HOO did not violate the ordinance because it did not discriminate on the basis of anyone's sexual orientation. Second, the Commission cannot apply the ordinance under these circumstances without violating HOO's and its owners' constitutional freedom from compelled expression. Third, this application of the ordinance also contravenes HOO's and its owners' rights under KRS 446.350. And lastly, the Commission's Order violates HOO's and its owners' free-exercise rights protected by the federal and state constitutions.

I. This case turns on questions of law that are reviewed de novo.

This Court must uphold the Court of Appeals' decision if the Commission's Order is "[i]n violation of constitutional or statutory provisions," "[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).

The proper interpretation of a statute or ordinance, including "the application of [agency-determined] facts to the legal standard," "is a question of law" "subject to de novo review." *Bd. of Educ. of Fayette Cty. v. Hurley-Richards*, 396 S.W.3d 879, 885 (Ky. 2013). "[M]atter[s] of constitutional construction" are likewise "review[ed] *de novo*." *Kentucky CATV Ass'n, Inc. v. City of Florence*, 520 S.W.3d 355, 359 (Ky. 2017).[61]

While deference ordinarily "extends to agency *fact-finding*," *Hurley-Richards*, 396 S.W.3d at 882, it does not apply here. 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). In addition, the Commission decided this case on summary judgment, which "involve[s] no fact finding" and is reviewed "*de novo*." *Caniff v. CSX Transp., Inc.*, 438 S.W.3d 368, 372 (Ky. 2014). Thus, the Court should not defer to the Commission's version of the facts.

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[61] Although courts occasionally defer to an agency's statutory interpretation, deference is not appropriate here because the Commission merely rubber-stamped the decision of a Hearing Examiner who is not a Commission member and lacks expertise in construing the ordinance. *Cf. 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").

II. The Commission's Order misconstrues the ordinance by concluding that HOO discriminated based on sexual orientation.

Nothing in the ordinance prohibits HOO from declining to print messages that its owners consider objectionable. Expanding that law to punish such message-based decisions conflicts with the ordinance's purpose because it would mandate special—not equal—treatment for customers with certain messages. And it would threaten the expressive freedom of people who create speech for a living.

A. The ordinance does not forbid HOO from declining to create the requested shirts because of their message.

The ordinance bans discrimination "on the ground of" "an individual['s]" protected *status*. KRS 344.120; LFUCG Ordinance § 2-33(2) (incorporating KRS 344.120). It does not prohibit business owners from declining to create speech with *messages* that they deem objectionable. *See Owen v. Univ. of Kentucky*, 486 S.W.3d 266, 270 (Ky. 2016) ("[W]e will not construe a meaning that the text of the statute cannot bear."); American Center for Law & Justice Amicus Br. 1-3 (explaining that public-accommodation laws do not forbid "refusals based upon the *nature of the project*, rather than the *identity of the customer*"). Even the Commission's executive director testified that "if a company does not approve of the message that it's asked to print, . . . that's a valid non-discriminatory reason to decline to print." Sexton Dep. at 32-34, 47-48 (Ex. C) (attached at App'x B).[62]

This status/message distinction is illustrated by the U.S. Supreme Court's decision in *Hurley*. Although the parade organizers in *Hurley* refused an LGBT group's request to participate as a "unit carrying its own banner," 515 U.S. at 572, the Court held that the

[62] *See also* Jack Minor, *T-Shirt Company in Crosshairs*, World News Daily, at 2 (Ex. 165) (quoting the executive director as stating that "[i]f [a] company does not approve of the message[,] that is a valid non-discriminatory reason to refuse").

organizers did not "exclude homosexuals as such" because "openly gay, lesbian, or bisexual individuals" were welcome to "participat[e] . . . in various units admitted to the parade," *id.* In other words, the parade organizers included only certain messages, but they allowed anyone to deliver those messages. The Court recognized that this is not discrimination "because of . . . sexual orientation[]." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (discussing *Hurley*). *Hurley* thus rejected the state court's conclusion that the organizers' exclusion of the LGBT group "because of its values and its message" was discrimination based on "its members' sexual orientation." 515 U.S. at 562.

Other cases similarly turn on this status/message distinction. *See, e.g.*, *World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 257-58 (Utah 1994) ("[The nondiscrimination law] 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 [law], 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 Cty. 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 explaining that the human-rights commission's decision in that case—*Vincenz v. Bono Film and Video*, a copy of which HOO filed as Exhibit E below—held that the nondiscrimination law "protects individuals from discrimination based on their sexual orientation, [but] does not prohibit content based discrimination"); *see also N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988) (explaining that the public-accommodation law allowed private clubs to "exclude individuals who do not share the views that the . . . members wish to promote,"

but that the law banned those clubs from "using race, sex, and other specified characteristics" as a basis for denying membership).

HOO operates much like the parade organizers in *Hurley*. While HOO declines to print messages that conflict with its owners' beliefs, it serves all people. Stated differently, HOO prints only certain messages, but it will print those messages for anyone. That is not unlawful discrimination.

The record in this case is replete with evidence—as both the Court of Appeals and Circuit Court correctly held—that Adamson declined to create the Pride Festival shirts because of the messages that he was asked to print on them. Adamson Aff. ¶ 43 (Ex. 1). To Adamson, the words "Lexington Pride Festival" with a rainbow-colored logo communicate that "people should take pride . . . in sexual relationships or sexual activity outside of a marriage between one man and one woman." *Id.* The GLSO's representatives agree. They similarly testified that the shirts, which incorporate the "nationally recognized gay pride . . . symbol," convey that people "should be proud about their same-sex relationships." Lowe Dep. at 51-53 (Ex. B) (attached at App'x D); *see also* Brown Dep. at 27-28 (Ex. A) (attached at App'x C) (similar).

Other undisputed facts confirm that HOO declined the GLSO's request because of the messages on the shirts rather than the sexual orientation of the requester. Most notably, HOO would not have printed those messages for anyone. It did not matter whether the requester was a gay GLSO member or one of its non-gay members or supporters. In fact, Adamson did not even know—let alone care about—the sexual orientation of the man he spoke with on the telephone. Complainant's Supp. Answers to Resp't's Reqs. for Admis. at Nos. 2-3 (Ex. 107). Furthermore, Adamson did not decline the order until he asked

Lowe what would be printed on the shirts and Lowe gave him "a detailed description." Lowe Statement to Comm'n at 2 (Ex. 105) (attached at App'x E). Even the Commission's executive director testified that these facts "tend to show that [Adamson] was motivated by the [shirt's] message" rather than the customer's sexual orientation. Sexton Dep. at 41 (Ex. C) (attached at App'x B).

Facts about HOO's general operations bolster that conclusion. HOO has an established practice of declining orders because of their messages, *see* HOO's Supplemental Resp. to Interrog. No. 15 (Ex. 9) (attached at App'x H), while regularly printing orders for LGBT customers, including a lesbian singer who performed at the 2012 Pride Festival, *see* Adamson Aff. ¶ 49 (Ex. 1). In addition, HOO will print for LGBT groups like the GLSO if the requested items do not contain or promote messages that conflict with HOO's beliefs. *See* Resp't's Resp. to Interrog. No. 5 (Ex. 163).

Nor can it be said that HOO's objection to the messages on the Pride Festival shirts singles out LGBT customers. As Chief Judge Kramer recognized, people of all sexual orientations—not just gays and lesbians—express and support those messages. *See* Ct. App. Op. 17. Moreover, HOO's unwillingness to promote sexual relationships outside of opposite-sex marriages causes it to decline orders from heterosexuals and homosexuals alike. It is thus no surprise that Chief Judge Kramer, like Judge Lambert and the Circuit Court, found no evidence that HOO "refused any individual the full and equal enjoyment" of the goods and services that "it offered to everyone else *because* the individual in question had a specific sexual orientation." Ct. App. Op. 15.[63]

[63] *See* Ct. App. Op. 20 (Lambert, J., concurring) ("[A]s the majority points out, HOO did not refuse to print the shirts simply because the GLSO representative is a member of a protected class"); Cir. Ct. Op. 13 ("There is no evidence in this record that HOO or its

The Commission surprisingly seeks support for its position from *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015), a case now under review by the U.S. Supreme Court. But even the government and its supporters in that case acknowledge that businesses do not violate public-accommodation laws by declining to create messages that they will not produce for anyone. *See* Center for Religious Expression Amicus Br. 3-9 (discussing the arguments in that case). Indeed, the Colorado civil-rights commission recognizes that "[a] business may refuse service" because of an objection to "the specific design of a requested product"[64] or an unwillingness "to sell [products] with 'pro-gay' designs or inscriptions."[65] The ACLU likewise concedes that a business may adopt policies that say: "We won't write this message for anyone."[66] The arguments in that case thus undermine the Commission's position here, and it is telling that the Commission's amici in this case, many of which filed briefs in *Masterpiece Cakeshop*, do not take a position on whether HOO violated the ordinance. *See* Americans United for Separation of Church and State Amicus Br. 2 n.1 & 15 (AU Amicus Br.).

Even the reasoning in *Elane Photography, LLC v. Willock*, 309 P.3d 53, 72 (N.M. 2013)—another case on which the Commission relies, *see* Comm'n Br. 6—favors HOO. That court recognized that public-accommodation laws do not prohibit a business "from turning away clients with whose views [it] disagrees." *Elane Photography*, 309 P.3d at 72 (stating that black business owners may refuse to promote a Klan rally because objecting

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owners refused to print the t-shirts in question based upon the sexual orientation of GLSO or its members").

[64] Br. for Resp't Colo. Civil Rights Comm'n at 48, *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, No. 16-111 (U.S. Oct. 23, 2017), *available at* https://bit.ly/2fEwm1s.

[65] *Id.* at 35.

[66] Br. for Resp'ts Craig and Mullins at 26, *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, No. 16-111 (U.S. Oct. 23, 2017), *available at* https://bit.ly/2fEwm1s.

to a group's "views" is not unlawful). Since HOO declined the GLSO's request because it disagreed with the views expressed on the shirts, it did not violate the ordinance.[67]

B. The Commission's interpretation of the ordinance and its arguments in support of that position are untenable.

The Commission and the dissent below argue that permitting business owners to decline to create messages would allow them "to refuse service to an individual or group of individuals" whenever they "express pride in their status," Comm'n Order 12, or "publicly display their same gender sexual orientation," Ct. App. Op. 24 (Taylor, J., dissenting). That is not true. A ruling for HOO will allow business owners to decline requests only when customers ask them to create or disseminate speech that they deem objectionable. Gay or lesbian customers who express pride in their status or otherwise display their same-sex sexual orientation—such as a gay man who walks into a grocery store holding hands with another man—cannot be turned away on that ground. Here, however, there is more—the GLSO asked HOO to create speech in support of a cause. The ordinance does not require HOO to do that.

The Commission also relies on the observation in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), that "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that

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[67] The Commission argues at length about constitutional principles of associational standing. Comm'n Br. 8-10. But when a party relies on a "specific statute authorizing invocation of the judicial process," "the inquiry as to standing must begin" not with constitutional principles but by deciding "whether the statute in question authorizes review at the behest of the plaintiff." *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972). Here, the Commission cannot get beyond the statutory standing question because the ordinance permits claims only by "an individual"—not an association. KRS 344.120; LFUCG Ordinance § 2-33(2) (incorporating KRS 344.120). Hence, the Commission's arguments about constitutional standing principles are irrelevant.

class can readily be presumed." Comm'n Br. 5. But it is not correct, as Chief Judge Kramer explained, that the messages on the Pride Festival shirts are communicated "exclusively or predominantly" by LGBT individuals. *Id.* at 17. The LGBT community, which comprises a very small portion of the population,[68] would not have achieved so much without many others championing its causes. Moreover, the rule announced in *Bray* applies only to "irrational object[s] of disfavor"—those that lack "common and respectable reasons for opposing" them. 506 U.S. at 270. *Bray* held that "opposition to voluntary abortion," even though "abortion is . . . engaged in only by women," is not irrational discrimination against women. *Id.* at 270-71. Likewise, HOO's desire not to create messages promoting sexual relationships outside of opposite-sex marriages is not irrational. In fact, the U.S. Supreme Court has recognized that those sorts of beliefs are "based on decent and honorable . . . premises" and held "in good faith by reasonable and sincere people." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 2602 (2015).

The Commission additionally contends that HOO engaged in unlawful discrimination because its message-based "objection to the printing of the t-shirts was inextricably intertwined with the status of the sexual orientation of members of the GLSO." Comm'n Order 13; *see also* Comm'n Br. 6-7. This argument fails as a factual matter because, again, people of all sexual orientations speak the messages on the Pride Festival shirt and the GLSO's members identify with diverse sexual orientations. This argument also fails as a matter of law. *Hurley* held that refusing a banner that simply displays an LGBT

[68] *See* Brian W. Ward et al., *Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013*, National Health Statistics Reports (July 2014), https://bit.ly/1jMEMmy (only 1.6 percent of the population identifies as gay or lesbian and 0.7 percent identifies as bisexual, according to information published by the Centers for Disease Control and Prevention).

group's name—"Irish American Gay, Lesbian and Bisexual Group of Boston"—in celebration of "its members' [LGBT] identity," *Hurley*, 515 U.S. at 570, does not constitute discrimination "because of [the members'] sexual orientation[]," *Dale*, 530 U.S. at 653 (discussing *Hurley*). It follows, then, that declining to create promotional shirts conveying similar messages is not discrimination based on sexual orientation either. This is because when speech is involved, a parade, printer, or "publisher may discriminate on the basis of content" even if that content relates to a protected classification. *World Peace Movement*, 879 P.2d at 258.[69]

If the ordinance works as the Commission suggests, it would empower anyone (including people who do not belong to a protected class) to force private businesses to create speech that relates to a protected classification. *See* Ct. App. Op. 18 (forcing printer to accept man's request for shirts that say "I support equal treatment for women"). But that conflicts with the ordinance's acknowledged purpose of requiring business owners "to treat all citizens regardless of their [status] the same," Comm'n Br. 10, because it mandates *special*—not equal—*treatment* for customers who seek favored messages. Those customers are afforded not the same goods sold to others, but messages that the business owner would not create for anyone—in effect obtaining items not on the business's "menu of services." Ct. App. Op. 18. The ordinance does not demand that.

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[69] Relying on *Christian Legal Society v. Martinez*, 561 U.S. 661, 689 (2010), the Commission argues that the GLSO's "conduct" of hosting the Pride Festival "cannot be divorced from [the] status" of sexual orientation. Comm'n Br. 14-15. Unlike the party in *Martinez*, however, HOO does not differentiate between status and conduct. Instead, like the parade organizers in *Hurley*, HOO's arguments distinguish between its customers' status (which is irrelevant to HOO's decisions) and the messages it is asked to express (which HOO bases its decisions upon). Moreover, it is not true that only gays and lesbians plan or participate in the Pride Festival. *See* Brown Dep. at 34 (Ex. 504). In fact, the GLSO's representative in this case, Aaron Baker, is a man who is married to a woman and does not identify as gay. Baker Dep. at 13 (Ex. 505); Brown Dep. at 94 (Ex. 504).

If it did, the ordinance would violate expressive freedom and compromise the consciences of many business owners—those of all ideological stripes—who create speech for a living. A lesbian printer could be forced to make posters for a conservative church's event about marriage; a pro-abortion graphic designer compelled to create a religious group's pro-life flyers; a Palestinian printer forced to make pro-Israel shirts; and a Muslim marketer required to develop Scientology ads.[70]

But this Court has a duty to protect against these sorts of constitutional violations and, to that end, must interpret the ordinance "consistent with constitutional mandates" by "avoid[ing] construction that 'threatens unconstitutionality,' whenever reasonably possible." *In re Beverly Hills Fire Litig.*, 672 S.W.2d 922, 925 (Ky. 1984). The Court should thus reject the Commission's interpretation, which will lead to unconstitutional results (as explained below), and instead affirm the crucial distinction between declining to speak a *message* and declining to serve someone because of their *status*. That "would be an important step toward a sensible reconciliation of laws and policies promoting both antidiscrimination and expressive freedom." 16 Scholars Amicus Br. 14.[71]

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[70] Taken to its logical end, the Commission's position could require the GLSO, contrary to its wishes, to accept applications for booths at the Pride Festival from anti-gay religious groups like the Westboro Baptists. *See* Brown Dep. at 58-59 (Ex. A) (testifying that the GLSO would deny "an application by the Westboro Baptist Church").

[71] HOO raised each of the remaining issues addressed in this brief—(1) compelled speech, (2) KRS 446.350, and (3) constitutional free exercise—at every stage of this litigation. *See* HOO's Mem. in Support Mot. for Summ. J. 26-38 (filed with Commission on Apr. 11, 2014); HOO's Mem. in Support Mot. for Summ. J. 18-34 (filed with Circuit Court on Jan. 13, 2015); HOO's Ct. App. Br. 8-24 (filed on Feb. 12, 2016). And each one of those issues provides an alternative basis for affirming the court below. Indeed, the Circuit Court resolved the case on compelled-speech and KRS 446.350 grounds. *See* Cir. Ct. Op. 7-15.

III. The Commission's Order violates HOO's and its owners' freedom from compelled expression protected under the federal and state constitutions.

Regardless of whether HOO violated the ordinance, well-settled constitutional principles protect creators of expression like HOO. The Commission's Order infringes those principles by punishing HOO for declining to create speech and by requiring it to speak messages that it deems objectionable in the future. Strict scrutiny applies to such deep intrusions of conscience, particularly here where the Commission admits that it applies the ordinance in a content- and viewpoint-based manner. But the Commission cannot satisfy that demanding standard because the government does not have a compelling interest in punishing business owners who serve all people simply because they decline to express some messages.

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. § 1; Ky. Const. § 8. They guarantee that each person is free to "decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Champion v. Commonwealth*, 520 S.W.3d 331, 334 (Ky. 2017) (quoting *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013)).[72]

That right to expressive freedom "includes both the right to speak freely and the right to refrain from speaking." *Wooley*, 430 U.S. at 714. The government 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.*,

[72] In *Champion*, this Court left open the question whether Kentucky Constitution's "free-speech provision affords a greater protection independent of the First Amendment." 520 S.W.3d at 334 n.7.

475 U.S. 1, 20-21 (1986) (*PG&E*) (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 their license plates); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (forbidding government from requiring a newspaper to include a politician's writings). Even public-accommodation laws cannot override this constitutional freedom. *See, e.g.*, *Hurley*, 515 U.S. at 572-73 (forbidding government from applying a public-accommodation law to require parade organizers to include the message of an LGBT group); *Dale*, 530 U.S. at 659 (forbidding government from applying a public-accommodation 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 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. And it protects "individual dignity and choice," *Cohen v. California*, 403 U.S. 15, 24 (1971), enabling each of us "to preserve [our] integrity as speakers and thinkers," Cato Institute Amicus Br. 5.

This freedom 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); *PG&E*, 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); *see also* Arkansas Amicus Br. 6 (collecting cases).

The Pride Festival shirts undoubtedly constitute expression. *See, e.g.*, *Cohen*, 403 U.S. at 18-19 (jacket with three-word 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 those shirts communicate ideological messages about pride and sexual relationships. *See* Lowe Dep. at 51-53 (Ex. B) (attached at App'x D); Brown Dep. at 27-28 (Ex. A) (attached at App'x C).

HOO's role in producing expressive shirts qualifies it as a speaker. 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 (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 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 speaker when its customers pay it to print an ad).[73]

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 Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir.

[73] *See also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 675 (1994) (O'Connor, J., concurring and dissenting) ("Selecting which speech to retransmit is, as we know from the example of publishing houses, movie theaters, bookstores, and Reader's Digest, no less communication than is creating the speech in the first place."); Tyndale House Publishers Amicus Br. 9-12 (collecting cases holding that newspapers, television stations, fine-art painters, photographers, and search-engine websites like Google are all speakers).

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). That is why "[p]ublishers disseminating the work of others" are fully protected by the First Amendment. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 925 (6th Cir. 2003); *see also Hurley*, 515 U.S. at 574 (explaining that the protection against compelled speech applies to "professional publishers"); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (noting that both an author and publisher qualify as "First Amendment 'speaker[s]'"); *Buehrle*, 813 F.3d at 977 ("[The] First Amendment protects . . . the act of publishing").

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." Comm'n Order 13-14. Therefore, just as the State of New Hampshire could not force a motorist to serve as a "mobile billboard" for the state motto, *Wooley*, 430 U.S. at 715, the Commission cannot compel HOO to create walking billboards for the Pride Festival.

Three facts confirm that HOO is a speaker. First, HOO exercises editorial discretion over all requests, routinely declining to print messages that it cannot support. Adamson Aff. ¶¶ 27, 30 (Ex. 1); HOO's Supplemental Resp. to Interrog. No. 15 (Ex. 9) (attached at App'x H) (listing examples). Second, HOO's artists create original content for 55% to 65% of the orders that HOO prints. *Id.* at ¶ 11. Third, even when a customer provides the initial artwork, HOO's artists refine the design to create a better image. *Id.* at ¶ 14. Much like a publisher, then, HOO edits, improves, and finalizes all the content it prints.

The Commission's amici nevertheless insist that "any speech at issue belongs to [the

GLSO], not to [HOO]." AU Amicus Br. 1. This ignores that they both are speakers. Constitutional protection for speech is not "a mantle, worn by one party to the exclusion of another and passed between them depending on . . . each party's degree of creative or expressive input." *Buehrle*, 813 F.3d at 977. *Riley* demonstrates this. There, a group of charities and the fundraisers who worked for them challenged a law requiring those fundraisers to speak unwanted messages about the charities' past fundraising efforts. Although the charities had undeniable speech interests at stake and the fundraisers were speaking on behalf of those charities, the Court recognized that the fundraisers had "an independent First Amendment interest in the speech." *Riley*, 487 U.S. at 794 n.8. The same is true of HOO. Indeed, if HOO is not a speaker when it prints for its customers, neither are publishers, newspapers, television stations, internet companies, and other media outlets when they disseminate speech submitted by and attributed to others. Such a ruling would upend much settled constitutional jurisprudence. *See supra* at 25-26.[74]

By requiring HOO to create messages that its owners deem objectionable, the Commission's Order adversely affects HOO's speech in at least three ways. First, and most obviously, the Order requires HOO to convey unwanted messages on the shirts that it is forced to print. That "directly alter[s] the messages that HOO expresses." Adamson Aff. ¶ 60 (Ex. 1).

Second, the Order pressures HOO to stop speaking. The Order declares that so long as HOO remains in business, it must print messages that conflict with its owners' beliefs.

[74] Declaring HOO to be beyond constitutional protection leaves it and similar creators of expression vulnerable to ever-expanding public-accommodation laws. At least 13 jurisdictions have already added "political affiliation" as a protected classification. *See* Cato Institute Amicus Br. 8 n.1 (collecting examples). In those locations, if the First Amendment does not cover promotional printers, Democratic printers could be forced to create campaign signs for Republican candidates.

But this puts "substantial pressure" on HOO's owners to close their business and forfeit their constitutional right to create "promotional materials" with messages that they want to communicate, *id.* at ¶ 62, such as those produced through HOO's Christian Outfitters division, *id.* at ¶ 25. *See Tornillo*, 418 U.S. at 257 (a compelled speaker "might well conclude that the safe course" is to stop speaking). The Order thus threatens to silence HOO entirely. *See* CatholicVote Amicus Br. 13-14 ("[T]he Commission force[s] HOO to . . . either acquiesce in a speech compulsion . . . or submit to a speech restriction").

Third, the Order compels HOO to respond to objectionable speech. Requiring HOO to print the Pride Festival shirts forces it to communicate messages that directly conflict with its owners' religious beliefs. Adamson Aff. ¶ 43 (Ex. 1). That inconsistency between expression and belief pressures HOO "to speak out against the messages" on the Pride Festival shirts in order to set straight its owners' "apparent hypocrisy." *Id.* at ¶ 64. But "HOO does not want to be forced" to do that. *Id.* at ¶ 65. Such "pressure to respond" "is antithetical to the free [speech] that the First Amendment seeks to foster." *PG&E*, 475 U.S. at 15-16 (plurality).

1. *Hurley* controls this case.

Hurley not only guides this Court in interpreting the ordinance, it also dictates that HOO must prevail on its compelled-speech claim. *Hurley* invalidated a government's attempt to apply its public-accommodation law to a speaker that widely offered its speech to the public, 515 U.S. at 562, and permitted gays and lesbians to access that speech, *id.* at 572, but declined to convey certain messages, *id.* That decision, as the Circuit Court held, controls this case and forbids the Commission from applying the ordinance to HOO here. Cir. Ct. Op. 11. Three key similarities demonstrate why *Hurley* is controlling.

First, both *Hurley* and this case involve compelled access to communicative mediums

that by their nature express messages. The public-accommodation 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-accommodation statute in *Hurley* treated "speech itself [as] the public accommodation" and forced the parade organizers "to alter the[ir] expressive content." *Id.* at 572-73. Here too, this application of the public-accommodation law requires HOO to modify its speech by creating promotional items that it would not otherwise print.

Third, both the parade organizers and HOO work with gays and lesbians. *Id.* at 572; Adamson Aff. ¶ 49 (Ex. 1). They simply declined to express certain messages.

Despite these similarities, the Commission argues that *Hurley* is irrelevant because it did not involve a commercial business, insisting that the Court there "distinguished the private parade [from a] commercial business." Comm'n Br. 11. That is not true. The Court actually said that freedom from compelled speech is "*enjoyed by business corporations generally*," including "professional publishers" that (like HOO) print speech originating with others. 515 U.S. at 574 (emphasis added). *Hurley* applied the compelled-speech doctrine not because the case arose outside of commerce, but because, as in this case, the government applied the law "in a peculiar way," "essentially requiring [a group] to alter the expressive content" of its speech. *Id.* at 572-73.[75]

[75] The U.S. Supreme Court has protected commercial businesses from compelled speech at least three times. *See Riley*, 487 U.S. at 795-801 (fundraisers); *PG&E*, 475 U.S. at 9-21 (utility company); *Tornillo*, 418 U.S. at 254-58 (newspaper).

2. The Commission's Order mandates speech not conduct.

The Commission and its amici argue that the compelled-speech doctrine is not even implicated here because the "ordinance applies to conduct, not speech." Comm'n Br. 5; AU Amicus Br. 3. Yet when analyzing an as-applied constitutional claim like HOO raises, the question is not whether the ordinance typically regulates speech or conduct, but whether the government has applied its law *in this case* to punish speech or a decision not to speak. Indeed, the U.S. Supreme Court has held that strict constitutional scrutiny applies to a law that "*generally* functions as a regulation of conduct" when "the conduct triggering" the law in a specific case "consists of communicating" or declining to communicate "a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010). Here, the ordinance was triggered by HOO's decision not to create speech with a particular message, and this application of the ordinance mandates speech alone—forcing HOO to print unwanted expression. Compelled-speech protections thus apply.[76]

3. Compelled-speech violations do not depend on what a hypothetical observer might perceive.

The Commission, its amici, and the dissent below all wrongly assume that a compelled-speech violation depends on whether an observer of the Pride Festival shirts would attribute their messages to HOO or think that HOO endorses them. Comm'n Br. 11-12; AU Amicus Br. 4; Ct. App. Op. 25. It does not. In *Wooley*, for example, the U.S. Supreme Court found a compelled-speech violation even though no observer of a car would reasonably attribute the state motto on a license plate to the driver—much less

[76] It cannot be said that the process of printing speech is conduct. Constitutional analysis does not distinguish "between the process of creating a form of *pure* speech"—like "the act of setting the type" on a printing press—and "the product" of that process. *Anderson*, 621 F.3d at 1061-62. Those sorts of processes are "purely expressive activities entitled to full First Amendment protection." *Id.* at 1062; *accord Buehrle*, 813 F.3d at 977 (similar).

think that the driver endorses it. 430 U.S. at 715-17. Similarly, in *PG&E*, the Court struck down a state order requiring a business to transmit a third party's newsletter in its billing envelope, even though the newsletter explicitly stated that it was not the business's speech. 475 U.S. at 6-7, 15 n.11 (plurality); *see also* CatholicVote Amicus Br. 11-12 (discussing *Wooley* and *PG&E*). Third-party perceptions are not dispositive.

That makes sense because the compelled-speech doctrine protects each individual's freedom to decide which ideas are "deserving of expression" and to refuse to convey contrary views. *Champion*, 520 S.W.3d at 334. Whether the Commission invades Adamson's "freedom of mind" does not ultimately depend on what others perceive. *Wooley*, 430 U.S. at 714. Otherwise, the Commission could force people to write books or speak on radio if their identity remains secret. Or students could be compelled to recite the Pledge of Allegiance if classmates do not believe that they endorse the message. *Cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633, 642 (1943) (invalidating mandatory pledge even if it merely requires students to "simulate assent by words without belief"). Nothing supports such a cramped understanding of expressive freedom.

The arguments of the Commission's amici illustrate that their perception-based focus is untenable. They contend that the messages on the Pride Festival shirts will not "be attributed" to HOO "because all retail businesses are required to comply with the . . . ordinance." AU Amicus Br. 4. But since all compelled speech is mandated by law, that reasoning would negate compelled-speech protection entirely. It would transform legal coercion from a predicate of a compelled-speech violation to its antidote. If "the government made me do it" eliminates compelled-speech concerns, the doctrine itself would cease to exist. *See also* 16 Scholars Amicus Br. 9 (explaining this further).

In any event, perception-based considerations actually bolster HOO's claim. To begin with, countless people would know that HOO created the Pride Festival shirts. Not only does the GLSO freely disclose the name of its printers,[77] Festival attendees would know who made the shirts because the GLSO brings the shirts to the Festival in the boxes from the printer[78]—"boxes that depict the HOO logo" and are labeled with "sticker[s] displaying the HOO logo"[79]—and the GLSO leaves those boxes where the shirts are displayed.[80] Moreover, an informed observer would think that HOO supports—or at least does not oppose—the messages it prints. This is because "[i]t is standard practice within the promotional-printing industry to decline to print materials containing messages that the owners do not want to support," Adamson Aff. ¶ 32 (Ex. 1) (citing examples), and HOO regularly declines to print messages its owners deem objectionable, *id.* at ¶ 30. Given this, had HOO printed the GLSO's shirts, it would have been "perceived as having resulted from [its] customary determination" that the shirts' "message was worthy of presentation and quite possibly of support." *Hurley*, 515 U.S. at 575.

The Commission suggests that HOO might disclaim the messages on the Pride Festival shirts. *See* Comm'n Br. 12. But even if that were true, it would not undo the compelled-speech violation. Disclaimers do not suffice when the government orders people to convey "messages with which they disagree" because the government cannot

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[77] *See* Brown Dep. at 22 (Ex. 504) (testifying that the GLSO will disclose "the name of the company that printed the shirts"); Lowe Dep. at 54-55 (Ex. 503) (same); Anyssa Roberts, *Court rulings giving Lexington Pride Festival even more reason to celebrate*, Lexington Herald-Leader, June 27, 2013, at 3 (Ex. 112) (disclosing who printed the shirt for the 2013 Festival).

[78] Lowe Dep. at 54 (Ex. 503).

[79] Adamson Aff. ¶¶ 54-55 (Ex. 1).

[80] Lowe Dep. at 54 (Ex. 503).

"require speakers to affirm in one breath that which they deny in the next." *Hurley*, 515 U.S. at 576 (quoting *PG&E*, 475 U.S. at 16). *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980)—a case that the Commission discusses, *see* Comm'n Br. 12—is not to the contrary. There, the shopping-center owner, who was not forced to create speech but only to allow it on his premises, "did not even allege that he objected to the content of [that speech]." *Hurley*, 515 U.S. at 580. Thus, "[t]he principle of speaker's autonomy was simply not threatened" in that case. *Id.*[81]

4. *Rumsfeld* does not control this case.

The Commission unpersuasively attempts to analogize this case to *Rumsfeld v. FAIR*, 547 U.S. 47 (2006). *See* Comm'n Br. 12. The *Rumsfeld* Court rejected the law schools' compelled-speech claim because they were "*not speaking* when they host[ed] interviews and recruiting receptions." 547 U.S. at 64 (emphasis added). Here, however, the Commission admits 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 13-14. *Rumsfeld* is thus plainly distinguishable. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 n.10 (2008) (distinguishing the "[f]acilitation of speech" in *Rumsfeld* from situations where parties are "require[d] . . . to reproduce another's speech against their will").

Nor is HOO's position undermined by *Rumsfeld*'s requirement that the law schools

[81] The Commission's disclaimer suggestion also fails because a disclaimer inserted into the objectionable speech would not be "practicab[le]" in this case. *Hurley*, 515 U.S. at 576-77. After all, no one would want to purchase shirts bearing a disclaimer. Moreover, the disclaimer itself might violate the ordinance's prohibition on businesses "publish[ing]" or "display[ing]" a "communication" indicating that a protected group's "patronage" or "presence" is "objectionable, unwelcome, unacceptable, or undesirable." KRS 344.140; LFUCG Ordinance § 2-33(2) (incorporating KRS 344.140)

send logistical emails announcing when and where military recruiters will be on campus. Those emails did not contain messages that the schools deemed objectionable. *Rumsfeld*, 547 U.S. at 60-62. It is not as if the government forced the law schools to create flyers advertising the military's "Don't Ask, Don't Tell" policy, which was the source of the schools' disagreement with the military's operations. *Id.* Here, though, the Commission requires HOO to create speech conveying messages that its owners disagree with. Unlike *Rumsfeld*, then, core compelled-speech concerns are threatened in this case.

Furthermore, *Rumsfeld* reasoned that the logistical emails were "plainly incidental" to the law schools' legal duty of conduct to provide military recruiters physical access to campus. *Id.* at 62. But here, HOO has no legal duty to host the Pride Festival; thus, forcing HOO to print the Festival shirts is not incidental to a legal duty of conduct like the emails in *Rumsfeld* were. Nor is requiring HOO to create the shirts incidental to any conduct at all. *See* CatholicVote Amicus Br. 13 ("There are not two separate things—the conduct . . . and the incidental speech."). All that is required is the printing of speech, and that "process of creating a form of *pure* speech" is not "conduct" but a "purely expressive activit[y]." *Anderson*, 621 F.3d at 1061-62; *accord Buehrle*, 813 F.3d at 977 (similar).[82]

[82] The Commission cites other cases where the government did not compel anyone to create speech and the parties did not raise a compelled-speech claim. *See, e.g.*, *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (rejecting law firm's associational claim defending its refusal to promote a female attorney); *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973) (rejecting private school's associational claim defending its racial segregation); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 400-03 (1968) (per curiam) (awarding attorneys' fees against restaurant that refused to serve black customers); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243-44, 258, 261-62 (1964) (finding congressional authority for the federal public-accommodation statute, and concluding that the statute did not deprive hotel owner of "liberty or property under the Fifth Amendment"). These cases do not speak to—let alone foreclose—HOO's arguments.

5. The Court of Appeals' dissent is not persuasive.

The Court of Appeals dissent does not squarely address HOO's compelled-speech claim, but to the extent that it touches on issues relevant to that claim, its analysis is unpersuasive. At one point, the opinion suggests that HOO "sought to censor" the GLSO. Ct. App. Op. 25. That is not correct. HOO simply declined to be the one to create the GLSO's speech, while offering to connect the GLSO to another printer that would.

The dissent also implied that HOO is not entitled to constitutional protection because the speech that it declined to create "was not obscene or defamatory" or otherwise unprotected by the First Amendment. Ct. App. Op. 25-26. That argument misses the point. In every compelled-speech case decided by the U.S. Supreme Court, the message that the compelled speaker declined to express, including the LGBT group's message in *Hurley*, was fully protected speech. That the government cannot silence the GLSO's message does not mean that HOO must print it.

Nor does *Obergefell*'s recognition of "gay marriage . . . as a fundamental right" years after this case arose thwart HOO's claims. Ct. App. Op. 24; *see also* Comm'n Br. 15-16. *Obergefell* actually supports HOO. It promises "proper protection" to people of faith seeking to engage in "an open and searching debate" about the meaning of marriage and related issues. 135 S. Ct. at 2607. That good-faith debate can hardly occur if people on one side of a contentious issue are forced to speak the other side's views.

B. Strict scrutiny applies to HOO's compelled-speech claim.

The government must satisfy the most stringent level of constitutional review—strict scrutiny—whenever it compels objectionable expression or imposes punishment for declining to express objectionable messages. *Riley*, 487 U.S. at 795-801; *PG&E*, 475 U.S. at 19 (plurality). That exacting standard is doubly warranted here because the

Commission applies the ordinance in a content-based manner. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (content-based laws are subject to strict scrutiny).

This application of the ordinance is content based in two ways. First, a law is "a content-based regulation of speech" when it "[m]andat[es] speech that a speaker would not otherwise make" because that "necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. Applying the ordinance in this case is undoubtedly content based in this sense because it compels HOO to create speech that it "would not otherwise make."

Second, a law used to compel speech is content based when that law is triggered by the topic or idea that a compelled speaker is asked to express. *See Turner*, 512 U.S. at 654-55 (explaining that the law invalidated in *Tornillo* and the order struck down in *PG&E* were content based because they selected the speakers whose expression the compelled speakers must disseminate based on its content); *Champion*, 520 S.W.3d at 336 ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea the message expressed.") (quoting *Reed*, 135 S. Ct. at 2227).

The Commission has conceded that type of content discrimination in this case. Its executive director testified that printers may unquestionably refuse to create materials on topics like "basketball and March Madness" that are unrelated "to a protected category," but not items like "[p]ro-gay material[s]" with messages that "relate to individuals [who] are members of a protected class." Sexton Dep. at 54-55 (Ex. 506) (attached at App'x B). Worse yet, the Commission has admitted viewpoint discrimination. While printers may refuse to create items with *negative* messages about a protected class, they risk prosecution for declining materials that express *favorable* messages about a class. *Id.* at

22-23. To justify this content and viewpoint discrimination, the Commission must overcome strict scrutiny.

C. The Commission's Order does not satisfy strict scrutiny.

Under strict scrutiny, the Commission must show that applying the ordinance here "furthers a compelling interest and is narrowly tailored." *Champion*, 520 S.W.3d at 338. This test ensures that the government interferes with constitutional freedoms "only out of absolute necessity and by the least-restrictive means possible." *Id.* The Commission "bears the burden" of satisfying these requirements, and it "is an admittedly challenging burden to meet." *Id.* When the government asserts a problem to solve, this Court will "not presume [it] exists; the governing body must prove" it. *Id.*

On multiple occasions, governments that have applied public-accommodation laws to infringe First Amendment liberties have been unable to satisfy constitutional scrutiny. *See, e.g.*, *Hurley*, 515 U.S. at 578-79; *Dale*, 530 U.S. at 659; *see also* Tyndale House Publishers Amicus Br. 13-14 & nn.22-26 (collecting cases where expressive freedom prevailed over nondiscrimination laws). The Commission's efforts fare no better here.

The Commission argues that its interest is in "protect[ing] all its citizens no matter their protected status from discrimination by a public accommodation." Comm'n Br. 16. Yet that characterization of the interest is far too broad. Strict scrutiny "look[s] beyond broadly formulated interests justifying the general applicability of government mandates" to see whether the test "is satisfied through application of the challenged law" to "the particular" party. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006); *see also Attorney General v. Desilets*, 636 N.E.2d 233, 238 (Mass. 1994) ("The general objective of eliminating discrimination of all kinds . . . cannot alone provide a compelling State interest"). As *Hurley* illustrates, the analysis should focus not

on the ordinance's general purpose of preventing "denial[s] of access to (or discriminatory treatment in) public accommodations," but on its "apparent object" when "applied to [the] expressive activity" at issue. 515 U.S. at 578.

The Commission thus must show a compelling interest in forcing printers like HOO—those who serve all people and refer all declined orders—to violate their consciences by printing messages like those on the Pride Festival shirts. Unlike most of the ordinance's applications, this one has as its "apparent object" requiring HOO to create speech and "modify the content of [its] expression." *Id.* But as *Hurley* said, permitting that would "allow exactly what the general rule of speaker's autonomy forbids." *Id.* Even this cursory look at strict-scrutiny analysis reveals that it is not satisfied here.

Diving deeper, it becomes clear that the Commission's generically stated interest in nondiscrimination rests on two specific interests: (1) to ensure that LGBT groups have access to promotional printing; and (2) to protect the dignity of LGBT groups. Neither of those interests satisfies strict scrutiny under these circumstances.[83]

1. The Commission's access interest is not furthered by punishing HOO under these facts.

The Commission claims an interest in "guarantee[ing] all citizens access to goods and services." Comm'n Br. 17. But the Commission has introduced no evidence suggesting that LGBT groups like the GLSO have problems accessing promotional printers. On the contrary, the submitted evidence shows that no such problem exists. In fact, the GLSO

[83] The Commission's amici also claim that the Commission has an interest in "avoiding [an] Establishment Clause violation." AU Amicus Br. 15. But when any form of heightened constitutional scrutiny applies, neither courts nor amici may "supplant the precise interests put forward by the [government] with other suppositions." *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). Regardless, as explained below, those amici's Establishment Clause arguments lack merit.

itself admits that "nearly a dozen t-shirt printing companies" have offered "to print . . . t-shirts for the Pride Festival." GLSO Newsletter, May 2012, at 2 (Ex. 106); *see also* Baker Dep. at 8-9 (Ex. 505) (accepting that as "an accurate quote"). And one company printed its Festival shirts for free. Complainant's Resp. to Interrog. No. 9 (Ex. 108).[84]

More importantly, punishing HOO does *nothing* to further the Commission's interest in ensuring access to promotional printing. Everyone who contacts HOO will obtain the materials they seek. If HOO cannot print them, it will connect the customer to another company that will. Adamson Aff. ¶¶ 33, 47 (Ex. 1). HOO thus already ensures that everyone has access to printing services; hence, the Commission's access interest is "not implicated on these facts" and cannot satisfy strict scrutiny. *Texas v. Johnson*, 491 U.S. 397, 407-10 (1989).

2. The Commission's dignitary interest does not satisfy strict scrutiny under these facts.

The Commission also raises an interest in eliminating the "deprivation of personal dignity" that accompanies "denial[s] of equal access to public accommodations." Comm'n Br. 16. But that interest, while laudable, does not satisfy strict scrutiny here.

No compelling interest. The Commission furthers its dignitary interest only when it punishes businesses that discriminate based on status. HOO, however, works with everyone, including LGBT customers. To be sure, the company will not print some messages, but those messages are unavailable to everyone. Because these kinds of business practices involve neither unequal treatment nor status-based discrimination, punishing HOO does not advance the Commission's dignitary interest. *See* 16 Scholars

[84] Also, because the printing industry "is not confined by geographical boundaries," a customer can purchase from printers anywhere in the country. Adamson Aff. ¶ 51 (Ex. 1).

Amicus Br. 11-12 ("[W]here invidious discrimination is absent, the Commission's interest . . . is quite weak."); Girgis Amicus Br. 13 (this case does not involve "the kinds of dignitary harms rightly fought by antidiscrimination laws").

Furthermore, as a matter of well-settled law, the Commission's dignitary interest does not justify compelling HOO's speech. *Hurley* established that the government's interest in eliminating dignitary harms is not compelling where, as here, the cause of the harm is another's decision not to create or facilitate speech. *See* Girgis Amicus Br. 7-9 (discussing *Hurley* and *Dale*). The *Hurley* Court recognized 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; *see also Champion*, 520 S.W.3d at 338 ("[T]o accept [freedom of speech] is to welcome controversy and to embrace discomfort."). An interest in preventing dignitary harms thus is not a compelling basis for infringing expressive freedom. *Cf. Johnson*, 491 U.S. at 409 (explaining that "[i]t would be odd" to conclude that the hurtfulness of an expressive decision is the reason both "for according it constitutional protection" and for stripping it of protection). Some dignitary harms must be tolerated to provide "adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).[85]

If dignitary interests override HOO's freedom in this case, that risks allowing them to

[85] *See also Champion*, 520 S.W.3d at 334 ("'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because it finds the idea itself offensive or disagreeable.'") (quoting *Johnson*, 491 U.S. at 414); *Boos v. Barry*, 485 U.S. 312, 322 (1988) (expressing grave doubts about the government's "interest in protecting the dignity" of listeners from speech since that is "inconsistent with our longstanding refusal to punish speech because the speech in question may have an adverse emotional impact on the audience") (quotation marks and alterations omitted); Becket Fund Amicus Br. 11-13 (discussing the "acute" dignitary harms tolerated in *Dale* and *Snyder v. Phelps*, 562 U.S. 443 (2011)).

curtail freedom in other First Amendment contexts—for example, when a picketer shouts messages ("Black Lives Matter") that the government deems offensive to some groups, or when a person of faith shares messages ("Jesus is God") that the government thinks will demean others. Permitting the Commission's dignitary interest to prevail here thus threatens to "trim[] the whole field" of First Amendment protection. Girgis Amicus Br. 5.

Additionally, allowing dignitary interests to compel speech in this case is self-defeating because it simply shifts the dignitary harm onto Adamson. The First Amendment exists to protect the dignity of speakers and religious adherents. *See Cohen*, 403 U.S. at 24 (expressive freedom protects "individual dignity"); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) (religious freedom "is essential in preserving [one's] own dignity" in the "economic life of our larger community"). But it is an affront to Adamson's dignity to order him to convey messages that violate his conscience. And it is demeaning for the government to officially disapprove of his religious beliefs and subject him to diversity training to teach that he was wrong to operate his business according to his faith. "The 'indignity' of being forced to [create speech] in violation of one's conscience or to exit one's profession cannot be easily dismissed." Law & Econ. Scholars Amicus Br. 13.

Finally, the Commission has not shown that sexual-orientation discrimination is such a great concern in Lexington that it justifies overriding HOO's freedom. In fact, the evidence shows that the opposite is true. Aside from this case, in the first sixteen years after sexual orientation was added to the ordinance, only *three* complaints alleging that kind of discrimination were filed, and *none* of them were supported by probable cause. Comm'n Amended Resp. to Req. for Prod. No. 10 (Ex. 17) (attached at App'x G).

No narrow tailoring. Nor is the ordinance narrowly tailored to achieve the Commission's asserted dignitary interest. This is because the law is overinclusive (compelling speech where it does not advance the interest), it is underinclusive (failing to compel speech where the interest is implicated), and the government has less restrictive alternative means of advancing its interest without infringing HOO's freedom.

As to overinclusiveness, the Commission would force printers to create materials that speak favorably about a protected class even if the requester does not belong to the class. *See* Ct. App. Op. 18. This means that printers must accept a request from a Buddhist for shirts that say "Muslim Pride" even though declining that order would not demean the Buddhist's religion in any way. This and countless similar examples show that the ordinance is significantly overinclusive. *See id.* (reciting other examples).

As to underinclusiveness, the ordinance allows printers to refuse orders, including from members of protected classes, to produce speech about topics that are unrelated to a protected classification. Sexton Dep. at 54-55 (Ex. 506) (attached at App'x B). Hence, a pro-gun printer may decline to create shirts for a GLSO rally on gun control, notwithstanding that the refusal risks dignitary harm to requesters who perceive that the decision is based on the group's LGBT mission. Also, the ordinance permits printers to reject requests from protected individuals for speech that denounces another protected class. *Id.* at 22-23. Thus, a printer may turn down a request from the GLSO for flyers criticizing a specific religious group, even though that will have a similar effect on the GLSO's dignity as HOO's decision in this case. Because the ordinance permits all this, it is decidedly underinclusive.

As to less restrictive means, many alternatives would enable the government to

further its asserted goals without infringing HOO's rights. For starters, the Commission could construe the ordinance, as HOO argues in Section (II) above, to allow business owners that create expression to decline requests because of their message. *Cf.* 42 U.S.C. § 2000e-2(e)(1) (creating exemption from federal nondiscrimination law when "reasonably necessary to the normal operation of [a] particular business"). Another option is narrowing the definition of public accommodation to mirror the federal public-accommodation statute and thereby excluding businesses that are selective about what speech they create. *See* 42 U.S.C. § 2000a(b) (applying only to hotels, restaurants, gas stations, and limited places of entertainment). Or the government could adopt "educational campaigns" that encourage businesses to promote certain messages, using persuasion instead of compulsion to achieve its goals. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (1996) (plurality). These alternatives confirm that the ordinance is not narrowly tailored.

The Commission's amici suggest that the ordinance is as closely tailored as it can be because any outcome that protects HOO will license widespread discrimination and render the ordinance ineffective. AU Am Br. 15. Such conjecture is baseless. A ruling for HOO would not apply to the vast majority of business transactions (e.g., grocery stores, restaurants, gas stations, etc.). It would apply only in the narrow circumstance when (1) a business owner who creates speech for a living (2) is asked to create speech and (3) declines because he does not want to express the requested message (not because he refuses to serve people of a particular class). Because those business owners are not discriminating against anyone based on their status, respecting this freedom will not undermine the ordinance at all.

Nor is it reasonable to assume that a ruling for HOO will unleash a flood of printers refusing to create messages like those on the Pride Festival shirts. "Market forces . . . tend to discourage [business] owners" from declining orders. *Desilets*, 636 N.E.2d at 240. And there are additional deterrents when an order includes a message like the one at issue here. As this case illustrates, declining to print such messages risks boycotts, negative publicity, and lost customers. *See* Boycott Hands On Originals Facebook Page (Ex. 117); Adamson Aff. ¶ 57 (Ex. 1) (discussing lost customers). And choosing that path often provokes "death threats, abusive phone calls, and a torrent of vitriolic hate mail." Law & Econ. Scholars Amicus Br. 10 (citing examples). Few will have the courage of conviction to endure this, and it is telling that the Commission has introduced no evidence to support these arguments. *See, e.g.*, *Gonzales*, 546 U.S. at 435-36 (rejecting the government's "slippery-slope" argument that "[i]f I make an exception for you, I'll have to make one for everybody, so no exceptions"); *Hobby Lobby*, 134 S. Ct. at 2783 (rejecting the government's argument about "a flood of religious objections" because it "made no effort to substantiate" it).

Finally, the Commission, its amici, and the dissent below all argue that *Bob Jones University v. United States*, 461 U.S. 574 (1983), establishes that strict scrutiny is satisfied here. Comm'n Br. 13-14; AU Amicus Br. 15; Ct. App. Op. 22. The interest in *Bob Jones* was "eradicating racial discrimination in education," which the Court found "compelling." *Bob Jones*, 461 U.S. at 604. The interest here, however, is "requir[ing] speakers to modify the content of their expression," which is not compelling because it "allow[s] exactly what the general rule of speaker's autonomy forbids." *Hurley*, 515 U.S. at 578. Moreover, *Bob Jones* withheld a tax exemption—a government benefit—and

doing that did not keep the school "from observing [its] religious tenets." 461 U.S. at 603-04. But here, the Commission mandates speech that violates HOO's faith, which risks forcing HOO's owners to close their shop. Laws "that require action" (like the ordinance here) are of greater constitutional concern than "those that withhold benefits" (like the law in *Bob Jones*). *See Martinez*, 561 U.S. at 682-83 (distinguishing *Bob Jones* from public-accommodation cases like *Dale* that "*compel[]* a group" to act "with no choice to opt out").

IV. The Commission's Order violates HOO's and its owners' free exercise of religion protected by KRS 446.350.

The Commission's Order also violates KRS 446.350. That statute 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." Like its federal counterpart, the Religious Freedom Restoration Act, KRS 446.350 "provide[s] very broad protection for religious liberty." *Hobby Lobby*, 134 S. Ct. at 2760.[86]

KRS 446.350's protection applies here. It is undisputed that HOO's decision not to print the Pride Festival shirts was motivated by its owners' religious beliefs. Adamson Aff. ¶ 43 (Ex. 1). And the Commission has conceded that "the religious beliefs of Mr. Adamson and his co-owners . . . are sincerely held." Comm'n Order 8.

Nor is there any doubt that the Commission's Order "substantially burdens" HOO's religious exercise. Before the Court of Appeals, the Commission did not even contest the

[86] The Commission mischaracterizes *Hobby Lobby* by attributing to it a quote from another case—*Employment Division v. Smith*, 494 U.S. 872, 878 (1990). Comm'n Br. 15.

substantial-burden issue, prompting Judge Lambert to observe that "the parties agree" on that point. Ct. App. Op. 20.

Case law confirms that governmental action requiring people or organizations to "engage in conduct that seriously violates [their] religious beliefs" "easily satisfie[s]" the "substantial[] burden[]" requirement. *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (quotation marks omitted). Because the Commission's Order requires HOO to print messages that violate its owners' faith, it substantially burdens religious exercise.

Other cases establish that putting "pressure on [a religious] adherent to modify his behavior and to violate his beliefs" imposes a "substantial" "burden upon religion" even though "the compulsion" is "indirect." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981); *see also* KRS 446.350 (burdens may be "indirect"). Adamson testified that the Commission's Order "substantially pressure[s] HOO and its owners . . . to violate [their] religious convictions." Adamson Aff. ¶ 58 (Ex. 1). Either HOO must print messages that violate its faith, or it will be (1) stigmatized as a discriminator,[87] (2) subjected to diversity training designed to teach that Adamson was wrong to operate HOO consistently with his faith, (3) exposed to suits for "damages . . . including compensation for humiliation and embarrassment,"[88] and (4) subjected to enforcement actions by the Commission.[89] Because HOO's owners could not long endure the latter

[87] *See Desilets*, 636 N.E.2d at 237-38 ("[B]oth their nonconformity to the law and any related publicity may stigmatize the [business owners] in the eyes of many and thus burden the exercise of the[ir] religion."); KRS 344.230(4) (authorizing the Commission to publish "the names of persons" who have "engaged in an unlawful practice"); LFUCG Ordinance § 2-32(1) (incorporating KRS 344.230(4)).

[88] KRS 344.230(3)(h); LFUCG Ordinance § 2-32(1) (incorporating KRS 344.230(3)).

[89] KRS 344.340 (authorizing the Commission to initiate a "proceeding for enforcement"); LFUCG Ordinance § 2-31(3) (incorporating KRS 344.340).

course, their only real choice is between their faith and livelihood. But "choos[ing] between following the precepts of [one's] religion" and "work" surely imposes a substantial burden on religion. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see also Desilets*, 636 N.E.2d at 238 (discussing five similar cases finding a substantial burden).[90]

Because KRS 446.350's protection applies, the Commission must satisfy strict scrutiny "by clear and convincing evidence." KRS 446.350. But as HOO explained in Section (III)(C), the Commission has not done so. HOO should thus prevail.

The Commission's amici counter that affirming HOO's freedom under KRS 446.350 would violate the Establishment Clause. AU Amicus Br. 8-10. But their arguments are misguided. The primary cases they cite—*Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989)—found Establishment Clause violations because the statutes at issue afforded religious people and groups "absolute and unqualified right[s]" without regard for the impact on others. *Caldor*, 472 U.S. at 709. KRS 446.350 does no such thing—a religious claimant cannot succeed if the government demonstrates a "compelling governmental interest." That statute is thus like the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, which the U.S. Supreme Court found "compatible with the Establishment Clause" because its "'compelling governmental interest' standard" adequately accounts for "the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v.*

[90] The Commission's amici admit that the government substantially burdens religious exercise whenever it "put[s] substantial pressure on an adherent . . . to violate his beliefs." AU Amicus Br. 11 (quoting *Thomas*, 450 U.S. at 718). But they insist that no such pressure exists here because HOO supposedly "did not argue that its (or its owner's) faith forbade it to fill the order." AU Amicus Br. 15. Yet those amici are mistaken. Adamson's affidavit expressly declares: "I sincerely believe that I would disobey God if I were to knowingly authorize HOO to print" the requested shirts. Adamson Aff. ¶ 43 (Ex. 1). Amici's arguments are thus unconvincing.

Wilkinson, 544 U.S. 709, 720, 722-23 (2005). KRS 446.350 thus does not pose any Establishment Clause concerns.

This Court, to be sure, must consider "the burdens" on third parties when analyzing "the [g]overnment's compelling interest and the availability of a less restrictive means of advancing that interest." *Hobby Lobby*, 134 S. Ct. at 2781 n.37. "But it could not reasonably be maintained" that KRS 446.350 provides no protection whenever the law that burdens religious freedom "benefit[s] . . . third parties" or the requested religious accommodation has any adverse effect on any third party. *Id.* Otherwise, KRS 446.350 would be practically "meaningless." *Id.* Only significant third-party harm that the government has a compelling interest in avoiding will override rights afforded under KRS 446.350. As discussed in Section (III)(C), however, the Commission has not shown any such harm or interest under the facts of this case because, among other reasons, HOO does not discriminate against anyone but only declines to speak certain messages.

V. 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.[91]

First, HOO has invoked a hybrid of rights, both its free-exercise rights and its free-speech rights (discussed in Section (III)). Such hybrid claims are subject to strict scrutiny.

[91] HOO encourages the Court to adopt Governor Bevin's suggestion to jettison the state constitutional free-exercise rule announced in *Gingerich v. Commonwealth*, 382 S.W.3d 835 (Ky. 2012), or at least confine it to cases involving public safety. Bevin Amicus Br. 8-14. Should the Court do that, strict scrutiny would apply to HOO's state free-exercise claim for all the reasons discussed in Section (IV)—without needing to consider the following two arguments.

See Smith, 494 U.S. at 881-82 (strict scrutiny applies in "hybrid situation[s]" where a free-exercise claim is linked with "other constitutional protections, such as freedom of speech"); *Triplett v. Livingston Cty. Bd. of Educ.*, 967 S.W.2d 25, 32-33 (Ky. App. 1997) (similar); *see also* Arkansas Amicus Br. 12-13 (developing the hybrid argument further).

Second, the Commission has exhibited a lack of neutrality toward HOO's religious beliefs. At the Commission meeting adopting the Hearing Examiner's ruling in this case, a commissioner expressed a "hope to see a change in attitude" of people with HOO's beliefs about marriage. Comm'n Meeting Minutes from Nov. 17, 2014, at 4 (Ex. D). The Commission also mandated that HOO submit to diversity training to reshape or confine its beliefs. And the Commission insisted on diversity training over its own attorney's plea not to impose it and her warning of its questionable constitutionality. *See* Comm'n Resp. to HOO's Opposition to Hearing Examiner's Ruling ¶ 13 (attached at App'x F) (stating that diversity training would "create a whole new realm of constitutional arguments pertaining to freedom [of] expression and the free exercise of religion," and that "[i]t is not clear to the Commission that diversity training would be helpful in this situation").

In addition, the Commission manifested its hostility toward HOO's beliefs by ignoring its executive director's testimony that declining an order because a "company does not approve of the message that it's asked to print" is "a valid non-discriminatory reason to decline to print." Sexton Dep. at 32-34, 47-48 (Ex. C) (attached at App'x B). The Commission also disregarded its director's acknowledgement that the facts "tend to show that [Adamson] was motivated by the [shirt's] message" rather than the customer's sexual orientation. *Id.* at 41. And it ordered HOO to create speech violating Adamson's faith despite recognizing that HOO "acts as a speaker" when it "prints a promotional

item" and that "this act of speaking is constitutionally protected." Comm'n Order 13-14. In short, this record discloses a government body so antagonistic toward HOO's religious beliefs that it disregarded all aspects of the case that did not support its desired outcome.

Government conduct that lacks neutrality toward a particular faith "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 (as discussed in Section (III)(C)), HOO should prevail on its constitutional free-exercise claims.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals' ruling.

Respectfully submitted,

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