COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2017-SC-00278

Court of Appeals of Kentucky
Case No 2015-CA-00745

On Appeal from
Fayette Circuit Court
Case No. 14-CI-4474

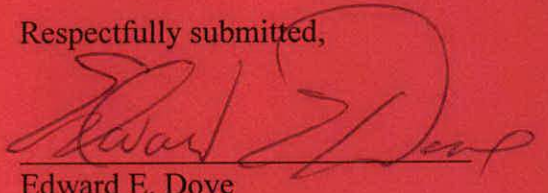
LEXINGTON-FAYETTE URBAN COUNTY HUMAN RIGHTS COMMISSION — **APPELLANT/ MOVANT**

V.

MOVANT/APPELLANT'S BRIEF IN SUPPORT OF ISSUES RAISED ON DISCRETIONARY REVIEW FROM FAYETTE CIRCUIT COURT AND THE COURT OF APPEALS DECISION RENDERED ON MAY 12, 2017 AFFIRMING THE DECISION OF FAYETTE CIRCUIT COURT

HANDS ON ORIGINALS — **APPELLEE/ RESPONDENT**

Respectfully submitted,



Edward E. Dove
201 W. Short Street
Suite 300
Lexington, KY 40507
(859)252-0020
eddove@windstream.net

Certificate of Service

This certifies that a true and correct copy of the foregoing has been mailed to the following on this the 23RD day of January, 2018:

Hon. Bryan H. Beauman
STURGILL, TURNER, BARKER & MOLONEY, PLLC
333 West Vine Street, Suite 1500
Lexington, KY 40507

Hon. James A. Campbell
Hon. Byron J. Babione
Hon. Kenneth J. Connelly
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, Arizona 85260

Hon. James D. Ishmael, Jr.
Fayette Circuit Court
Robert F. Stephens Circuit Courthouse
120 N. Limestone
Lexington, KY 40507

and the original and ten (10) copies to:

EDWARD E. DOVE

Comes now the Movant, by and through counsel, and submits the Lexington-Fayette Urban County Human Rights Commission (hereinafter "HRC") argument in support of reversal of the Fayette Circuit Court Opinion and the Court of Appeals Opinion affirming Fayette Circuit Court.

INTRODUCTION

This case involves the violation of the Lexington Fayette Urban County Government (hereinafter "LFUCG") Ordinance No. 201-99, hereinafter "Fairness Ordinance". In 2012, Hands On Originals (hereinafter "HOO"), a private custom-printing business opened to serve the public, refused to print customized T-shirts for the Lexington Pride Festival. As a result, the Gay Straight Lesbian Organization (hereinafter "GLSO") filed a Complaint with the Lexington-Fayette Urban County Human Rights Commission (hereinafter "HRC") alleging that the Fairness Ordinance had been violated.

Following an investigation, the HRC found probable cause that HOO had violated the Fairness Ordinance by refusing to do business with the individual organizers of the Lexington Pride Festival. The case was assigned to a public hearing pursuant to HRC Rules of Practice and Procedure. The Hon. R. Greg Munson was appointed Hearing Officer.

Since the facts were mostly not in dispute, the parties agreed to submit the argument to the Hearing officer, and a public hearing therefore was not held. On October 6, 2014 the Hearing Officer rendered an Opinion that the HOO violated the Ordinance by refusing to contract with representatives of the Pride Festival to print T-shirts.

Hands-On Originals appealed the HRC decision to Fayette Circuit Court, pursuant to KRS 344.340. On October 16, 2014 the Circuit Court reversed the Hearing Officer's decision and found that HOO's failure to print the T-shirts was an exercise of HOO's freedom of religion and violated

the First Amendment. The HRC then appealed the Circuit Court decision to the Kentucky Court of Appeals.

The Kentucky Court of Appeals, in a 2-1 decision, ultimately affirmed the decision of the Fayette Circuit Court. The Court of Appeals found that HOO was a public accommodation subject to the Fairness Ordinance (p. 132) but affirmed the Circuit Court decision by finding that "[T]he conduct HOO chose to not promote was pure speech . . .. Nothing in the Fairness Ordinance prohibits HOO, a private business, from engaging in viewpoint or message censorship". (Kentucky Court of Appeals Opinion, p. 18) Following the Kentucky Court of Appeals decision, the HRC moved for Discretionary Review on [date], and the HRC motion was granted on [date].

STATEMENT CONCERNING ORAL ARGUMENT

The Movant/Appellant would welcome the opportunity to argue the position before the Court. The Oral Argument may assist the Court in addressing the issue which will have far reaching effects due to the fact that many communities that have adopted a similar Fairness Ordinance protecting their lesbian, gay, bisexual, transgendered, queer (hereinafter "LGBTQ") citizens.

STATEMENT OF POINTS

STATEMENT OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITY

STATEMENT OF THE CASE

The Appellant LFUC-HRC accepted a charge of discrimination from Aaron Baker[1] on behalf of the GLSO. Baker alleged that on or about March 8, 2012, the Appellee HOO denied GLSO the full and equal enjoyment of a service when they refused to print T-shirts for the upcoming GLSO sponsored 2012 Pride Festival which was then in its fifth year. The Festival was to be held in Fayette County on June 30, 2012. It was the fifth year of the Festival and the proposed design of the shirt was an enlarged number 5 (Exhibit 1). The Commission accepted the charge as a possible violation of Local Ordinance 201-99 which states that sexual orientation/gender identity is a protected class against discrimination in housing, employment, and public accommodations and KRS 344.120 which states that it is an unlawful practice for a person to "deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, resort, or amusement, as defined in KRS 344.130, on the ground of disability, race, color, religion, or national origin."

The investigation revealed that GLSO is the organizer of the Lexington Pride Festival. One of the activities in preparation of the Festival is to contract with an area business to print T-shirts commemorating the Festival.

Donald Lowe, the marketing and publicity person for the 2012 Lexington Pride Festival, contacted Appellee HOO to obtain a quote for the printing of the T-shirts. Lowe spoke to an employee of HOO, Kaleb Carter, about the design of the shirt. Carter did not turn down the offer to print the shirts.

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[1]President of the GLSO

On March 8, 2012, Lowe again contacted HOO and was transferred to the owner, Blaine Adamson. Adamson questioned Lowe about the GLSO, its mission and what the organization was promoting. After hearing about GLSO and the Pride Festival, Adamson declined to do business with GLSO. Adamson cited his religious beliefs and that he could not support an event that encouraged homosexual behavior. Adamson did offer to refer GLSO to other businesses to print the shirts. The Pride T-shirts were eventually printed by a Cincinnati printing business.

Upon determination of Probable Cause, the Appellant appointed a Hearing Officer to preside over a public hearing. The parties agreed that since the facts were not in dispute and the issue was solely one of law, the case could be presented on Motions for Summary Judgment.

On October 6, 2014, the Hearing Officer found that the Appellee had violated the ordinance, entered a cease and desist Order and required HOO to participate in diversity training. The Appellee appealed the decision to Fayette Circuit Court pursuant to KRS 344.240.

The case was fully briefed and the Court heard oral arguments on the issues. The Circuit Court then entered an Order reversing the decision of the Commission. The Circuit Court's decision was appealed to the Court of Appealed which affirmed the decision of the Fayette Circuit Court. The HRC timely moved for Discretionary Review which was granted. The Movant/Appellant now submits its argument to the Court.

ARGUMENT

I. HOO'S FAILURE TO CONTRACT WITH GLSO VIOLATED THE LFUCG FAIRNESS ORDINANCE.

There are many facts that are not in dispute which play into the analysis of the issues. First, there is no argument that LFUCG passed a Fairness Ordinance in 2008 which prohibited discrimination based on the sexual orientation by a public accommodation. HOO is a public

accommodation under KRS 344 and the Ordinance affirmed the Court of Appeals The GLSO requested that HOO print T-shirts for the upcoming Lexington Pride Festival. The request was denied by HOO because the business opposed the "message" presented by the Pride Festival. The HOO also objected to the "message" due to their religious opposition to an alternative lifestyle. With the facts being stated, the Movant states that the HOO, while holding valid religious beliefs in opposition to LGBTQ individuals, cannot operate to deny a protected class from goods and services offered to individuals by their business.

The decision on the legality of the HOO decision will rely on the application of the 1st Amendment to the U.S. Constitution, specifically Free Speech Clause and Free Exercise Clause.

There is no question that the LFUCG has the authority to pass a Fairness Ordinance which protects its citizens from discrimination in conducting business if the business that chooses to operate in Fayette County. The HOO attempts to evade serving the population sought to be protected by the Fairness Ordinance by asserting a First Amendment, exception based on their religious beliefs.

The Respondent/Appellee argues two reasons presented to the Court of Appeals on why the Circuit Court decision should be affirmed. The reasons are:

1. A business refusal to provide a service because of the customer's protected status and the refusal is based on the customer's message.
2. The Fairness Ordnance cannot compel a business to service customers when they do not agree with the customer's message.

Both reasons articulated by the Respondent and accepted by the Court of Appeals are constitutionally flawed.

II. HOO'S REFUSAL TO PROVIDE SERVICE TO THE GLSO VIOLATED THE FAIRNESS ORDINANCE.

The HOO case is not the first time a business has sought to avoid an anti-discrimination law by invoking the First Amendment. However, the Supreme Court has repeatedly stated "[invidious] private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." Hishon v. King & Spalding, 467 U.S. 69, 78, 104 S. Ct. 2229, 2235 (1984) (*quoting* Norwood v. Harrison, 413 US 455, 470 (1973) *See also* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 88 S. Ct. 964 (1968); Heart of Atlanta Motel v. United States, 379 U.S. 241, 85 S. Ct. 348 (1964).

The Supreme Court in Newman v. Piggie Park Enterprises, Inc. declined to extend protection to the restaurant chain who refused service to African-American customers. The failure to provide equal access to the facility due to one's race violated the public accommodations section of the Civil Rights Act of 1964.

The Court's decision in the Heart of Atlanta Motel found that Title VII of the Civil Rights Act of 1964 states "[a]ll persons shall be entitled to the full and equal enjoyment of the good services facilities, privileges, advantages and accommodations of any place of public accommodation."

While both Piggie Park and Heart of Atlanta addressed the denial of service to African Americans, Title VII prohibits discrimination against the seven protected classes (i.e. race, sex, religion, national origin, age, disability, color).

The LFUCG exercised their right to address the prohibition of discrimination against discrimination in Fayette County by passing the Fairness Ordinance. In a similar manner, eight other jurisdictions have adopted a similar ordinances.[2] Since the day of the passage of the Fairness

[2]Louisville, Lexington, Covington, Vicco, Frankfort, Morehead, Danville, Midway and Paducah

Ordinance, the person's sexual orientation is afforded the protection from discrimination in the same manner.

The denial of a customer due to a protected status has been addressed by the Courts as early as 1889 when the Nebraska Supreme Court in Messenger v. State, 25 Neb. 674, 41 N.W. 638, (1889) stated:.

> There is no doubt of the authority of the state to prevent discrimination against certain individuals or races because of their color or previous condition. A barber, by opening a shop and putting out his sign, thereby invites every orderly and well behaved person who may desire his services to enter his shop during business hours. The statute will not permit him to say to one, you were a slave or the son of a slave, therefore I will not shave you. Such prejudices are unworthy of our better manhood, and are clearly prohibited by the statute.
>
> *At* 25 Neb. 677

The prohibition of discrimination by a public accommodation based on one's protected status predates the passage of the Fairness Ordinance. The business owner's refusal to provide a service to a customer due to their status is discrimination whether it's the goods denied or the denial because of "message of the customer."

The Court of Appeals majority Opinion found that HOO is a place of public accommodation covered by the Fairness Ordinance. The Court continues to correctly cite Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 113 S. Ct. 753 (1993) for the proposition that "[s]ome activities may be such an irrational object of disfavor that if they are targeted and if they happen to be encaged in exclusively or predominately by a particular class of people, an intent to disfavor that class can be readily be presumed." The Court then went in a different direction to find that HOO's conduct that choosing not to promote the "message" of the Pride Festival was pure speech. The Court of Appeals opinion concerning the "message" is simply not in step with the Supreme Court's Opinion concerning "speech". The Fairness ordinance applies to conduct, not speech.

Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 2015 Colo. App. LEXIS 1217, 2015 COA 115 was argued before the Supreme Court on December 5, 2017 [*Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, No. 16-111]. The Colorado Civil Rights Commission found that Masterpiece Cakeshop violated the Colorado Fairness Ordinance when the Cakeshop refused to bake a cake for a same sex marriage. The decision of the Colorado Court of Appeals was affirmed by the Colorado Supreme Court with their holding that the Colorado law "does not endorse any particular religion or view". The law merely prohibits Masterpiece from discriminating against potential customers on account of their sexual orientation.

Likewise, The New Mexico Supreme Court, in finding that a wedding photographer violated the state's anti-discrimination statute prohibiting discrimination in places of public accommodations when it refused to photograph a same-sex wedding, stated as follows:

> We agree that when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation. Otherwise we would interpret NMHRA [the anti-discrimination statute] as protecting same-gender couples against discriminatory treatment but only to the extent that they do not openly display their same-gender sexual orientation.
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> Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013); **Cert denied by the United States Supreme Court, No. 13-585 (April 7, 2014)** (emphasis added).[3]

To interpret the law the way HOO wants us to would allow individuals to be discriminated against in spite of the Ordinance. It tells the LGBTQ community that they are protected by the Ordinance as long as they don't act gay. That cannot possibly be the intent of the Ordinance. The purpose of anti-discrimination statues is "to remove the daily affront and humiliation involved in

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[3] The Hearing Commissioner cited this case in his Order on page 15 and stated that the New Mexico Court held that the New Mexico Human Rights Act does not violate free speech guarantees because the act does not compel photography studio to either speak a government-mandated message or publish the speech of another.

discriminatory denials of access to facilities ostensibly open to the general public." Daniel v. Paul, 395 U.S. 298, 307 (1969). The "daily affront and humiliation" would continue in spite of the Ordinance if we adhere to HOO's argument. To interpret the law in this manner would allow Mr. Adamson to refuse to print t-shirts that show a message. The fact that the GLSO has a Pride Festival is intertwined with their sexual orientation and cannot be separated from it. HOO attempts to give examples of events or circumstances that happened during past Pride Festivals to support its claim that HOO objected to the message of the Pride Festival, not the GLSO' s sexual orientation. The Commission points out there is absolutely nothing in the record to suggest that Mr. Adamson knew about any of these events prior to rejecting the GLSO's request to print shirts.

In the Court of Appeals Opinion the two Judges found that the Fairness ordinance did not apply because "[N]othing in the Fairness Ordinance prohibits HOO a private business from encaging in the viewpoint or message censorship." The Court of Appeals logic is flawed.

To adopt the logic of Court of Appeals holding would allow a business to deny service to any protected class that the business had an objection for any reason.

The Court of Appeals acknowledges "[F]or example, a shopkeeper's refusal to serve a Jewish man, not because he is Jewish, but because the shopkeeper disapproves of the fact that a man is wearing a yarmulke would be the legal equivalent of religious discrimination. (*Kentucky Court of Appeals Opinion,* p. 14 *citing* Bray v. Alexandria Women's Health Clinic, 506 US 263, 270, 113 S.Ct. 753, 760, 122 L.Ed. 34 (1993)). The Court continues in their opinion and cites Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472 (2003) and states "[A] shopkeeper refusal to serve a homosexual but because the shopkeeper disapproves of the homosexual intercourse or same sex marriage would be the equivalent of sexual orientation discrimination." However, after citing the

two decisions, the Court went astray in finding that HOO had encaged in protected conduct when denying GLSO services.

The HOO clearly targeted the conduct that they did not approve of the Fairness Festival. The owner of the HOO stated that he did not approve of the Pride Festival. Blaine Adamson stated in his Affidavit "whether the messages conveyed by the requested material, or the messages conveyed by the promoted event or organization are inappropriate or inconsistent with my beliefs is ultimately a judgment call based on my beliefs." (Exhibit 2, Adamson Affidavit, Par. 31). However, contrary to his earlier Adamson also stated in his Affidavit that he agreed provided services to a customer who performed at the Lexington Pride Festival. This inconsistency raises the question of whether Adamsn's objections tot he GLSO is based on sincere religious beliefs or his individul prejudice against the organization and the free speech that was protected during the Pride Festival.

The Court of Appeals' conclusion that the owner of HOO did deny the business because of sexual orientation and the content of the message of the t-shirt, but because the HOO owner did not approve of the Pride Festival at all.

With all due respect to the Court of Appeals, their conclusion is not supported by the facts of the case.

The Court of Appeal decision does not expressly state that the GLSO does not have standing to bring a claim. However, it alludes as much when the majority attempts to "circumvent the public accommodations issue by holding that the GLSO as an entity, has no sexual orientation and thus is not protected by the ordinance" (*Kentucky Court of Appeals Opinion, p. 23*) Therefore, it is appropriate to address the legal status of associations and the issue of associational standing because the GLSO is a legal entity, and has the capacity to sue on behalf of its members.

The Court noted that "The GLSO is a Lexington-based organization that functions as a support network and advocate for gay, lesbian, bisexual or transgendered (hereinafter "GLBT") individuals. Its membership also includes individuals in married, heterosexual relationships". (*Kentucky Court of Appeals Opinion, p. 2*)

It is long recognized that an association is a legal entity—a legal "person"—which, like a natural person, is bound to follow the law, and also enjoys its privileges and protections. Further, an association or organization does have the capacity to sue on its own behalf. Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982), and on behalf of its members. NAACP v. Alabama, 357 U.S. 449 (1958). In Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977) the Supreme Court articulated a three-part test to determine whether an association or organization could sue on behalf of its members, stating that an association had standing to sue on behalf of its members when:

1. Its members would otherwise have standing to sue in their own right;
2. The interests it seeks to protect are germane to the organization's purpose; and
3. Neither the claim asserted nor the relief requested requires the participation in the lawsuit of the individual members".

Id. At 343.

Later, in United Food and Commercial Workers v. Brown Group, 517 U.S. 544 (1996), the Court reaffirmed the Hunt test and clarified that its third prong was prudential and not constitutional, and therefore could be overridden in allowing the association to sue on behalf of its members. It should be noted that nowhere in the Hunt test is a requirement for standing based on characteristics of the association's membership.

Here, the GLSO members would otherwise have standing to sue in their own right. Further, the interests the GLSO seeks to protect, discrimination based on one's sexual identity, are germane to the organization, not only because this is a core issue affecting members of the GLBT community, but also because some members may wish to remain anonymous and might never come forward to assert their rights individually. Finally, neither the claim asserted nor the relief requested by the GLSO individualized participation by its members. Therefore, the Hunt test is satisfied, and the GLSO organization does have associational standing to sue on behalf of its members.

Further, to say that the GLSO is not protected by the Fairness Ordinance because the association itself has no sexual orientation is analogous to saying that an organization whose membership includes children, for example, and whose purpose is to advocate for the fair treatment of children, is not protected by statutes promoting fair treatment of children because the organization itself is not a child. To recognize and accept such an argument completely undercuts the effectiveness and desirability for any organization to advocate for others, especially those who may not be able to effectively advocate for themselves.

Therefore, HOO's conduct in denying business to the GLSO violated the Fairness Ordinance and the constitutional providing against discrimination against a protected class.

III. HOO'S ARGUMENT THAT THE FAIRNESS ORDINANCE IS COMPELLED SPEECH VIOLATION OF THE FIRST AMENDMENT IS WITHOUT MERIT.

There is no question that the Fairness Ordinance is neutral on its face and application. The Ordinance simply states that a business operating in Fayette County, Kentucky cannot deny goods and services due to one's sexual orientation. The only act required by the Ordinance is to treat all citizens regardless of their sexual orientation the same when conducting business.

While the Court of Appeals does not mention the Supreme Court's Opinion in Hurley v. Irish-American Gay, 515 U.S. 557, 115 S. Ct. 2338 (1995) it is anticipated that the Respondent Appellee will rely on Hurly to support their position. The Court of Appeals obviously rejected any reference to Hurley but the Movant/Appellant feels it is necessary to address the application of Hurley to the facts of the case.

The most important distinction is that Hurley addressed a private parade not a commercial parade. When the Massachusetts State Court required the parade organizers to include an Irish American Gay Lesbian and Bisexual group in the parade, the Supreme Court ruled the State Court's decision to require the Petitioner's organization to be involved in the parade unconstitutional. However, the Supreme Court found "[T]he state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation." The Court reasoned that because "every participating unit" of a parade "affects the message conveyed by the private organizers, the state courts' application of the [public accommodation law] produced an order essentially requiring petitioners to alter the expressive content of their parade. Id. at 572.

HOO, unlike the parade in Hurley is a commercial business. The Court distinguished the private parade v. commercial business and recognized that anti-discrimination laws properly protect "any number of the public wanting a meal at the inn."

Additionally, in Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 100 S. Ct. 2035 (1980) the Supreme Court upheld a state law requiring the proprietor of shopping malls to allow the entrance of people soliciting signatures on political petitions. The Supreme Court found that proprietors were "running a business establishment that is open to the public to come and go as they please and that "solicitations would most likely not be identified as message or belief of owners. Likewise, there

was nothing on the requested print that would have identified HOO as the printer of the quested t-shirts. (See Exhibit 1)

If the Court accepts that the Fairness Ordinance required HOO to exercise free speech which the business opposed, the Court would have to ignore the precedent of prior Supreme Court rulings. For example, Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 126 S. Ct. 1297 (2006) (hereinafter "FAIR"). In FAIR, the Court addressed the implementation of the Solomon Amendment [10 U.S.C.S. § 983]. The Solomon Amendment withheld funds from colleges and universities that denied equal access to miliary and non-miliary recruiters. The objection of the students and administration of the Educational institution was based on the military's prohibition allowing gays or lesbians to serve.

> Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto "Live Free or Die," and it trivializes the freedom protected in Barnette and Wooley [*citations omitted*] to suggest that it is.
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> Id. at 51

The Court also found that Solomon Amendment was content neutral. The working of the Fairness Ordinance is also content neutral.

> The Supreme Court in Pruneyard disagreed with the state court:
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> [T]he shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.

Pruneyard at 87

IV. THE FAIRNESS ORDINANCE AS WRITTEN REQUIRES NEUTRAL APPLICATON TO ALL BUSINESSES.

The First Amendment does not permit HOO to encage in discrimination prohibited by Fairness Ordinance because it is neutral.

The Movant/Appellant position is simply a law that is neutral and generally applicable is constitionally permissible if it is rationally related to a genuine government interest. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217 (1993) "A law lacks facial neutrality of it refers to a religious practice without a secular meaning discernable from the language or content." Id at 533. The Fairness Ordinance does not target any business but only serves to protect the minority class. The Ordinance is *generally* applicable to all business within Fayette County.

The Respondent argues that if the Ordinance applies, it would offend religious beliefs of the HOO. The Courts have addressed similar arguments and have been found not to be persuasive.

In Bob Jones Univ. v. United States, 461 U.S. 574, 103 S.Ct. 2017 (1983) the Court addressed an issue where a private university that prohibited interracial dating and marriage on religious grounds challenged the IRS's disallowance of the University's tax status. The IRS challenged the University's tax exempt status because the University prohibited interracial dating and marriage citing religious grounds. The Court upheld the IRS revocation by holding that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education." In upholding the IRS revocation of the school's tax exemption, the Court recognized that because "the Government has a fundamental, overriding interest in eradicating racial discrimination in education." Id. At 623. The IRS's action withstood constitutional scrutiny not withstanding that the

University's policy was motivated by religious beliefs. The GLSO stands as a protected organization under the ordinance. The analogy established by the cases prohibiting racial discrimination can be applied to the protected class of gays, lesbians, and transgender persons cannot be ignored. While education discrimination has been found to be an illness in our society, it is an illness that needs to be eliminated. The goal of the Fairness Ordinance is to eliminate the illness of discrimination against a protected class in the goods and services provided by a business in Fayette County.

Additionally, the Supreme Court cited Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996), stating that "the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation." Obergefell v. Hodges, 135 S.Ct. 2584, 2643 (2015) found that the state could not discriminate against same sex marriage under the equal protection analysis. The facially neutral ordinance in question should receive the same protection.

The same argument accepted by the Court was made in the Masterpiece case wherein the Court cited Christians' Legal Society Chapter of University of California Hastings College of Law v. Martinez, 561 U.S. 661, 689 (2010):

> CLS contends that it does not exclude individuals because of sexual orientation, but rather on the basis of a conjunction of conduct and the belief that the conduct is not wrong [citation omitted]. Our decisions have declined to distinguish between status and conduct in this context. *See* Lawrence v. Texas, 539 U.S. 558, 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination." (emphasis added)); Id., at 583, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (O'Connor, J., concurring in judgment) (While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); *cf.* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993) (A tax on wearing yarmulkes is a tax on Jews.).

It is clear from the opinion that in cases cited in a similar manner as the case at bar that conduct cannot be divorced from status. There is no argument that the Pride Festival is to support the gay and lesbian population of Fayette County. The Appellee spent numerous hours of discovery establishing the atmosphere and patrons of the Pride Festival. Certainly, the Appellee's own theory of the case establishes that the conduct is closely related to the protected status. As in Masterpiece, the Pride Festival was one promoting acceptance of one's sexual orientation. That is the sole reason that the Appellee denied printing the T-shirts. It is also unclear from the record whether the Appellee was even aware of the purpose of printing the t-shirts for the Pride Festival at the time it declined the contract.

The Court also relies on Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) to support its decision. Once again, a closer reading of the Hobby Lobby decision does not provide blanket protection for Appellee's position. The Hobby Lobby decision was based on interpretation of the Religious Freedom Restoration Act of 1993 (RFRA). Additionally, the Supreme Court held "the *First Amendment* has not been offended" because "prohibiting the exercise of religion... is not the object of the [statute] but merely incidental effect of a generally applicable and otherwise valid provision." Id at 878.

The Obergefell decision recognized that the continuing debate over the alternative lifestyle advocated by the GLSO. While Obergefell was decided by analyzing the Due Process and Equal Protection clause of the 14th Amendment to the United States Constitution, the logic is instructive on the issue before the Court. In speaking of same sex discrimination, the Court stated:

> The nature of injustice is that one may not always see it in one's own time. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as they learn its meaning. When new insight reveals discord between the

> Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.
>
> Obergefell v. Hodges, 135 S. Ct. 2584, 2588 (2015)

Additionally, the Court realized the strong religious beliefs of those objecting to the alternative lifestyle, The Court stated:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.
>
> Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015)

The United States Constitution does not permit the state to discriminate against same sex couples from marriage. Likewise, the Fairness Ordnance does not permit a business to deny the same sex couple their right to do business without being denied due to their status.*

"Acts of insidious discrimination is the discrimination in the distribution of public available good and other advantages cause unique evils that government has a compelling interest to prevent. Roberts v. United States Jaycees, 468 U.S. 609, 104 S. Ct. 3244 (1984). The blatant discrimination against one group of people sharing common view and principal causes person harm to the protected members of the class. The Heart of Atlanta decision recognized the "personal harm" caused by discrimination noting that denial of equal access to public accommodations causes deprivation of personal dignity. *At* 241. The issue presented by the case is that the LFUCG has opted to protect all its citizens no matter their protected status from discrimination by a public accommodation. The

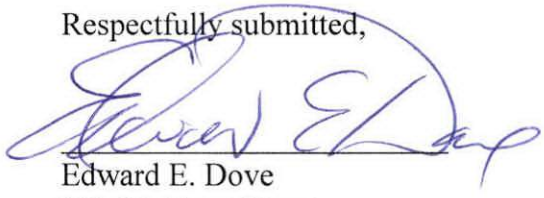
business owner cannot hide behind a religious belief which operates to thwart the government's goal for full inclusion in their community. This case is no more about t-shirts that civil rights decisions were about access to sandwiches. State v. Arlene's Flowers, Inc., 389 P.3d 543, 187 Wn.2d 804 (Wash. 2017).

CONCLUSION

The decision of the Fayette Circuit Court and the Kentucky Court of Appeals demands reversal. Fayette County, Kentucky, followed by eight other communities recognized the importance of the fabric of their community not to allow businesses to discriminate against citizens due to their sexual orientation. The Fairness Ordinance prohibits discrimination against a protected class and guarantees all citizens access to goods and services without restriction.

To allow HOO's decision to stand would generously limit equal access to LGBTQ residents throughout the Commonwealth and perpetuate the indignity of discrimination based on status.

Respectfully submitted,



Edward E. Dove
201 W. Short Street
300 Lexington Building
Lexington, KY 40507
(859)252-0020
(859)258-9288
eddove@windstream.net