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

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

LEXINGTON FAYETTE URBAN COUNTY HUMAN RIGHTS COMMISSION — **APPELLANTS**

and

GAY AND LESBIAN SERVICES ORGANIZATION

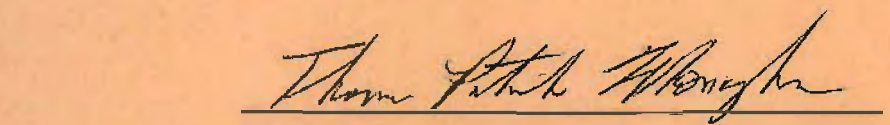
v.

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

BRIEF OF AMICUS AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF AFFIRMANCE OF TRIAL COURT'S GRANT OF SUMMARY JUDGMENT

Certificate required under CR 76.12(6)

The undersigned does hereby certify that copies of this brief were served upon the following individuals by U.S. mail on this 28th day of October, 2015: Hon. Judge James D. Ishmael, Jr., Robert F. Stephens Circuit Courthouse, 120 N. Limestone, Lexington, KY 40507; Hon. Edward E. Dove, 201 West Short St., Suite 300, Lexington, KY 40507; Hon. Bryan H. Beauman, Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine St., Suite 1500, Lexington, KY 40507; and Hon. James A. Campbell, Alliance Defending Freedom, 15100 North 90th St., Scottsdale, AZ 85260.



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STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF PURPOSE AND ISSUES

Amicus curiae, the American Center for Law and Justice, an organization dedicated to the defense of constitutional liberties secured by law, submits this brief with an accompanying motion for leave. The purpose of this amicus brief is to argue that this Court should resolve this case on grounds of statutory interpretation, namely by holding that a decision not to accept a particular project because of the nature of that project ("the what"), rather than the identity of the person requesting the project ("the who"), is not discrimination "on the basis of" a protected characteristic, and thus does not violate the Lexington nondiscrimination ordinance.

This brief addresses the following issues: (1) the importance of the distinction between a business acting on the basis of the product or service sought, rather than the identity of the would-be customer; (2) the consistency of this distinction with the relevant language in the pertinent ordinances and state statutory law; (3) the consistency of disposing of this case on statutory grounds with the rule of constitutional avoidance; and (4) the application of these norms to the present case. As explained herein, this Court should affirm the judgment below on the grounds that HOO simply did not violate the Lexington nondiscrimination ordinance.

ARGUMENT

I. HOO DID NOT VIOLATE THE LEXINGTON ORDINANCE.

The circuit court ruled that because Hands On Originals (HOO) declined to print message-bearing t-shirts because of HOO's objection to the nature of the product, rather than the identity of the customer, applying the nondiscrimination ordinance to HOO would violate the federal right to free speech and the Kentucky statute protecting religious liberty. While this ruling is correct, there is a simpler way to dispose of this case and affirm the judgment below: statutory interpretation. The ordinance banning "sexual orientation" discrimination should be read not to apply to refusals based upon the *nature of the service*, rather than the *identity of the customer*.

A. THE DISTINCTION BETWEEN DECLINING A PROJECT BECAUSE OF WHAT IT IS, RATHER THAN WHO REQUESTED IT, IS CRUCIAL.

There is a fundamental difference between discrimination on the basis of *who a person is*, versus discrimination on the basis of *what is being asked.* This is the common-sense difference between a restaurateur who does not serve Muslim customers, versus a restaurateur who welcomes customers regardless of religion but does not carry halal food options. Or an evangelical sculptor who won't handle projects for Catholics, versus one who welcomes Catholic patronage but, as a matter of religious conscience, will not sculpt devotional images of saints. Or a toy shop owner who won't serve Japanese patrons, versus one who welcomes all ethnicities but refuses, based upon painful memories from World War II, to carry products manufactured in Japan.

In each of these examples, the first business owner discriminates based upon the identity of the customer – Muslim, Catholic, Japanese. In the second, the owner "discriminates" based upon the nature of the product or service requested, refusing to handle certain products or services – halal meals, images of saints, Japanese toys.

Recognition of this distinction is essential to liberty and to a sensible reading of nondiscrimination laws. One who discriminates based upon the identity of the patron indulges in essentially arbitrary and invidious bias, withholding identical products or services from otherwise perfectly suitable patrons. Such a person is the quintessential target of nondiscrimination laws. But the decision to supply *all comers* with *only certain* products or services and not others, simply represents a business decision necessary for all commercial enterprises: what will this business carry? Importantly, that business decision can reflect a variety of motives: profit judgments, personal taste, ethical norms, religious principles, concern about brand and image, etc.

Whether or not the business owner in fact deeply disagrees with some belief or practice of the pertinent class of customers is irrelevant. A refusal to serve black

customers is impermissible discrimination even if the bar owner has no animosity toward blacks (maybe even is black himself), agrees they are entitled to equal rights, but nevertheless excludes them to please other, bigoted customers. On the other hand, a bar owner who serves all customers regardless of race does not discriminate even if he has the heart of Archie Bunker or Bull Connor.[1]

Similarly, it is legally irrelevant whether a business decision reflects personal beliefs that an opponent might characterize as "bias." In the examples above, the restaurateur may (or may not) harbor resentment against all Muslims based upon the acts of some Muslims in the World Trade Center bombing or the recent beheadings in the Middle East; the evangelical sculptor may finds certain Catholic devotional practices theologically repugnant, perhaps even idolatrous; the toy shop owner may hold a grudge against all Japanese for their nation's hostilities in World War II. Anti-discrimination laws, however, target discriminatory acts, not "bad thoughts."

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[1] The Oregon Court of Appeals held that there was an exception for the refusal of a business to serve a same-sex marriage, holding that such a marriage is "inextricably tied to sexual orientation". *Craig v. Masterpiece Cakeshop*, 2015 COA 115 at *34-*35, 2015 Colo. App. LEXIS 1217 at **17-**19 (Aug. 13, 2015). Essentially, the court held that only homosexual individuals would enter a same-sex marriage; hence, refusal to serve such an event is tantamount to sexual orientation discrimination. The decision in *Elane Photography v. Willock*, 2013-NMSC-040 at *16-*17, 309 P.3d 53, 61-62 (N.M. 2013), is to the same effect. That rationale obviously distinguishes the present case, since one need not identify as homosexual to support events like the Lexington Pride Festival. Moreover, the *Craig* court expressly distinguished cases, including by name the instant case involving HOO, where the objection was to a *message* the business was asked to reproduce. 2015 COA 115 at *40 n.8, 2015 Colo. App. LEXIS 1217 at **21-**23. This Court therefore need not decide whether a decision not to cater to a same-sex marriage is better characterized as based upon the identity of the participants or the nature of the event. *Compare Bray v. Alexandria Women's Health Center*, 506 U.S. 263, 271-73 (1993) (disparate treatment of abortion, like disparate treatment of childbirth, is not sex-based even though only women experience them), *with id.* at 270 (*irrational* disfavor of activities associated with a particular class of people can indicate *intent* to disfavor that class).

B. THE ORDINANCE REFLECTS THIS CRUCIAL DISTINCTION.

The language of the pertinent Lexington ordinance reflects this important distinction between declining a job because of the *who* (identity of the requester) versus the *what* (nature of the request). That ordinance declares a policy to safeguard "all individuals," Code of Ordinances 201-99; Sec. 2-33(1) (effective July 8, 1999), not to guarantee "all services." The ordinance (Sec. 2-33(2)) adopts state nondiscrimination law, which makes it unlawful "to deny an individual the full and equal enjoyment of *the* goods, services, facilities, [etc.] of a place of public accommodation," KRS 344.120 (emphasis added). Importantly, a customer is not entitled to *whatever* goods, services, etc. *he or she might want*. Instead, the customer is only entitled to "*the*" goods or services the business provides. Thus, a bookstore does not violate this provision for failure to carry Christian publications that a Christian clientele might desire, even if the owner does this because he is a fervently anti-Christian atheist. Conversely, the Christian bookseller does not discriminate on the basis of religion by declining to carry books promoting atheism, regardless of motive. In both cases customers of all stripes are welcome to "*the* products" which the seller offers, but neither seller is obliged to add *other* products to satisfy a subgroup, even if that subgroup is statutorily protected from discrimination based upon their identity.

C. RESPECTING THIS DISTINCTION AVOIDS CONSTUTIONAL QUESTIONS.

It is well settled that a law should be construed in a way that avoids raising constitutional questions. *Elery v. Commonwealth*, 368 S.W.3d 78, 94 (Ky. 2012) (that a more limited reading of the statute would avoid any concern about the constitutionality of the law "alone would require us to read the statute in such limited fashion, so long as the reading is a reasonable one"). Here, the parties raise, and the circuit court addressed, important questions of constitutional law under the First Amendment to the U.S. Constitution. There is, however, no need to address or resolve those constitutional

questions if HOO simply did not violate the Lexington nondiscrimination ordinance. Reading that ordinance to incorporate the common sense difference between rejecting a *person* versus rejecting a *project* obviates any need to reach the constitutional questions. This Court should therefore resolve the case on statutory grounds, rather than constitutional grounds. *Curd v. Kentucky State Bd. of Licensure for Professional Engineers & Land Surveyors*, 433 S.W.3d 291, 304 (Ky. 2014) ("we have a strong policy of avoiding constitutional questions unless absolutely necessary for the proper resolution of the case") (footnote omitted).

D. THIS DISTINCTION DISPOSES OF THE PRESENT CASE.

In the present case, HOO and its owners rejected the t-shirt order because it represented an objectionable *project*, not because of the identity of the owners. Adamson MSJ Aff. at 7-9. HOO did not know the sexual orientation of the agents or officers of GLSO – the entity placing the order. *Id.* at 9. (Obviously the mission of GLSO is one that people of differing sexual orientations can and do embrace. In fact, the record reflects that a past president of GLSO was a man married to a woman. Baker Dep. at 7, 13.) Nor is there any indication that it would matter to HOO whether the persons requesting the shirt personally considered themselves to be same-sex attracted. Adamson MSJ Aff. at 9-10 (HOO serves and employs "individuals who identify as gay"). An exclusively heterosexual group that wanted to promote the homosexual/sex outside of man/woman marriage message of GLSO's Pride Festival would have no reason to expect that HOO would have suddenly changed course and agreed to the very same objectionable message, if only it had come from a different source.

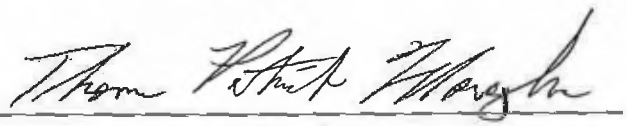
Nor can HOO's objection fairly be characterized as a *post hoc* pretext – HOO had previously rejected a number of project requests on the grounds that they had objectionable content, and thus had a clear track record of being selective in deciding what projects to undertake. Adamson MSJ Aff. at 6, para. 30; HOO Supp'l Resp. to First Set of Interrogs. at 5 (listing projects that HOO declined to handle because of their

content). HOO was by no means an uncritical "hired gun" for any and all projects. Rather, HOO offered certain products and services, and not others. That such selectivity reflected moral and religious norms is no more relevant for purposes of the nondiscrimination ordinance than if the selectivity reflected aesthetics, profitability projections, or personal quirks. In neither case does the identity of the would-be patron matter. Hence, there is not discrimination "on the basis of" such identity.

CONCLUSION

HOO therefore did not violate the Lexington nondiscrimination ordinance. This Court should affirm judgment for HOO on that basis.

Respectfully submitted,



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