LEXINGTON-FAYETTE URBAN COUNTY HUMAN RIGHTS COMMISSION

Aaron Baker for GLSO, Complainant, vs. Hands On Originals, Inc., Respondent.	HRC # 03-12-3135 **RESPONDENT HANDS ON ORIGINALS' VERIFIED STATEMENT OF POSITION**

GENERAL INFORMATION

Respondent's name is Hands On Originals, Inc. Its address is 990 West New Circle Road, Lexington, Kentucky 40511. HOO's legal status is a corporation.

HOO's company representative for purposes of this matter is its managing owner, Blaine Adamson. But the Commission should communicate exclusively through HOO's legal counsel, the Alliance Defense Fund, for all issues relating to this matter. Specifically, the Commission should direct all communications to Bryan Beauman, Alliance Defense Fund, P.O. Box 779, Paris, Kentucky 40362; the business telephone number through which he can be reached is (859) 340-1127.

HOO's primary business enterprise is printing promotional materials, which include but are not limited to shirts, hats, bags, blankets, cups, bottles, and mugs.

RESPONSE TO THE COMPLAINT

Complainant Aaron Baker for the Gay and Lesbian Services Organization ("GLSO") alleges that HOO engaged in unlawful discrimination on the basis of sexual orientation when it declined to print promotional shirts for the Lexington Pride Festival—an ideologically driven advocacy event. HOO responds that this charge of sexual-orientation discrimination is

unfounded and that, under the Commission's governing rules, the complaint should be promptly dismissed.

The parties' material factual allegations, as will be demonstrated below, are in general agreement; thus the complaint presents pure legal questions that can be resolved quickly without further investigation. Stated differently, even under Complainant's own version of the facts, which are recounted in the complaint and on GLSO's website, Complainant cannot prevail on this charge of unlawful conduct.

As we explain below, in light of the undisputed factual allegations presented by the parties, the Commission's rules mandate that "[t]he Executive Director . . . shall dismiss the complaint" without delay. LFUCHRC Rule 2.050(1). For the undisputed material facts show that "the Commission does not have jurisdiction over the complaint," *id.* at Rule 2.050(1)(a), and that "no . . . monetary, . . . accommodation, . . . declaratory, or injunctive relief [is] available to the complainant," *id.* at Rule 2.050(1)(e)(2).

Prompt resolution—without protracted investigation or proceedings—is particularly necessary here. Complainant has widely proclaimed this unfounded discrimination charge against HOO. *See* GLSO Press Release, http://www.glso.org/site/?cat=94 (attached as Exhibit 1); GLSO Home Page, http://www.glso.org/site/ (attached as Exhibit 2); Kayla Phelps, *Former UK vendor accused of discriminating against organizers of Lexington gay pride festival*, Kentucky Kernel, March 29, 2012, http://kykernel.com/2012/03/29/former-uk-vendor-accused-of-discriminating-against-organizers-of-lexington-gay-pride-festival/, at 2 (attached as Exhibit 3) ("We aren't seeking monetary damages, we just want to raise awareness that this type of discrimination is occurring in Lexington . . . . We just want the entire community to be aware it is going on . . . ."). As a result of the public pressure created by Complainant and GLSO's allies,

some of HOO's large customers have placed a hold on further business with the company pending the resolution of this complaint. HOO employs more than 30 people, many of whom reside and pay taxes in Lexington. Needlessly prolonging dismissal of the pending complaint jeopardizes the livelihood of these individuals, the stability of their families, the tax revenues they provide this local government, and the future of HOO's operations.

UNDISPUTED MATERIAL FACTS

I. HOO's Business Operations

For more than 18 years, HOO has created promotional materials—including but not limited to shirts, hats, bags, blankets, cups, bottles, and mugs—for its customers. By creating walking billboards for the individuals and organizations that it serves, HOO (through its more than 30 employees) helps its customers promote their organizations, events, and messages. HOO's managing owner, Blaine Adamson, first began creating and designing shirts in college, and he quickly discovered that he had a passion for this type of expressive work, leading him to pursue a career in this field and ultimately to become managing owner of HOO.

HOO's work is inherently creative, expressive, and artistic. The company employs five full-time artists/graphic designers whose primary function is to work with customers to create logos, patterns, designs, messages, taglines, and other expressive content for the shirts and other promotional materials produced by HOO. Oftentimes, customers relay general concepts to these employees, and they in turn use their expressive talents and creative abilities to develop promotional messages or artwork that, subject to the customer's approval, HOO will print. The vast majority of HOO's orders—approximately 65% of them—create materials that are custom designed by the company's artists.

Because of the promotional and expressive nature of HOO's business, HOO has regularly declined requests to produce materials depicting messages (or promoting events or organizations that communicate messages) that its owners do not want to endorse, including expression that conflicts with its owners' religious and moral convictions. HOO, for example, has declined orders promoting strip clubs, containing lewd or vulgar content, or depicting curse words. In particular, in January 2012, HOO declined to print a shirt for a local business that read, "Rock out with your hop out," a not-too-subtle twist on the crude saying "Rock out with your cock out." In February 2011, HOO refused to print a shirt that read "Cummingtonite?" for a college club. And in 2007, HOO turned down a college club's request to print a picture of Jesus walking on water next to a pirate ship.

HOO's salespeople are often able to discern—and thus quickly decline—orders promoting messages that the owners do not want to support, but given the wide variety of requests that they receive, they are not capable of determining every order advocating a message that the owners cannot in good conscience promote. Thus, after the initial communications between HOO's salespeople and prospective customers, orders are presented to Mr. Adamson for his approval, and if the requested materials depict messages (or promote events or organizations communicating messages) that the owners do not want to support, he will decline it. HOO nevertheless strives to assist the individuals and organizations whose promotional materials it cannot create, so HOO generally offers to connect them to another company that will fill the order for the same price that HOO would charge.

HOO has a Christian Outfitters division. *See* Hands On Originals Christian Outfitters Webpage, http://www.handsonoriginals.co/ (attached as Exhibit 4). That division creates promotional materials for Christian events, camps, and youth groups. Many large Christian

organizations use HOO's services to create their promotional materials. HOO Christian Outfitters is a very large component of the company. In fact, over 50% of HOO's revenue derives from its Christian Outfitters division.

II. HOO's Owners' Relevant Religious Convictions

Mr. Adamson, like his co-owners, is a Christian who sincerely believes that the Bible is the Holy Word of God and who strives to live consistently with Biblical commands. Mr. Adamson sincerely believes that God demands his obedience in all areas of his life, and that he cannot distinguish between conduct in his personal life and his actions as a business owner. Mr. Adamson also believes that his vocation as an owner of HOO is part of his religious practice and calling, and thus that he is accountable to God for the messages that his business prints or promotes.

Mr. Adamson sincerely believes that he would affirmatively disobey God if his company created promotional materials that communicate messages (or that promote events or organizations that communicate messages) advocating immoral conduct. Mr. Adamson also sincerely believes the Bible's teaching that homosexual behavior is immoral. But even though he is compelled to refrain from advocating (or helping to advocate) immoral conduct, Mr. Adamson sincerely believes that God calls him to love and minister the Gospel to all people including those who identify as homosexual.

III. HOO's Decision Not to Print GLSO's Pride Festival Shirts

In early February 2012, an HOO employee asked HOO salesman, Kaleb Carter, to email her friend, Brad Shepherd, about his interest in ordering 504 eight-colored shirts from HOO. So on February 9, 2012, Mr. Carter sent an email to Mr. Shepherd quoting him a price ($5.76 per shirt for 504 white shirts) based on the number of colors requested (8 total colors) and asking

him to send a picture of the artwork. Copies of this and subsequent emails between Mr. Carter and Mr. Shepherd, all of which are discussed below, are submitted with this position statement as Exhibits 5 and 6.

Later that day, Mr. Shepherd sent Mr. Carter a version of the desired logo, but stressed that "[t]he final shirt design is not complete," so while the "logo will be on the front," it is possible that "additional art [might be] added to the front." Ex. 6 at 2. Mr. Shepherd also indicated that the shirt will display "blocks of sponsors" on the full back. *Id.* Furthermore, Mr. Shepherd mentioned that "[t]he Lexington Pride Festival is currently soliciting sponsors as well," and directed HOO that [f]or more information about the Lexington Pride Festival and it's [sic] umbrella organization, the GLSO, please visit www.lexpridefest.org." *Id.* Mr. Carter did not turn down the request at that time because he did not know whether HOO's owners would decline to print the shirt.

The following day, February 10, 2012, Mr. Carter responded as follows: "This should work just fine . . . . Just let me know what you want me to do and I will get on it." Ex. 5 at 3. Later that day, Mr. Shepherd reiterated that he would "like to have a quote based on . . . the information [he] provided." *Id.* He then stated: "[W]e'd be very interested in discussing a sponsorship. I'm attaching a copy of the sponsorship packet and ask you to please review. If [HOO] has any interest in a sponsorship, I will gladly put the necessary person in direct contact with the 2012 Lexington Pride Festival sponsor representative, Samara Baker." *Id.* Mr. Shepherd did not actually attach a copy of the sponsorship packet to his email.

The following week, on February 14, Mr. Carter asked if Mr. Shepherd wanted HOO to "get started on some art for the[] shirts," noting that sponsors could be added later. *Id.* at 2. Later that day, Mr. Shepherd replied that the art had "not been approved by the board yet" and

that such approval would not occur "until the middle of [M]arch." *Id.* Since it was clear that Mr. Shepherd had yet to finalize the contents of the shirt and was not ready to place an order, Mr. Carter put the onus for further action on Mr. Shepherd, stating "let me know if you need anything from me." *Id.*

Many weeks later, as Complainant admits, a GLSO committee member "called [HOO] with the intention of finding out whether any lower price could be negotiated." Ex. 2 at 3. Complainant then acknowledges that the GLSO committee member "reached someone [at HOO] who asked who he had previously talked to. At that moment, he could not remember [the person's] name, and when the name 'Blaine' was suggested, he agreed. Numerous phone messages back and forth were exchanged before the committee member was finally able to speak with Blaine [Adamson], who represented himself as an owner of Hands On Originals." *Id.*

In his discussion with Mr. Adamson, the GLSO committee member identified himself as "Don," stated that he needed shirts for the GLSO's Pride Festival, and referenced a prior quote that he said Mr. Adamson had given him. Mr. Adamson asked if Don was sure that the two of them had previously spoken because Mr. Adamson does not usually give quotes for call-in orders. Don replied that he thought the two of them had discussed this matter.

Mr. Adamson then asked what GLSO wanted HOO to print on the shirts. Don replied, as Complainant admits, that the shirt would depict the Pride Festival logo, the name of the Festival, and the Festival's sponsors. *See* Ex. 2 at 3 (alleging that the inquiring GLSO committee member stated that the shirt would "contain a stylized number '5' on the front and the name of the festival, and sponsors on the rear"). And as Complainant acknowledges, Mr. Adamson also asked what GLSO was and what the Pride Festival was promoting. *See id.* (alleging that Mr.

Adamson inquired about "what the GLSO was, what [its] mission was, and what [it was] promoting.").

Based on Don's answer, Mr. Adamson understood that the Pride Festival was an event that advocated social celebration of—and encouraged people to be "proud" about engaging in—homosexual behavior and same-sex relationships, and that the shirt would be promoting that event and those messages. Mr. Adamson knew that his religious convictions prohibited him from printing that shirt, promoting that event, or supporting the messages advocated at that event. He sincerely believes that if he had printed the shirt and thereby assisted GLSO in promoting the event, he would have violated his sincerely held religious convictions.

Mr. Adamson then stated that he knew Don was going to be upset with him, but that because of Mr. Adamson's Christian beliefs, HOO could not print the requested shirts. *See* Ex. 2 at 3 (alleging that Mr. Adamson said that "Hands On Originals would not print shirts related to a gay pride festival"). Nevertheless, as Complainant admits, Mr. Adamson indicated that he knew another company that could fill the order at the same price. *See id.* (admitting that Mr. Adamson offered to "refer [GLSO] to a different business who would print the shirts"). Don told Mr. Adamson, as Complainant concedes, that "he would take that offer to [GLSO's] board, but that he felt that [GLSO] would not want to do business with anyone who did business with Hands On Originals." *See id.*

HOO did not decline GLSO's request—nor has it ever declined an order—because of the prospective customer's sexual orientation. Instead, like its many other message-based denials, HOO declined this order because its owners did not want to communicate the message of the requested shirt—that people should be "proud" about engaging in homosexual behavior or same-

sex relationships—nor did they want to promote the Pride Festival or the ideology conveyed at that advocacy event.

Notably, HOO has filled past orders for customers who it knew identified as homosexual and will continue to do so in the future. In addition, HOO has hired, currently employs, and will continue to employ individuals who identify as homosexual.

IV. GLSO and the Pride Festival

GLSO endeavors to "empower[]" the "GLBTQQIA community" through "education, access to information, and outreach programs." GLSO Info Webpage, http://www.lexpridefest.com/site/?page_id=342, at 1 (attached as Exhibit 7). To further that goal, GLSO organized and presented the first Lexington Pride Festival in 2008. *Id.* The Pride Festival was originally known as the "Gay, Lesbian, Bi-Sexual, and Transsexual Pride Festival." Peaceways Newsletter, June/July 2008, at 1 (attached as Exhibit 8). And even though the official name has been truncated, the Pride Festival remains, in GLSO's words, the "premiere festival for the lesbian, gay, bisexual, transgender, queer and questioning community and its allies." Lexington Pride Festival Webpage, http://www.lexpridefest.org/site/?page_id=2, at 1 (attached as Exhibit 9).

GLSO explicitly describes the Lexington Pride Festival as one of its "outreach programs" designed to "empower[]" the GLBT community. Ex. 7 at 1. According to GLSO, the Pride Festival "provides a yearly outlet for all of us [at GLSO] to visibly celebrate our pride in being members of our local GLBT community." Keep the Doors Open Campaign, Facebook, http://www.facebook.com/events/292976287383849/, at 1 (attached as Exhibit 10). This visual celebration includes, among other things, live music, entertainers, and drag shows. *See* Pride

Festival Drag Shows, http://www.lexpridefest.org/site/?page_id=755, at 1 (attached as Exhibit 11).

One of the "most important goals" of the Pride Festival is "fundraising" to support GLSO's other advocacy, education, and outreach efforts. Ex. 10 at 1. GLSO uses the sale of Pride Festival shirts as a fundraising tool: for instance, GLSO originally sold the 2011 Pride Festival shirts for $12.00 each, *see* GLSO Merchandise Webpage, http://www.glso.org/site/?page_id=14, at 1 (attached as Exhibit 12), even though the estimated cost to print a similar shirt is $5.76—roughly half that price, *see* Ex. 5 at 4.

Other events organized or advocated by GLSO include programs "support[ing] LGBT youth in learning new skills to improve the quality of their intimate partner relationships," *see* Ex. 2 at 2; discussion groups supporting people who have yet to "come out" and encouraging others to "tell [their] unique story about coming out," *see id.* at 5; and the Mr. and Miss Lexington Pride Contests, *see* Mr. & Miss Lexington Pride Webpage, http://www.lexpridefest.org/site/?page_id=760, at 1 (attached as Exhibit 13).

V. The Aftermath of HOO's Decision

Complainant has widely publicized the filing of this discrimination complaint. *See, e.g.*, Exs. 1, 2, & 3. As a result of the public pressure created by Complainant and GLSO's allies, some of HOO's large customers—such as the University of Kentucky, the Fayette County Public School System, and the Kentucky Blood Center—have publicly stated that they are placing a hold on further business with HOO pending the resolution of this complaint. *See* Scott Sloan, *Fayette public schools place hold on purchases from Hands On Originals*, Herald Leader, March 28, 2012, http://www.kentucky.com/2012/03/28/2130257/public-schools-place-hold-on-purchases.html, at 1-2 (attached as Exhibit 14); Brian Powers, *The Hands Off Approach: A Look*

at the Law in Hands On Originals v. GLSO, Business Lexington, April 3, 2012, http://www.southsidermagazine.com/articles-c-2012-04-03-101161.113117-the-hands-off-approach-a-look-at-the-law-in-hands-on-originals-v-glso-poll-attached.html, at 2 (attached as Exhibit 15). This unfortunate and unwarranted development has jeopardized the jobs of HOO's many employees and the future of HOO's business. Swift dismissal of the pending complaint is needed to restore HOO's reputation, vindicate its owners, and protect its employees.

ARGUMENT

According to the Commission's rules, "[t]he Executive Director . . . shall dismiss the complaint" without delay, LFUCHRC Rule 2.050(1), because for the following five reasons,[1] the undisputed facts demonstrate that "the Commission does not have jurisdiction over the complaint," *id.* at Rule 2.050(1)(a), and that "no . . . monetary, . . . accommodation, . . . declaratory, or injunctive relief [is] available to the complainant," *id.* at Rule 2.050(1)(e)(2).

I. Complainant's Own Version of the Facts Plainly Show that HOO Did Not Violate the Ordinance Since HOO Did Not Decline to Print the Pride Festival Shirts Because of Complainant's Sexual Orientation.

HOO did not decline to print the Pride Festival shirts because of Complainant's sexual orientation; instead, it declined the order because its owners did not want to communicate the message expressed on the requested shirt—that people should be "proud" about engaging in homosexual behavior or same-sex relationships—nor did they want to promote the Pride Festival or the ideology that would be conveyed at that advocacy event. Because the undisputed facts show that HOO acted for this legitimate and nondiscriminatory reason, no relief is available to Complainant, and the Executive Director must dismiss the complaint.

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[1] In this position statement, HOO highlights five separate substantive arguments plainly requiring the Executive Director to dismiss the complaint. But HOO does not include every legal defense that it would raise in its answer.

Code of Ordinance, Lexington-Fayette Urban County Government Section 2-33(2), in conjunction with incorporated state law, KRS § 344.120, (hereafter referred to as "Section 2-33(2)") provides that "it is an unlawful practice for a person to deny an individual the full and equal enjoyment of the goods, services, . . . and accommodations of a place of public accommodation . . . on the ground of" that individual's "sexual orientation." The ordinance defines "sexual orientation" to "mean an individual's actual or imputed heterosexuality, homosexuality, or bisexuality." LFUCGCO § 2-33(4). Here, HOO did not violate Section 2-33(2) since it did not decline to print the Pride Festival shirts because of Complainant's sexual orientation, but instead declined the order because its owners did not want to support the ideological message that it was asked to promote.

The Commission's Executive Director Raymond Sexton has acknowledged this obvious distinction between situations where business owners are motivated by "the message" that they are asked to promote, which would not violate the ordinance, and situations where business owners are motivated by "the protected class of the individuals in question," which would violate the ordinance. *See* Karla Dial, *Lexington Human-Rights Commissioner Delivers Opinion*, CitizenLink, April 2, 2012, http://www.citizenlink.com/2012/04/02/lexington-human-rights-commissioner-delivers-opinion/, at 1 (attached as Exhibit 16). As Mr. Sexton has succinctly stated, "[i]f the company does not approve of the message[,] that is a valid non-discriminatory reason to refuse the work." Jack Minor, *T-Shirt Company in Crosshairs for Saying No to Homofest*, World News Daily, http://www.wnd.com/2012/03/homosexuals-blast-t-shirt-company-over-beliefs-speech/, at 2 (attached as Exhibit 17).

That is why Mr. Sexton has acknowledged that a business owner who identifies himself as homosexual would not violate the ordinance by refusing to print materials promoting the

message that homosexual behavior is morally wrong, and that an African-American business owner would not violate the ordinance if he rejected an order to print promotional materials for a Klan rally. *Id.* The same principle must apply to HOO here, lest this Commission communicates that homosexual and African-American business owners receive better treatment than Christian business owners accused of discrimination.

Notwithstanding Mr. Sexton's public statements affirming that homosexual and African-American business owners would not violate the ordinance if they were motivated by a desire not to promote a message or ideological event, he has incredibly suggested that HOO was not motivated by the message that it was asked to promote because the Pride Festival shirt, in his opinion, did not contain "any pro or anti-'gay' message." *Id.* Yet that reasoning is belied by Complainant's own version of the facts. Complainant admits that the GLSO representative told Mr. Adamson that the shirt would contain "the name of the festival"—Lexington Pride Festival. *See* Ex. 2 at 3. That name necessarily communicates a pro-homosexual message, indicating that people should be "proud" about engaging in homosexual behavior or same-sex relationships. Indeed, GLSO admits that one goal of the Pride Festival is for individuals "to visibly celebrate [their] pride in being members of [the] local GLBT community." Ex. 10 at 1. By declining to create a shirt containing the ideologically laden title, "Lexington Pride Festival," HOO was unquestionably motivated by the message that it was asked to promote.[2]

Other undisputed facts additionally demonstrate that HOO did not discriminate against Complainant for an illicit reason and that HOO, in its business practices, does not discriminate based on sexual orientation. First, HOO has regularly declined requests to produce materials

[2] This situation—where HOO was asked to print a shirt containing the words "Lexington Pride Festival"—is analytically indistinguishable from the African-American business owner asked to print a shirt containing the words "Klan Rally."

depicting messages (or promoting events or organizations that communicate messages) that its owners do not want to endorse. Examples of these legitimate, nondiscrimination business decisions are recited above. *See supra* at 4. Second, HOO has created promotional materials for customers who identify as homosexual, and the company will continue to do so in the future. Third, HOO has hired, currently employs, and will continue to employ individuals who identify as homosexual.

In sum, the Executive Director must promptly dismiss this complaint because the undisputed materials facts—indeed, Complainant's own version of the facts—show that HOO did not act for an unlawful reason and thus that no relief is available to Complainant. But even if it were possible to conclude that HOO violated the terms of Section 2-33(2), which it is not for all the reasons discussed above, the remaining sections outline four constitutional reasons why the Executive Director still must dismiss the complaint.

II. Punishing HOO for Declining to Communicate a Promotional Message Would Violate HOO's and Its Owners' Constitutional Rights Against Compelled Expression.

Both the United States Constitution and the Kentucky Constitution protect the right to freedom of expression against governmental coercion. *See* U.S. Const. amend. I; Ky. Const. § 8; Ky. Const. § 1 ("All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned . . . [t]he right of freely communicating their thoughts and opinions."). "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (quotation marks and citation omitted); *see also Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he First Amendment . . . includes both the right to speak freely and the right to refrain from speaking"). The First Amendment thus

prohibits the government, including this Commission, from compelling a private business to express (or punishing a private business for refusing to express) a message that its owners do not want to promote. *See United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (recognizing that the First Amendment "prevent[s] the government from compelling individuals to express certain views"). Thus, well-established constitutional principles prohibit the Commission from forcing HOO to print (or punishing HOO for declining to print) expressive promotional materials for GLSO's advocacy event.

HOO undoubtedly engages in expression. The company employs five full-time artists/graphic designers who create logos, patterns, designs, messages, taglines, and other expressive content for 65% of the shirts and other promotional materials that HOO prints. And even when HOO's designers do not create the contents of a customer's promotional materials, the company still prints words, logos, or pictures on promotional materials—conduct that is unquestionably a form of constitutionally protected expression. *See Kaplan v. California*, 413 U.S. 115, 119-20 (1973) (acknowledging that "both oral utterance and the printed word have First Amendment protection"). So by asking HOO to print words and logos on the Pride Festival shirts, GLSO requested that HOO use its constitutionally protected expression to promote an inherently expressive and ideologically driven event. But HOO's and its owners' constitutional rights protect their decision not to print the Pride Festival shirts.

The United States Supreme Court's unanimous decision in *Hurley* demonstrates that the Executive Director must dismiss this complaint because First Amendment principles prevent the Commission from providing Complainant any relief. In *Hurley*, the Supreme Court rejected the State of Massachusetts's application of its sexual-orientation-nondiscrimination law to expressive activity. There, the complainant organization (known as GLIB) was engaged in

expression—"celebrat[ing] its members' identity as openly gay, lesbian, and bisexual descendents of the Irish immigrants," *Hurley*, 515 U.S. at 570—and sought access to the "inherent expressiveness" of the defendant's services, a parade, to communicate its message, *id.* at 568-69. Likewise here, GLSO is seeking to engage in expression—an advocacy festival where individuals "visibly celebrate [their] pride in being members of [the] local GLBT community," *see* Ex. 10 at 1—and sought the help of HOO's expressive services, printing promotional materials, to communicate and promote the messages of that event. The constitutional principles addressed in *Hurley* thus compel the Executive Director to dismiss this complaint.

Two other well-established constitutional principles support HOO's and its owners' freedom-of-expression rights in this context. First, a business need not originate expression for it to be constitutionally protected; printing or publishing subjects selected (or expression created) by another person is sufficient to invoke First Amendment protection. *See Hurley*, 515 U.S. at 570 ("First Amendment protection [does not] require a speaker to generate, as an original matter, each item featured in the communication"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (finding that a newspaper's opinion page, which publishes the writings of others, is constitutionally protected). Second, HOO's status as a commercial, for-profit corporation does not diminish its First Amendment rights. "[S]peech does not lose its protection because of the corporate identity of the speaker." *Pac. Gas and Electric Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986); *see also Citizens United v. FEC*, 130 S. Ct. 876, 899-900 (2010) ("First Amendment protection extends to corporations"); *Hurley*, 515 U.S. at 574. And "[i]t 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." *Riley v. Nat'l Fed'n of the Blind of N.C.*,

487 U.S. 781, 801 (1988); *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988).

The Commission may not compel HOO to engage in expression (or punish HOO for refusing to engage in expression) because taking adverse action against HOO under these circumstances would not survive strict scrutiny. *See Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 642 (1994). The Commission's actions cannot withstand strict scrutiny because punishing HOO is not a "narrowly tailored means of serving a compelling [governmental] interest." *See Pac. Gas and Electric Co.*, 475 U.S. at 19.

The relevant governmental interest for strict-scrutiny analysis is not Lexington's broad purpose for enacting Section 2-33(2), but its particular interest in applying that ordinance under these circumstances. *See Hurley*, 515 U.S. at 578-79. In *Hurley*, for example, the Supreme Court did not evaluate the government's general interest in preventing discrimination, but instead its particular interest in applying the law to the "expressive activity" at issue. *See id.* at 578. In that case, as here, the apparent purpose of applying the law to an organization's expression was "simply to require [the organization] to modify the content of [its] expression to whatever extent beneficiaries of the law choose to alter it." *Id.* Such an unconstitutional interest—which "allow[s] exactly what the [constitutional] rule of speaker's autonomy forbids," *id.*—is not even legitimate, let alone compelling, and thus does not trump HOO's and its owners' First Amendment rights. Moreover, Section 2-33(2) could have been more narrowly tailored to achieve its goals while better protecting freedom of expression: the ordinance, for example, could have exempted commercial entities that provide inherently expressive services, such as printers, newspapers, and speech writers.

The Commission is not free to depart from this strict-scrutiny analysis. The United States Supreme Court has twice addressed this issue in similar contexts involving public-accommodation laws prohibiting discrimination on the basis of sexual orientation, and in both instances the Court concluded that the application of those laws to infringe First Amendment rights did not satisfy strict scrutiny. *See Hurley*, 515 U.S. at 578-79; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657-59 (2000). The High Court has thus already performed the relevant constitutional analysis; the Commission must follow its established course; and the Executive Director must swiftly dismiss the pending complaint.

III. Punishing HOO for Declining to Print Promotional Materials for an Ideological Event Would Violate HOO's and Its Owners' Constitutional Rights Against Compelled Association and Expression.

The First Amendment rights of expression and association protect the choices of private individuals and organizations to "refus[e] to associate" with an ideological or political message with which they disagree. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233-35 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1, 9-10, 13-14 (1990). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein.*" *Abood*, 431 U.S. at 235 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)) (emphasis added).

The United States Supreme Court's decisions in *Abood* and *Keller* demonstrate that the Executive Director must dismiss the pending complaint because First Amendment principles prevent the Commission from providing Complainant any relief. In those cases, the Supreme Court established that the First Amendment prohibits the government from forcing an individual to contribute money (or punishing an individual for refusing to contribute money) to a private

organization for the purpose of communicating ideologies with which the individual disagrees. *See Abood*, 431 U.S. at 233-35; *Keller*, 496 U.S. at 9-10, 13-14. Likewise here, the First Amendment forbids the Commission from compelling HOO to provide (or punishing HOO for declining to provide) its services to promote the Pride Festival, an event espousing GLSO's ideology.

Notably, the service that HOO was asked to provide—printing the Pride Festival shirts—would have not only promoted the Pride Festival; it would have also generated money for GLSO, thereby advancing the organization's other means of advocacy. After all, one of the "most important goals" of the Pride Festival is "fundraising" to support GLSO's other advocacy, education, and outreach efforts, *see* Ex. 10 at 1, and GLSO sells its Pride Festival shirts as a fundraising tool, *see* Ex. 12. This exacerbates the First Amendment violation because compelling HOO to print the Pride Festival shirts would have required HOO to directly support both this ideologically driven event and GLSO's other means of advocacy.

IV. Punishing HOO for Declining to Print Promotional Materials for GLSO's Advocacy Event Would Violate HOO's and Its Owners' Constitutional Rights to Freedom of Expressive Association.

The First Amendment forbids the government from punishing a private organization for refusing to associate with a message that will negatively affect the organization's constitutional rights of expression. *Dale*, 530 U.S. at 648-59. This constitutional right of expressive association protects HOO's decision not to print the Pride Festival shirts.

The United States Supreme Court in *Dale* established the constitutional analysis for an expressive-association claim. The first step in the analysis is to "determine whether a group is protected by the First Amendment's expressive associational right." *Id.* at 648. "The First Amendment's protection of expressive association is not reserved for advocacy groups," *id.*, or

for organizations that "trumpet [their] views from the housetops," *id.* at 656. "[T]o come within its ambit, a group must [simply] engage in some form of expression, whether it be public or private." *Id.* at 648. Stated differently, an organization does "not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. [It] must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Id.* at 655.

HOO engages in expression by, among other things, creating logos, messages, taglines, and other expressive content for the shirts and other promotional materials that it produces; printing promotional materials for its customers; advertising its services; posting messages and marketing materials on its website; and communicating messages through its owners and representatives. This abundance of expressive activity easily qualifies HOO for protection under the First Amendment's expressive-associational right.

The legal analysis next considers whether requiring HOO to print GLSO's Pride Festival shirts "would significantly affect [its] ability to [express its] public or private viewpoints." *Dale*, 530 U.S. at 650. Courts and government agencies "must . . . give deference to an association's view of what would impair its expression." *Id.* at 653. HOO firmly believes that printing GLSO's Pride Festival shirts would affect its expression. Indeed, printing those promotional materials would require HOO to create a message—namely, that people should be "proud" about engaging in homosexual behavior or same-sex relationships—that it does not want to support or associate with. Communicating that message squarely conflicts with the Christian messages that HOO, particularly its Christian Outfitters division, otherwise desires to—and does, in fact—express. *See* Ex. 4.

Finally, the last step in the expressive-association analysis requires a weighing of HOO's and its owners' expressive-associational rights against the government's particularized interest in applying Section 2-33(2) in this specific situation. *See Dale*, 530 U.S. at 658-59. The United States Supreme Court has already conducted this analysis under similar circumstances and thus established binding precedent that this Commission must follow. The High Court reasoned as follows:

> We have already concluded that [this particular application of the sexual-orientation nondiscrimination law] would significantly burden the organization's right to [express its views about] homosexual conduct. *The state interests embodied in [the] public accommodations law do not justify such a severe intrusion on the [organization's] rights to freedom of expressive association.* That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.

Id. at 659. Likewise, the governmental interest at issue here does not justify this severe intrusion into HOO's freedom of expressive association. The First Amendment therefore prohibits the Commission, through application of Section 2-33(2), from requiring HOO to print (or punishing HOO for declining to print) the Pride Festival shirts.

V. Punishing HOO for Declining to Violate Its Owners' Sincerely Held Religious Beliefs Would Contravene HOO's and Its Owners' Constitutional Rights to the Free Exercise of Religion.

Mr. Adamson sincerely believes the Bible's teaching that homosexual behavior is immoral. He also sincerely believes that he would disobey God if his company created promotional materials that communicate messages (or that promote events or organizations that communicate messages) advocating immoral behaviors or conduct. Thus, forcing HOO to print the Pride Festival shirts (or punishing HOO for declining to print those shirts) would unconstitutionally infringe upon HOO's and its owners' constitutional rights to the free exercise

of religion. Consequently, the Commission cannot grant Complainant any relief because doing so would violate HOO's and its owners' free-exercise rights.

Both the United States Constitution and the Kentucky Constitution protect the right to free exercise of religion. *See* U.S. Const. amend. I; Ky. Const. § 5; Ky. Const. § 1 ("All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned . . . [t]he right of worshipping Almighty God according to the dictates of their consciences"). "Depending on the nature of the challenged law or government action, a free exercise claim can prompt either strict scrutiny or rational basis review." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004) (quotation marks and citation omitted). There are three reasons why strict scrutiny applies here.

First, HOO and its owners have presented a hybrid claim. A hybrid claim exists when a law "not only affects the free exercise of religion, but also burdens other constitutionally protected rights," such as the free-expression and free-association rights discussed above. *See Triplett v. Livingston Cnty. Bd. of Educ.*, 967 S.W.2d 25, 32 (Ky. App. 1997). Because a hybrid claim exists here, HOO's and its owners' free-exercise claims are "subject to strict scrutiny." *Id.*

Second, the applicable ordinance—Section 2-33(2)—is not generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993) (indicating that a not-generally-applicable law invokes strict scrutiny). An ordinance is not generally applicable when, among other reasons, it contains categorical exemptions that undermine its general purpose. *Id.* at 542-43. Categories of exemptions "are of paramount concern when a law has the incidental effect of burdening religious practice." *Id.* at 542. Section 2-33(2) includes categorical exceptions that undermine its general purpose of preventing discrimination, *see, e.g.*, LFUCGCO § 2-33(7), and therefore it is not generally applicable.

Third, free-exercise claims under the Kentucky Constitution should be analyzed using strict scrutiny. The Kentucky Constitution provides that "[n]o human authority shall, *in any case whatever*, control or interfere with the rights of conscience." Ky. Const. § 5 (emphasis added); *see also* Ky. Const. § 1 (ensuring all in this State the "inherent and inalienable right[]" to "worship[] Almighty God according to the dictates of their consciences"). This language is far broader than the free-exercise language in the First Amendment to the United States Constitution, and thus it should be construed to automatically demand strict-scrutiny review.

Since, for the foregoing reasons, strict scrutiny applies, that heightened standard of review requires Complainant to show that imposing this onerous burden on HOO's and its owners' free-exercise rights is the least-restrictive means of achieving a compelling state interest. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). But Complainant cannot demonstrate a compelling interest here because, as shown above, the only interest advanced by applying Section 2-33(2) under these circumstances is to compel HOO to engage in expression that violates its owners' sincerely held religious beliefs. *See Hurley*, 515 U.S. at 578-79. This does not constitute even a legitimate governmental interest, *see id.*, much less a compelling interest of the highest order. Furthermore, Section 2-33(2) is not the least-restrictive means of achieving the government's purported goals while adequately protecting the free exercise of religion: the ordinance, for instance, could provide an exemption for business owners motivated by their sincerely held religious convictions, just as it does for religious institutions. *See* LFUCGCO § 2-33(7).

CONCLUSION

For the foregoing reasons, the Commission lacks jurisdiction over the complaint, and no relief is available to Complainant; therefore, the Executive Director must dismiss the complaint.

Given the need for swift resolution and the clear constitutional protections afforded to HOO, the company requests that the Executive Director dismiss the complaint immediately so that HOO and its owners are not forced to seek redress for the violation of their constitutional rights.

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Respectfully submitted,
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**Out-of-State Certification forthcoming*