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

APPEAL FROM
FAYETTE CIRCUIT COURT, THIRD DIVISION
CIVIL ACTION NO. 14-CI-04474
HON. JAMES D. ISHMAEL, JR.

**AARON BAKER**
**FOR GAY AND LESBIAN SERVICES;**
**AND LEXINGTON FAYETTE URBAN**
**COUNTY HUMAN RIGHTS COMMISSION** **APPELLANTS**

**V.**

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

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# BRIEF FOR *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF APPELLEE'S BRIEF

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Richard G. Griffith
Elizabeth S. Muyskens
STOLL KEENON OGDEN PLLCS
300 West Vine Street, Ste. 2100
Lexington, KY 40507-1801
(859) 231.3000

Douglas Laycock
UNIVERSITY OF VIRGINIA
LAW SCHOOL
580 Massie Road
Charlottesville, VA 22903
(434) 243.8546

Luke W. Goodrich
Stephanie H. Barclay
Adèle A. Keim
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW
Suite 700
Washington, DC 20036
(202) 955.0095

Counsel for *amicus curiae*


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## CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2015, a true and accurate copy of the foregoing was served first-class by U.S. Mail, postage prepaid, to Hon. James D. Ishmael, Jr., Fayette Circuit Court Judge, Fayette County Courthouse, 120 North Limestone, Lexington, Kentucky 40507, and counsel for appellants Edward E. Dove, Esq., 201 West Short Street, Suite 300, Lexington, KY 40507, and counsel for appellees Bryan H. Beauman, Esq., Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Suite 1500, Lexington, KY 40507.

I further certify that the record on appeal has not been withdrawn from the office of the Fayette Circuit Clerk for purposes of this brief.

Counsel for *amicus curiae*
October 29, 2015

## STATEMENT OF POINTS AND AUTHORITIES

## INTRODUCTION

The question in this case is whether Americans will be allowed to live according to diverse moral views, or whether the government will instead pick one "correct" moral view and punish those who disagree. Fortunately, the Kentucky General Assembly has already addressed this question by enacting the Religious Freedom Act, KRS § 446.350—a law specifically designed to protect individuals of diverse religious views.

Appellee Hands On Originals is a small, closely-held printing business owned by Christians. The owners of Hands On willingly hire and serve LGBT individuals, and they have never declined to hire or serve anyone because of their race, sex, or sexual orientation. But, in accordance with standard industry practice, the owners of Hands On will not print messages that contradict their core beliefs. So, for example, just as pro-choice printers have declined to print pro-life messages, and LGBT printers have declined to print anti-gay messages, the owners of Hands On have declined to print shirts promoting a strip club, pens promoting sexually explicit videos, and shirts endorsing violence.

In 2012, the Gay and Lesbian Services Organization (GLSO) asked Hands On to print shirts featuring the name and logo of the local Pride Festival. Because the owners of Hands On believe that sex is designed for traditional marriage, and because the Pride Festival promotes a contradictory view, Hands On could not in good conscience print the shirts. Instead, it offered to refer GLSO to another printer who would print the shirts for the same price. GLSO received many offers to print the shirts and ultimately received them for free.

Yet now, the Lexington-Fayette Urban County Human Rights Commission (the Commission) has ordered Hands On to print shirts that contradict its beliefs and to attend "Di-

versity Training" telling the owners that their religious beliefs are wrong. The Commission's Order not only tramples the freedom of speech, it flagrantly violates Kentucky's Religious Freedom Act, KRS § 446.350. The Commission has failed to offer *any* evidence—let alone the clear and convincing evidence required by law—that forcing a closely-held, expressive business to create messages that violate its core religious beliefs is necessary to accomplish a compelling government interest, particularly when the same services are readily available from many other willing vendors. The Commission has not even alleged that eliminating the specific type of "discrimination" at issue here is necessary to overcome a widespread or significant obstacle for GLSO's full participation in society. And the Supreme Court has consistently held that a government's desire to shield individuals from encountering people who disagree with them—even when those encounters are emotionally distressing—is not a compelling government interest.

Just as a pro-choice printer has a right to decline to print a religious message attacking Planned Parenthood, and a gay photographer has a right to decline to photograph a religious anti-gay rally, a Christian printer who believes in traditional marriage has a right to decline to print materials contradicting that view. The law protects the freedom of individuals in a pluralistic society to disagree, and the Circuit Court's ruling protecting this freedom should be affirmed.

## ARGUMENT

### I. KRS § 446.350 Applies to the Commission's Order.

Kentucky's Religious Freedom Act, KRS § 446.350, provides as follows:

> Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest.

> A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

This law was enacted by an overwhelming majority in the wake of a Kentucky Supreme Court decision holding that laws burdening religious freedom were subject only to rational basis review. *Gingerich v. Com.*, 382 S.W.3d 835, 841 (Ky. 2012); Kentucky Legislature, Legislative Record Online, H.B. 279, 2013 Regular Session (Apr. 9, 2013, 11:36 AM), http://www.lrc.ky.gov/record/13RS/HB279.htm (overriding veto by 79-15 in the House and 32-6 in the Senate). It is modeled on the federal Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 *et seq.*, and, like its federal counterpart, it is designed to provide "very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014). Both laws provide that if the government substantially burdens a person's religious exercise, it must justify its action as the least restrictive means of accomplishing a compelling government interest. Both laws protect the ability of owners to run their business consistent with their religious beliefs. *Id.* at 2759; KRS § 446.010(33). But Kentucky's law goes further: it defines a substantial burden to include even "indirect" burdens; it requires the government to justify its infringement of each "specific act or refusal to act"; and it requires the government to satisfy the heightened standard of "clear and convincing evidence." KRS § 446.350. Federal cases are therefore relevant here; KRS § 446.350 tracks its federal analog but offers greater protection for religious exercise.

Both the Circuit Court and the Commission (in its original Order) correctly held that KRS § 446.350 applies to this case. The Commission is arguing on appeal that KRS § 446.350 does not apply because the complaint in this case was filed before KRS § 446.350 was enacted. Br. 17. According to the Commission, this would violate the presumption against applying statutes retroactively. But this argument is meritless. Simply

put, this case involves *prospective* relief—namely, an injunction forbidding Hands On from engaging in its religious conduct and requiring Hands On to participate in diversity training. And when a court imposes *prospective* relief, it is "unquestionably proper" to apply the law as it stands at the time of its decision, not at the time the case was filed. *Landgraf v. USI Film Products*, 511 U.S. 244, 273 (1994). As a result, "[a]pplying new statutes (or regulations) that 'authorize[ ] or affect[ ] the propriety of prospective relief,' . . . does not raise retroactivity concerns." *BellSouth Telecommunications, Inc. v. Se. Tel., Inc.*, 462 F.3d 650, 661 (6th Cir. 2006) (quoting *Landgraf*, 511 U.S. at 273).

Courts have routinely applied this principle to analogous statutes at the federal level. For example, when Congress enacted the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*—a statute that is parallel to RFRA—courts repeatedly applied the new statute to lawsuits seeking prospective relief, even when the lawsuits had been filed before the statute was enacted.[1] The Circuit Court correctly applied the same principle here. Because KRS § 446.350 was passed on March 27, 2013—more than a year before the Commission's November 2014 Order—KRS § 446.350 is controlling law.

## II. The Commission's Order Violates KRS § 446.350.

### A. The Commission has substantially burdened the religious beliefs of Hands On and its Owners.

To establish its prima facie case under KRS § 446.350, Hands On must demonstrate that the government has "substantially burdened" a "specific act or refusal to act" that is

[1] *See, e.g., Prater v. City of Burnside, Ky.*, 289 F.3d 417, 433 (6th Cir. 2002) ("Applying RLUIPA in the present case . . . does not implicate the general presumption against the retroactive application of statutory law, because the Church is seeking an injunction."); *Kikumura v. Hurley*, 242 F.3d 950, 961 n.5 (10th Cir. 2001) ("When the plaintiff's request for relief is a prospective injunction, application of new or amended statutes is not a retroactive application of the law.").

"motivated by a sincerely held religious belief." The Commission admits that Hands On was motivated by a sincerely held religious belief. *See* Order at 8. Thus, the only question is whether Hands On's ability to act or refuse to act has been "substantially burdened."

KRS § 446.350 defines "burden" to include "*indirect burdens* such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities." KRS § 446.350 (emphasis added). Similarly, the Supreme Court has held that "indirect" burdens are "substantial" when they place "pressure upon [religious adherents] to forego th[eir] [religious] practice[s]." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981). And if "indirect" pressure qualifies as substantial, a *direct* order to stop engaging in religious conduct is obviously also substantial. For example, in *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015), the Supreme Court held that a Muslim prisoner "easily satisfied" the substantial burden standard when the prison ordered him to shave his religiously motivated beard.

Here, the Commission has directly ordered Hands On to act in violation of its religiously motivated beliefs. It has charged Hands On with "unlawful discrimination" and ordered Hands On to print objectionable messages in the future. Order at 16. If Hands On does not comply, the Commission can list Hands On as an organization that has "engaged in an unlawful practice," initiate an enforcement proceeding in Kentucky circuit court, and impose "damages for injury caused by an unlawful practice including compensation for humiliation and embarrassment." KRS § 344.230; KRS § 344.340. The direct order to violate religious beliefs, backed by significant government penalties, obviously places "pressure upon [Hands On] to forego [its] [religious] practice[s]." *Sherbert*, 374 U.S. at 404. Thus, the substantial burden standard is "easily satisfied." *Holt*, 135 S. Ct at 862.

Beyond that, the Commission has ordered Hands On to "participate in diversity training." Order at 16. The point of this training is to convince the owners of Hands On that their conduct was wrong. As the Commission's own attorney admitted, this requirement "may create a whole new realm of constitutional arguments pertaining to freedom [of] expression and the free exercise of religion." Commission's Response ¶ 13 (Ex. F).

The Commission has suggested that Hands On can avoid the burden on its religious practices if it simply ceases to "operate[] . . . as a public accommodation." Order at 14. But that would force Hands On's owners to choose between their religious beliefs and their livelihood. As the Supreme Court has said, "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [Hands On] for [its] [religious exercise]." *Sherbert*, 374 U.S. at 404. That is the quintessential substantial burden. *See also Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2777 (rejecting the argument that a family business could avoid a substantial burden by "dropping insurance coverage").

**B. The Commission has failed to present clear and convincing evidence satisfying strict scrutiny.**

Upon a prima facie showing of a substantial burden, KRS § 446.350 entitles a claimant to an exemption unless the government can satisfy strict scrutiny. KRS § 446.350 requires the Commission to "prove[] by *clear and convincing evidence* that it has a compelling governmental interest in infringing the *specific* act or refusal to act and has used the least restrictive means to further that interest." KRS § 446.350 (emphasis added). The Commission has not satisfied that burden here.

**1. Strict scrutiny requires a fact-specific analysis based on concrete evidence, not broad generalities.**

The Commission claims that it has a broad interest in guaranteeing "equal access to goods and services of the Commonwealth" without discrimination. Br. 13. But strict scrutiny requires courts to "look[] beyond broadly formulated interests" and instead "scrutinize[] the asserted harm of granting *specific exemptions* to *particular religious claimants*." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (emphasis added). In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), for example, the Supreme Court did not analyze the government's interest in compulsory public education generally. It assessed the government's interest in making the specific *Amish* children before the court attend *one more year* of public education instead of trade-oriented education provided by their families. *Id.* at 214-15 (emphasis added).

In this case, Hands On has employed at least six gay or lesbian people and regularly provides its services to LGBT people. *See* Adamson Aff. ¶ 49-50 (Ex. 1). Hands On has never declined to hire or serve anyone because of any legally protected characteristic, and it has a firm company policy against such discrimination. *Id.* ¶ 26; Order at 2. Hands On simply cannot print messages that contradict its religious beliefs.

Hands On itself has a Christian Outfitters division that creates promotional Christian materials. Adamson Aff. ¶ 24 (Ex. 1 ). And Hands On notifies the public on its website that "it is the prerogative of [Hands On] to refuse any order that would endorse positions that conflict with the convictions of the ownership." Order at 2. This policy has led Hands On to reject a wide range of orders—at least 13 orders over a 3-year period—including shirts promoting a strip club, pens promoting sexually explicit videos, and shirts endorsing vio-

lence. Hands On's Supplemental Resp. to Interrog. No. 15 (Ex. 9). Such policies are standard industry practice—as LGBT-owned printing companies that support Hands On have noted.[2] Further, when Hands On declined to print the Pride Festival's message in this case, Hands On offered to connect GLSO with another printer who would provide the order at the same price. Adamson Aff. ¶ 47 (Ex. 1). Ultimately, the Pride Festival received many offers to print the shirts and ended up obtaining the shirts for free. GLSO Newsletter, May 2012, at 2 (Ex. 106); Complainant's Resp. to Interrog. No. 9 (Ex. 108).

Thus, here the Commission must justify forcing a closely-held, expressive business to create expressive items that contradict its sincerely-held religious beliefs, when the same items are readily available for the same price from many vendors in the same community. And the Commission cannot simply *assert* that it has a compelling interest in this sort of compulsion. It must "prove[]," by "clear and convincing evidence," that it has a compelling interest in "infringing th[is] specific act." KRS § 446.350; *see also O Centro*, 546 U.S. at 437 (government must "*offer[] evidence* demonstrating that granting the [religious adherent] an exemption would cause the kind of . . . harm recognized as a compelling interest") (emphasis added). But the Commission has not offered *any evidence*—much less clear and convincing evidence—that compelling Hands On to violate its religious beliefs furthers a compelling interest. That alone warrants judgment in favor of Hands On.

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[2] Adamson Aff. ¶ 32 (Ex. 1); BMP T-Shirts Email to Blaine Adamson at 1 (Ex. 11) ("We are a lesbian owned and operated t-shirt company . . . and we support your right to refuse to print the t-shirts for the local Pride organization."); Pride Festival Meeting Minutes, Apr. 12, 2012, at 1 (Ex. 102) (Cincy Apparel would not print "hate" on shirts); *see also* TheBlaze, *Lesbian Business Owner Defends Christian Printer's Rights*, YouTube (Nov. 7, 2014), https://www.youtube.com/watch?v=68sIlntWHmI.

**2. The interest served by public accommodation laws—removing pervasive barriers to equal citizenship—would not be undermined by accommodating Hands On here.**

Beyond failing to offer any evidence, the Commission has failed to show that the basic interests furthered by public accommodation laws would be undermined by accommodating Hands On here. As the Supreme Court has recognized, one of the foundational justifications for public accommodation laws is to "remov[e] the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984). But when a public accommodation law collides with other fundamental rights, the courts must balance those rights "on one side of the scale, and the State's interest on the other." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000). In such a case, the government must make a particularized showing that eliminating the specific type of discrimination at issue is necessary to overcome a significant structural barrier to an individual's full participation in society. In the absence of such a showing, fundamental rights like speech or free exercise must prevail. *See id.*; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995).

For example, in *Hurley*, the unanimous Supreme Court held that the government failed to make a particularized showing sufficient to satisfy strict scrutiny, even when a public accommodation (a local parade) refused to include a group that supported gay rights. 515 U.S. at 574-80. In reaching this conclusion, the Court considered the following factors: (1) the public accommodation "disclaim[ed] any intent to exclude homosexuals as such," but simply objected to including a message endorsing homosexuality; (2) the public accommodation was not "an abiding monopoly of access," because the gay rights group had a "fair shot" at obtaining its own parade permit; and (3) the government did "not show[]"

that the public accommodation "enjoy[ed] the capacity to 'silence the voice of competing speakers.'" *Id.* at 572-78.

This case presents an even easier scenario than *Hurley*. Here, far from "exclud[ing] homosexuals as such," Hands On regularly employs and serves LGBT individuals. And more than just having a "fair shot" at obtaining the same service, the Pride Festival had multiple offers to print the shirts at the same price and even received them for free. Nor can the government come close to claiming GLSO is at risk of being "silenc[ed]" by Hands On, as demonstrated by the fact that GLSO has hosted more pride festivals, continued its successful LGBT advocacy efforts, and organized an effective boycott of Hands On. *See* Adamson Aff. ¶ 57 (Ex. 1); Boycott Hands On Originals Facebook Page (Ex. 117).

The Massachusetts Supreme Court required a similar particularized showing by the government when the government attempted to enforce a nondiscrimination law against religious objectors who declined to rent housing to unmarried couples. *Attorney General v. Desilets*, 636 N.E.2d 233, 240 (Mass. 1994). There, the court rejected a general interest in "eliminating discrimination" and noted that "the analysis must be more focused." *Id.* at 325. Specifically, "the Commonwealth must demonstrate that it has a compelling interest in the elimination of discrimination *in housing* against an unmarried man and an unmarried woman who have a sexual relationship and *wish to rent accommodations to which [the anti-discrimination law] applies*." *Id.* at 325-26 (emphasis added). The court noted that the government did not show "proof" that accommodating the religious objectors would "significantly imped[e] the availability of rental housing for people who are cohabitating," because "[m]arket forces often tend to discourage owners from restricting the class[es] of people to whom they would rent." *Id.* at 329. Thus, the government failed to demonstrate

a "compelling interest . . . strong enough to justify the burden placed on the defendants' exercise of their religion." *Id.* at 330. Here, too, the Commission has offered no evidence—and certainly not "clear and convincing evidence"—that accommodating Hands On would significantly impede the ability of LGBT individuals to obtain shirts in Kentucky.[3]

Indeed, the facts of *Hurley* and *Desilets* stand in stark contrast with the facts of *Bob Jones University v. United States*, 461 U.S. 574, 592-93 (1983), where the government demonstrated pervasive obstacles to citizenship that were caused by invidious racial discrimination in education. The Court noted that, at the time, "racial segregation in primary and secondary education prevailed in many parts of the country," where there had been significant "stress and anguish" and a "history of efforts to escape from the shackles of the 'separate but equal' doctrine." *Id.* at 592-95. As one scholar has noted:

> There remains . . . a crucial difference between the race-based discrimination against African Americans in the Jim Crow South and *any* other form of discrimination or exclusion in our country. The pervasive impediments to equal citizenship for African Americans have not been matched by any other recent episode in American history. Our country has harmed many people . . . . But the systemic and structural injustices perpetrated against African Americans—and the extraordinary remedies those injustices warranted—remain in a class of their own.

John D. Inazu, *A Confident Pluralism*, 88 S. Cal. L. Rev. 587, 603 (2015). That is likely why no court has ever extended the rationale of *Bob Jones* beyond the context of race.[4]

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[3] Illinois and Michigan have adopted the same approach as Massachusetts. *See Jasniowski v. Rushing*, 685 N.E.2d 622 (Ill. 1997) (reversing a ruling requiring a religious landlord to lease to a cohabiting couple); *McCready v. Hoffius*, 459 Mich. 1235 (Mich. 1999) (same).

[4] The Supreme Court itself has recognized a difference between race discrimination and support for traditional marriage. When the Court struck down bans on same-sex marriage, both the majority and dissent went out of their way to state that many who support traditional marriage do so out of "decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). But the Court did the opposite when it struck down bans on interracial

To be sure, the government could in some cases make a showing of structural barriers sufficient to overcome a religious objection in the context of discrimination that does not involve racial classifications. For example, the *Desilets* court indicated the government could have prevailed if it had presented evidence showing a "significant housing problem" where "a large percentage of units are unavailable to cohabitants." 636 N.E.2d at 240. And the government would likely win a case where a religious objection would deny someone an important service from an "abiding monopoly of access." *Hurley*, 515 U.S. at 578. But here, the Commission has not even attempted to introduce any evidence demonstrating that GLSO faces such structural barriers to full participation in society. Nor could it, when Hands On does not discriminate against gays and lesbians as a class, Hands On offers fungible products widely available elsewhere for the same price (even for free), and there is no evidence of widespread business objections to providing shirts for pride festivals.

**3. The Supreme Court has never recognized a compelling government interest in shielding individuals from opposing viewpoints.**

Rather than offering any evidence of a structural barrier, the Commission invokes a generalized interest in "safeguarding specified classes of individuals from the humiliation" that results from "being denied equal access to public accommodations." Order at 10. In other words, the Commission seeks to prevent individuals from experiencing emotional distress that can accompany a denial of service from others who do not wish to endorse or support the individuals' message. But the Supreme Court has consistently held that a government's desire to protect people from emotional harm—even far more acute emotional harm than is present here—does not constitute a compelling government interest.

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marriage in *Loving v. Virginia*, stating that there was "no legitimate overriding purpose" for the bans other than "invidious racial discrimination." 388 U.S. 1, 11 (1967).

For example, it is difficult to imagine more excruciating humiliation, degradation, or emotional harm than that endured by the father who saw Westboro Baptist Church picketers with signs stating "God Hates Fags," "You're Going to Hell," and "God Hates You" at the funeral of his son, a Marine "killed in Iraq in the line of duty." *Snyder v. Phelps*, 562 U.S. 443, 448 (2011). A jury found this conduct so outrageous, and the father's resulting mental anguish so acute, that it awarded over $10 million in damages. *Id.* at 450, 456.

Despite this significant emotional distress, the Supreme Court in an 8-1 decision upheld the "bedrock principle underlying the First Amendment" that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 458 (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989)); *see also Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43 (1977). Any other result would "effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen v. California*, 403 U.S. 15, 21 (1971).

Nor is the government entitled to a unique "avoiding emotional harm" trump card in the context of public accommodations. In *Dale*, it was no doubt emotionally distressing for a gay scout leader to be expelled from the Boy Scouts; indeed, unlike this case, which involved an arms-length business transaction, Dale was expelled from a program that had been a major part of his life for nearly as long as he could remember. *Dale*, 530 U.S. at 654. Yet the Court explained that "public or judicial disapproval" of the organization's conduct "does not justify the State's effort to compel the organization to accept members" where such acceptance would violate rights protected by strict scrutiny. *Id.* at 661; *see also Hurley*, 515 U.S. at 574 (exclusion of the LGBT group was "hurtful," but still protected).

In *Snyder* and *Dale*, the plaintiffs could point to emotional harm caused by groups that wished to completely exclude or even condemn them; that is not the case here. Hands On is willing to serve and employ LGBT individuals; it simply cannot agree to promote the Pride Festival's political message. And although *Snyder* was a speech case, the Supreme Court has held that, regardless of whether strict scrutiny is triggered by the Free Speech Clause or RFRA, "the consequences are the same." *O Centro*, 546 U.S. at 429-30. The government must make the same particularized showing that it failed to make here.

Finally, when considering harms in the public accommodation context, courts must weigh the harm on both sides—not just the emotional distress of the aggrieved individual, but the concrete financial harm and government coercion imposed upon the owners of the establishment. *Dale*, 530 U.S. at 659. As one gay-rights advocate and scholar put it: "[T]he burden on individuals like [Hands On's owners] outweighs the burden on individuals like [GLSO's leaders]," who have "no difficulty finding [a substitute source for the desired service]," while business like Hands On might be forced to "abandon [their] business." Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Anti-discrimination Law*, 88 S. Cal. L. Rev. 619, 629-30 (2015).

**4. Enforcing public accommodations laws to punish objections to messages or events, rather than to prevent invidious class-based discrimination, endangers freedom for many groups across the political spectrum.**

The Commission has chosen to enforce its public accommodation law in a "peculiar" way that targets objections to particular messages or events, rather than focusing on invidious discrimination against a class of individuals "as such." *Hurley*, 515 U.S. at 572. The Supreme Court has noted that this type of "peculiar" enforcement is much more likely to collide with other important civil rights, such as speech, association, and free exercise. *Id.* at 573; *see also Dale*, 530 U.S. at 657 (as states have "expanded" their application of public

accommodation laws, "the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased").

A more targeted interpretation of public accommodation laws would safeguard civil rights for people of all political persuasions, including LGBT groups. For example, GLSO admits that it would reject a religious organization that wanted to set up a booth condemning homosexuality at the Pride Festival. Brown Dep. at 58-59 (Ex. A). Such conduct should be protected, just as a pro-choice printer's refusal to print religious pro-life messages should be protected, and just as a gay photographer's refusal to photograph a religious anti-gay rally should be protected. But if the Commission's current interpretation of the law were applied in an even-handed way, the Commission admits it may have to treat objections to hostile religious messages as equivalent to invidious anti-religious discrimination. Ex. C (Sexton Dep. at 13-16).

In our pluralistic society, the law should not be used to coerce ideological conformity simply to shield some groups from encountering people who disagree with them. Rather, on hotly contested moral issues, the law should "create a society in which both sides can live their own values." Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 877 (2014).

## CONCLUSION

The Circuit Court correctly determined that the Commission's actions violate Hands On Originals' fundamental free speech and religious exercise rights. The Circuit Court's award of summary judgment should thus be affirmed.

Respectfully submitted,

Counsel for *amicus curiae*