COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. ____

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 — **APPELLANT/ MOVANT**

V. **MOTION FOR DISCRETIONARY REVIEW**

HANDS-ON ORIGINALS — **APPELLEE/ RESPONDENT**

Comes now the the Appellant/Movant pursuant to CR 76.20 and respectfully requests the Supreme Court undertake discretionary review of the Court of Appeals Opinion dated May 12, 2017 which affirmed the decision of the Fayette Circuit Court finding that the Appellant Lexington-Fayette Urban County Human Rights Commission's (hereinafter "HRC") administrative finding on behalf of the Gay and Lesbian Services Organization (hereinafter "GLSO") that the Appellee, Hands-On Originals (hereinafter "HOO") had violated Local Ordinance 201-99 more commonly known as the "Fairness Ordinance" when HOO refused to conduct business with the Fayette County Gay and Lesbian Services Organization (hereinafter "GLSO") Specifically, the HOO refused to print t-shirts for the Lexington Pride Festival in 2012.

1. The Appellant/Movant HRC is represented by the undersigned counsel:

   Hon. Edward E. Dove
   201 W. Short Street
   Suite 300
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2. The Appellee is represented by:

Hon. Bryan H. Beauman
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Hon. James A. Campbell
Hon. Byron J. Babione
Hon. Kenneth J. Connelly
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
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3. The Court of Appeals entertained Amicus Briefs from the following parties:

   a. The Becket Fund for Religious Liberty

   b. American Center for Law and Justice

   c. Americans United for Separation of Church & State

   d. CATO Institute

   e. The Becket Fund for Religious Liberty

   f. Sutherland Institute

4. The date of the Entry of Judgment sought to be reviewed is May 12, 2012.

5. There is no supercedeas bond or bail applicable to the Motion.

6. The Movant does not have a petition for rehearing or reconsideration pending in the Court of Appeals.

7. The Movant is unaware that any other party has a Motion for Rehearing or Reconsideration in the Court of Appeals.

8. Material Facts of the Case:

The Appellant/Movant 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/Respondent

[1]President of the GLSO

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". 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.

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/Movant 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/Respondent had violated the ordinance, entered a cease and desist Order and required HOO to participate in diversity training. The Appellee/Respondent 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 HRC. The HRC appealed the decision to the Kentucky Court of Appeals on May 15, 2015. The Court of Appeals issued its Opinion affirming the Circuit Court decision on May 12, 2017.

9. Questions of Fact Presented:

   a. Is the Court of Appeals' ruling which affirmed the Fayette Circuit Court's decision that HOO did not violate the LFUCG Fairness Ordinance comply with the current status of the law.

   b. Was the Movant's decision in finding that the HOO violated the LFUCG Fairness Ordinance arbitrary and capricious.

10. The Court should accept the Movant Motion due to the unsettled law in the Commonwealth concerning the application of the LFUCG Fairness Ordinance as it applies to public accommodations. It is important because at this time eight localities have adopted a "Fairness Ordnance" and more government entities are considering the adoption of a "Fairness Ordinance". The Communities need direction on how to respond when a business open to the the public denies service to individual or a group due to their sexual orientation or the message they present. Human Rights Commission followed their statutory mandate

of KRS 344.320 when they "receive, investigate and issue orders" to eliminate discovery against a certain population of the community when they are denied service from a public accommodation. The Circuit Court decision affirmed by the Court of Appeals would allow businesses to intentionally discriminate against and individual or groups residing in their community.

Other jurisdictions, most notably Washington[2] and Colorado[3], have found that the failure to provide services due to sexual orientation violated the statue codes protecting individuals from discrimination. Kentucky should do the same.

In accepting the motion, the Supreme Court will assist in giving the Commonwealth direction on how to respond to issues similar to the one presented by the Movant.

Additionally, the Opinion of the split Court of Appeals is erroneous. The Opinion cites cases to support the decision, but is unclear as to how the cases apply to the situation presented by the Movant's appeal.

The Opinion basically offers three opinions (one in dissent) but offers no clear direction on why the "Fairness Ordinance" is not enforceable by the administrative process of the HRC. Again, the Supreme Court needs to accept discretionary review to give direction on the application of the communities adopting the "Fairness Ordinance" and business qualifying as public accommodations.

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[2]State v. Arlene's Flowers, Inc., 2017 Wash. LEXIS 216, No. 91615-2 (Wash. Feb. 16, 2017)

[3]Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 282 (Colo. Ct. App. 2015)

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that copies of this Motion for Discretionary Review were served upon the following named individuals by mailing same, postage prepaid, on this the **9th day of June, 2017**:

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and the original and ten (10) copies to the

Supreme Court of Kentucky
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EDWARD E. DOVE

RENDERED: MAY 12, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000745-MR

LEXINGTON FAYETTE URBAN COUNTY
HUMAN RIGHTS COMMISSION AND
AARON BAKER FOR GAY AND LESBIAN
SERVICES ORGANIZATION — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 14-CI-04474

HANDS ON ORIGINALS, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND TAYLOR, JUDGES.

KRAMER, CHIEF JUDGE: The Lexington Fayette Urban County Human Rights Commission ("Commission") appeals an order of the Fayette Circuit Court reversing its determination that appellee, Hands On Originals ("HOO"), discriminated against the Gay and Lesbian Services Organization ("GLSO") in

violation of Lexington-Fayette Urban County Government's public accommodation ordinance, Local Ordinance 201-99, Section 2-33 (hereinafter referenced as "Section 2-33" or the "fairness ordinance"), discussed below. The circuit court also determined that if HOO violated the above-stated ordinance, the Commission's application of the ordinance to HOO's conduct, under the circumstances of this case, was unconstitutional. Having carefully reviewed the record and applicable law, we agree HOO did not violate the ordinance and AFFIRM on that basis. Therefore, any discussion of whether an alternative constitutional basis supported the circuit court's judgment is unwarranted.[1]

FACTUAL AND PROCEDURAL HISTORY

The GLSO is a Lexington-based organization that functions as a support network and advocate for gay, lesbian, bisexual, or transgendered individuals. Its membership also includes individuals in married, heterosexual relationships. One such individual, Aaron Baker, functioned as the GLSO's President at all relevant times during this dispute.

HOO is in the business of promoting messages; specifically, it prints customized t-shirts, mugs, pens, and other accessories. Blaine Adamson is one of HOO's owners and manages the business. According to HOO's policy and

[1] It is the long-standing practice of our Courts to refrain from reaching constitutional issues when other, non-constitutional grounds can be relied upon. *See Baker v. Fletcher*, 204 S.W.3d 589, 597–98 (Ky. 2006).

mission statement, which appears on its website, HOO's menu of services is limited by the moral compass of its owners:

> Hands On Originals both employs and conducts business with people of all genders, races, religions, sexual preferences, and national origins. However, due to the promotional nature of our products, it is the prerogative of Hands On Originals to refuse any order that would endorse positions that conflict with the convictions of the ownership.

In this vein, the record provides examples of subject matter HOO has refused to promote because its ownership has deemed it morally objectionable, such as adult entertainment products and establishments. The record also provides examples of images HOO has refused to promote, such as the word "bitches" and depictions of Jesus dressed as a pirate or selling fried chicken.

With that said, the Commission alleged HOO violated the fairness ordinance on March 8, 2012. On that date, Don Lowe, on behalf of the GLSO, telephoned HOO to place an order for t-shirts that would bear a screen-printed design with the words "Lexington Pride Festival 2012," the number "5," and a series of rainbow-colored circles around the "5." The GLSO intended to sell these t-shirts to promote the 2012 Lexington Pride Festival, an event it organized and encouraged everyone to attend. Blaine Adamson, on behalf of HOO, answered the telephone call. What happened next was described later in the following exchange between Adamson and an interviewer from the Commission:

INTERVIEWER: Ok, on or about March 8th when you spoke to Don Lowe of the GLSO, did you attempt to find out what kind of organization the GLSO was during that conversation?

ADAMSON: I do not recall asking that specifically. I recall asking what the process was about. I had somewhat of an idea but I wasn't sure.

INTERVIEWER: So at any point during this conversation did you ask what the GLSO was about?

ADAMSON: I do not recall asking specifically that. I remember, yeah I don't remember asking that.

INTERVIEWER: Ok, so would it be accurate to say that you just asked about the Pride Festival and what exactly did he say?

ADAMSON: I asked him, um, because he had called and left a message. He mentioned something about the Pride Festival and so when I called him, I first asked him was he sure that he had spoke with me because I traditionally don't do quotes or anything and he said he had. So, I just said ok well then I wanted to take care of him and I said what you need and he explained he needed shirts for the Pride Festival and I asked him what exactly is the Pride Festival and he explained to me what it was about.

INTERVIEWER: Did he explain it to you?

ADAMSON: Yes.

INTERVIEWER: What did he say?

ADAMSON: He basically said it was a Pride Festival downtown, um, that it was for the gay and lesbian community. And then he began to tell me because I had asked him what was on the shirt. That was my next

question. And he said Pride Festival and I honestly can't remember what he said after that.

INTERVIEWER: Ok. Once Mr. Lowe explained what the t-shirt was for, what was your response?

ADAMSON: Well I knew that, I knew immediately that he would be upset with me, with what I was about to say. So I said that, I said, "Don, I know that this will upset you, but because of my Christian beliefs, I can't promote that." Then, um, he was upset. And I can't remember what else he had said at that point because we were kind of talking a little bit, back and forth. I was trying to…

INTERVIEWER: Ok.

ADAMSON: And he mentioned something about [inaudible]. He hung the phone up.

INTERVIEWER: Ok, ok. Here is a copy of the t-shirt design. That look about accurate of what you recall?

ADAMSON: I never saw the design but from over the past, I never saw the design before we talked.

INTERVIEWER: Ok you didn't see the actual design before you talked. What about this design do you find offensive? Or what about this picture that you see here, would you find offensive enough not to print?

ADAMSON: Um, the Lexington Pride Festival, the wording.

INTERVIEWER: Ok.

ADAMSON: To me it's promoting a message, um an event that I can't agree with because of my conscience.

INTERVIEWER: Ok. So would you say it's not exactly the design of the shirt that's offensive but rather the

message that it's portraying and what the GLSO stands for?

ADAMSON: Um, specifically it's the Lexington Pride Festival, the name and that it's advocating pride in being gay and being homosexual and I can't promote that message. It's something that goes against my belief system.

INTERVIEWER: So you feel that you use your own personal religious beliefs to make a decision not to print the t-shirts?

ADAMSON: My own personal religious beliefs? Yes.

INTERVIEWER: Ok.

ADAMSON: Not to promote that message. Correct.

Shortly thereafter Aaron Baker, on behalf of the GLSO, filed a complaint with the Commission alleging HOO had discriminated on the basis of sexual orientation and gender identity in violation of Section 2-33. Based upon what Adamson related to its interviewer, the Commission ultimately agreed. In the relevant part of its order, the Commission explained:

> [HOO] argues that Mr. Adamson's objection to the printing of the t-shirt was not because of the sexual orientation of the members of the GLSO, but because of the Pride Festivals' advocacy of pride in being homosexual. Acceptance of [HOO's] argument would allow a public accommodation to refuse service to an individual or group of individuals who hold and/or express pride in their status. This would have the absurd result of including persons with disabilities who openly and proudly display their disabilities in the Special Olympics, persons of race or color, who are not only of differing race and color, but express pride in being so,

> and persons of differing religions who express pride in their religious beliefs.
>
> The Hearing Commissioner notes that human beings are either internally proud or not of their race, color, sexual orientation, disability, age, or religion. Those that are internally proud of their status may or may not outwardly express such pride. It is doubtful that [HOO] would deny that a substantial number of those of the Christian faith are internally proud of being Christian, but never express that pride to others. However, those members of protected classes who outwardly express pride in their own religion or sexual orientation do so because of their self-identification of being within that classification of persons.
>
> The purpose of the Lexington Pride Festival is to celebrate and exhibit pride in their status as persons of differing sexual orientation or identity. The Hearing Commissioner agrees with the Commission's contention that [HOO's] objection to the printing of the t-shirts was inextricably intertwined with the status of the sexual orientation of the members of the GLSO. Mr. Adamson's refusal on behalf of [HOO] was clearly because of the sexual orientation and identity of members of the GLSO.

In short, the Commission held HOO had violated the fairness ordinance because, by refusing to print the t-shirts requested by the GLSO, HOO had either discriminated on the basis of sexual orientation and gender identity; or had effectively discriminated on the basis of sexual orientation and gender identity by discriminating against conduct engaged in exclusively or predominantly by gay, lesbian, bisexual, or transgendered persons.

HOO subsequently appealed by filing an original action in Fayette Circuit Court. The circuit court reversed the Commission, finding that HOO did not violate the fairness ordinance; and, even if HOO had violated it, the ordinance was unconstitutional as applied under the circumstances of this case. This appeal followed.

STANDARD OF REVIEW

In reviewing an agency decision, this Court, as well as a circuit court, may only overturn that decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence on the record. *See Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 301 (Ky. 1972); *see also Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 642-43 (Ky. App. 1994). "Judicial review of an administrative agency's action is concerned with the question of arbitrariness." *Commonwealth, Transportation Cabinet v. Cornell*, 796 S.W.2d 591, 594 (Ky. App. 1990) (quoting *Am. Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964)). Arbitrariness means "clearly erroneous, and by 'clearly erroneous' we mean unsupported by substantial evidence." *Crouch v. Police Merit Board*, 773 S.W.2d 461, 464 (Ky. 1988). Substantial evidence is "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *Fuller*, 481 S.W.2d at 308.

If it is determined that the agency's findings are supported by substantial evidence, the next inquiry is whether the agency has correctly applied the law to the facts as found. *Kentucky Unemployment Ins. Comm'n v. Landmark Cmty. Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 578 (Ky. 2002) (quoting *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Comm'n*, 437 S.W.2d 775, 778 (Ky. 1969)). Questions of law arising out of administrative proceedings are fully reviewable *de novo* by the courts. *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. App. 1998). When an administrative agency's findings are supported by substantial evidence and when the agency has applied the correct rule of law, these findings must be accepted by a reviewing court. *Ward*, 890 S.W.2d at 642.

ANALYSIS

The resolution of this appeal involves the application of law to undisputed facts. We begin with a discussion of the law that the Commission argues HOO violated. The fairness ordinance adopts KRS 344.120, which provides in relevant part:

> [I]t 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 fairness ordinance then adds to this language, providing that this practice is also unlawful if it is based upon grounds of "ages forty and over," "sexual orientation," or "gender identity."[2]

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[2] At all relevant times, the fairness ordinance provided:

> (1) It is the policy of the Lexington-Fayette Urban County Government to safeguard all individuals within Fayette County from discrimination in employment, public accommodation, and housing on the basis of sexual orientation or gender identity, as well as from discrimination on the basis of race, color, religion, national origin, sex, disability, and ages forty and over.
>
> (2) For purposes of this section, the provisions of KRS 344.010(1), (5) through (13) and (16), 344.030(2) through (5), 344.040, 344.045, 344.050, 344.060, 344.070, 344.080, 344.100, 344.110, 344.120, 344.130, 344.140, 344.145, 344.360(1) through (8), 344.365(1) through (4), 344.367, 344.370(1), (2), and (4), 344.375, 344.380, 344.400 and 344.680, as they existed on July 15, 1998, are adopted and shall apply to prohibit discrimination on the basis of sexual orientation or gender identity within Fayette County.
>
> (3) The [Lexington-Fayette Urban County Human Rights Commission] shall have jurisdiction to receive, investigate, conciliate, hold hearings and issue orders relating to complaints filed alleging discrimination in employment, public accommodation or housing based on the sexual orientation or gender identity of the complaining party. The commission is authorized to use the powers and procedures listed in sections 2-31 and 2-32 to carry out the purposes of this section, except that KRS 344.385, 344.635 and 344.670 shall not apply to the enforcement of this section.
>
> (4) For purposes of this section, "sexual orientation" shall mean an individual's actual or imputed heterosexuality, homosexuality, or bisexuality.
>
> (5) For purposes of this section, "gender identity" shall mean:

Under the broad definition of "public accommodation" set forth in KRS 344.130[3] (which the fairness ordinance has likewise adopted), a wide array of entities qualify as public accommodations and are therefore subject to the fairness ordinance. Such entities include, but are not limited to: universities; abortion clinics; and any private business that supplies goods or services to the general

> (a) Having a gender identity as a result of a sex change surgery; or
> (b) Manifesting, for reasons other than dress, an identity not traditionally associated with one's biological maleness or femaleness.
>
> (6) Nothing in this section shall be construed to prevent an employer from:
>
> (a) Enforcing an employee dress policy which policy may include restricting employees from dress associated with the other gender; or
> (b) Designating appropriate gender specific restroom or shower facilities.
>
> (7) The provisions of this section shall not apply to a religious institution or to an organization operated for charitable or educational purposes, which is operated, supervised, or controlled by a religious corporation, association, association or society except that when such an institution or organization receives a majority of its annual funding from any federal, state, local or other government body or agency or any combination thereof, it shall not be entitled to this exemption.

[3] KRS 344.130, which defines the term, in relevant part, as follows:

> [. . .] any place, store or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds, except that:
>
> (1) A private club is not a "place of public accommodation, resort, or amusement" if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests;

public, or which solicits or accepts the patronage or trade of the general public—even private businesses with goods and services that carry a specific ethnic or religious theme (*e.g.*, Christian bookstores).

Because HOO is a store which supplies goods or services to the general public in the Lexington-Fayette area and because none of the exceptions specified in KRS 344.130 otherwise apply to it, HOO qualifies as a "public accommodation" and is therefore subject to the fairness ordinance. The overarching issue presented by this appeal is whether, by refusing to print the t-shirts requested by the GLSO, HOO "den[ied] an individual the full and equal

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(2) "Place of public accommodation, resort, or amusement" does not include a rooming or boarding house containing not more than one (1) room for rent or hire and which is within a building occupied by the proprietor as his residence; and

(3) "Place of public accommodation, resort, or amusement" does not include a religious organization and its activities and facilities if the application of KRS 344.120 would not be consistent with the religious tenents of the organization, subject to paragraphs (a), (b), and (c) of this subsection.

(a) Any organization that teaches or advocates hatred based on race, color, or national origin shall not be considered a religious organization for the purposes of this subsection.

(b) A religious organization that sponsors nonreligious activities that are operated and governed by the organization, and that are offered to the general public, shall not deny participation by an individual in those activities on the ground of disability, race, color, religion, or national origin.

(c) A religious organization shall not, under any circumstances, discriminate in its activities or use of its facilities on the ground of disability, race, color, or national origin.

enjoyment of [its] goods, services, facilities, privileges, advantages, and accommodations" and therefore violated the fairness ordinance.

As an aside, finding a violation of KRS 344.120 or the fairness ordinance is a straightforward proposition in situations where a person is ordered off the premises of a business establishment otherwise open to the public, or service is otherwise refused or limited, for no reason except the person's protected status. This is the quintessential example of conduct prohibited by public accommodation statutes. A university could not, for example, refuse to enroll a student because the student is Hispanic. An abortion clinic could not order a person off of its premises solely because that person is Christian. The owner of a Christian bookstore could not refuse to sell books to a person because that person is Muslim. A restaurant that offers a full menu could not serve only a limited menu of heart-smart options to persons over the age of forty.

However, in situations where *conduct* is cited as the basis for refusing service, applying public accommodation laws is less straightforward. "Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S.Ct. 753, 760, 122 L.Ed.2d 34 (1993).

For example, a shopkeeper's refusal to serve a Jewish man, not because the man is Jewish, but because the shopkeeper disapproves of the fact that the man is wearing a yarmulke, would be the legal equivalent of religious discrimination. *See id.* (explaining "A tax on wearing yarmulkes is a tax on Jews.") A shopkeeper's refusal to serve a homosexual, not because the person is homosexual, but because the shopkeeper disapproves of homosexual intercourse or same-sex marriage, would be the legal equivalent of sexual orientation discrimination. *See, e.g, Lawrence v. Texas*, 539 U.S. 558, 583, 123 S.Ct. 2472, 2487-88, 156 L.Ed.2d 508 (2003) (O'Connor, J., concurring) (explaining that a law criminalizing only homosexual sodomy "is targeted at more than conduct. It is instead directed toward gay persons as a class."); *see also Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 (Colo. Ct. App. 2015)[4] (holding that a cake-maker's refusal to sell a wedding cake to homosexual couple, because the cake-maker knew the cake would be used to celebrate a same-sex marriage and the cake-maker was opposed to such unions, is the equivalent of discrimination on the basis of sexual orientation).

By contrast, however, it is not the aim of public accommodation laws, nor the First Amendment, to treat *speech* as this type of activity or conduct. This is so for two reasons. First, speech cannot be considered an activity or conduct that is engaged in exclusively or predominantly by a particular class of people. Speech is

[4] With regard to *Craig*, a petition for discretionary review is currently pending before the United States Supreme Court. We cite *Craig* for purposes of illustration only.

an activity *anyone* engages in—regardless of religion, sexual orientation, race, gender, age, or even corporate status. Second, the right of free speech does not guarantee to any person the right to use someone else's property, even property owned by the government and dedicated to other purposes, as a stage to express ideas. *See O'Leary v. Commonwealth*, 441 S.W.2d 150, 157 (Ky. 1969).

As it held in its order, the Commission argues on appeal that "Acceptance of [HOO's] argument [for why it did not print the GLSO's t-shirts] would allow a public accommodation to refuse *service* to an individual or group of individuals who *hold and/or express pride* in *their* status." (Emphasis added.)

We disagree.

Nothing of record demonstrates HOO, through Adamson, refused any individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations it offered to everyone else *because* the individual in question had a specific sexual orientation or gender identity. Adamson testified he never learned of or asked about the sexual orientation or gender identity of Don Lowe, the only representative of GLSO with whom he spoke regarding the t-shirts. Don Lowe testified he never told Adamson anything regarding his sexual orientation or gender identity. The GLSO itself also has no sexual orientation or gender identity: it is a gender-neutral organization that functions as a *support*

network and *advocate* for individuals who identify as gay, lesbian, bisexual, or transgendered.[5]

Also, nothing of record demonstrates HOO, through Adamson, refused any individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations it offered to everyone else because the individual in question was *engaging in an activity or conduct exclusively or predominantly by a protected class of people*.

As reflected in its order, the Commission characterized the "activity or conduct" in question as (to paraphrase) the GLSO's holding and/or expressing pride in their status of being gay, lesbian, bisexual, or transgendered. As noted, however, the GLSO has no sexual orientation. Its membership and its Pride Festival welcome people of all sexual orientations. It functions as a support network and advocate for *others* (*i.e.*, gay, lesbian, bisexual, or transgendered individuals). And, the t-shirts the GLSO sought to order from HOO are an example of its support and advocacy of *others*. While the shirts merely bore a screen-printed design with the words "Lexington Pride Festival 2012," the number "5," and a series of rainbow-colored circles, the symbolism of this design, the festival the design promoted, and the GLSO's desire to sell these shirts to everyone clearly imparted a *message*: Some people are gay, lesbian, bisexual, and

[5] The Commission made no determination that HOO discriminated on the basis of "imputed" sexual orientation, per Section 2-33(4). However, as *dicta* we note for the same reasons discussed that such a determination would have been similarly untenable.

transgendered; and people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals.

The act of wearing a yarmulke is conduct engaged in exclusively or predominantly by persons who practice Judaism. The acts of homosexual intercourse and same-sex marriage are conduct engaged in exclusively or predominantly by persons who are homosexual. But anyone—regardless of religion, sexual orientation, race, gender, age, or corporate status—may espouse the belief that people of varying sexual orientations have as much claim to unqualified social acceptance as heterosexuals. Indeed, the posture of the case before us underscores that very point: this case was *initiated* and *promoted* by Aaron Baker, a non-transgendered man in a married, heterosexual relationship who nevertheless functioned at all relevant times as the *President* of the GLSO. For this reason, conveying a message in support of a cause or belief (by, for example, producing or wearing a t-shirt bearing a message supporting equality) cannot be deemed *conduct* that is so closely correlated with a protected status that it is engaged in exclusively or predominantly by persons who have that particular protected status. It is a *point of view* and form of *speech* that could belong to any person, regardless of classification.

In other words, the "service" HOO offers is the promotion of *messages*. The "conduct" HOO chose not to promote was pure speech. There is no contention that HOO is a public *forum* in addition to a public *accommodation*.

Nothing in the fairness ordinance prohibits HOO, a private business, from engaging in *viewpoint* or *message* censorship. Thus, although the menu of services HOO provides to the public is accordingly limited, and censors certain points of view, it is the same limited menu HOO offers to every customer and is not, therefore, prohibited by the fairness ordinance.

A contrary conclusion would result in absurdity under the facts of this case. The Commission's interpretation of the fairness ordinance would allow any individual to claim any variety of protected class discrimination under the guise of the fairness ordinance merely by requesting a t-shirt espousing *support* for a protected class and then receiving a value-based refusal. A Buddhist who requested t-shirts from HOO stating, "I support equal treatment for Muslims," could complain of religious discrimination under the fairness ordinance if HOO opposed equal treatment for Muslims and refused to print the t-shirts on that basis. A 25-year-old who requested t-shirts stating, "I support equal treatment for those over forty" could complain of age discrimination if HOO refused on the basis of its disagreement with that message. A man who requests t-shirts stating, "I support equal treatment for women," could complain of gender discrimination if HOO refused to print the t-shirts because it disagreed with that message. And so forth. Clearly, this is not the intent of the ordinance.

CONCLUSION

The Fayette Circuit Court correctly reversed the order of the Lexington Fayette Urban County Human Rights Commission because HOO did not, as the Commission held, violate Section 2-33 of the Lexington-Fayette Urban County Government's Code of Ordinances. We therefore AFFIRM.

D. LAMBERT, JUDGE, CONCURS IN RESULT ONLY AND FILES A SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTS AND WRITES SEPARATE OPINION.

D. LAMBERT, CONCURRING: I concur with the result reached by the majority opinion. I write separately, however, to state that I would affirm the trial court based on the reasoning of *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014). *Hobby Lobby* makes it clear that the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb et seq., allows closely held, for-profit entities, to freely advance their owners' sincerely held religious beliefs, as long as those beliefs do not offend existing federal laws that pass strict-scrutiny. I would echo the *Hobby Lobby* decision to hold that KRS 446.350,[6] Kentucky's Religious Freedom Restoration Statute, offers

[6] **Prohibition upon government substantially burdening freedom of religion—Showing of compelling governmental interest—Description of "burden."** 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.

similar protection against Kentucky laws that substantially burden the free exercise of religion.

At the outset, it is important to clarify what is and what is not at issue. First, HOO is a privately-owned corporation. Second, as the majority points out, HOO did not refuse to print the shirts simply because the GLSO representative is a member of a protected class listed in the fairness ordinance. Rather, HOO refused to print the shirts because the HOO owners believe the lifestyle choices promoted by GSLO conflict with their Christian values. Third, no one questions the sincerity of HOO's owners' religious convictions; in fact, the parties agree that the fairness ordinance substantially burdens HOO's owners' religious beliefs. And fourth, there is little doubt LFUCG has a compelling interest in preventing local businesses from discriminating against individuals based on their sexual orientation. LFUCG must be able to market itself as a place where all people can acquire the goods and services they need. Accordingly, by the plain text of KRS 446.350, the central issue here is whether the fairness ordinance is the least-restrictive way for LFUCG to prevent local business from discriminating against members of the gay community without imposing a substantial burden on the exercise of religion. For the following reasons, I do not believe so.

Here, instead of providing an owner of a closely-held business, or the like, with an alternative means of accommodating a patron who wishes to promote

a cause contrary to the owner's faith,[7] the fairness ordinance forces the owner to either join in the requested violation of a sincerely held religious belief, or face a penalty, *i.e.*, support the furtherance of the offending cause or take a class on how to support it. Such coercion violates KRS 446.350. In the face of the protected religious freedoms afforded to HOO under both the Federal and State Religious Freedom Restoration Acts, and *Hobby Lobby,* the fairness ordinance is therefore invalid as applied in this case. Thus, I join the majority in affirming the Circuit Court.

TAYLOR, JUDGE, DISSENTING. Respectfully, I dissent. I would reverse the circuit court's opinion and order and reinstate the Lexington Fayette Urban County Human Rights Commission (Commission) order that Hands On Originals, Inc. (HOO) had engaged in unlawful discrimination in violation of Lexington-Fayette Urban County Government's (LFUCG) Ordinance 201-99, Section 2-33 of the Code of Ordinances (Fairness Ordinance).

Although the circuit court primarily relied upon a violation of HOO's constitutional rights to reverse the Commission's order, one member of the majority effectively concludes that the Fairness Ordinance is not applicable to this case on the premise that HOO was engaging in conduct equivalent to "message censorship," and thus said conduct was not in violation of the ordinance. This line of reasoning is misplaced and otherwise ignores the deliberate and intentional

[7] Here, the owners of HOO offered to find a printer who would do the work at the same price quoted initially to accommodate the needs of the customer.

discriminatory conduct of HOO in violation of the Fairness Ordinance, in my opinion.

The other majority member's view is that *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014) is controlling, effectively concluding that Kentucky Revised Statutes (KRS) 446.350 protects against enforcement of the Ordinance against HOO on religious freedom grounds. This position is also misplaced, in my opinion, as the holding in *Hobby Lobby* was limited solely to the issue of whether a closely held corporation could raise a religious liberty defense to the insurance contraceptive coverage mandate of the Affordable Care Act. *Id.* And, I do not believe KRS 446.350 is implicated in this case, as the statute does not prohibit a governmental entity from enforcing laws or ordinances that prohibit discrimination and protect a citizen's fundamental rights. Moreover, the United States Supreme Court has held that religious beliefs or conduct may be burdened or limited where the compelling government interest is to eradicate discrimination. *See Bob Jones Univ. v. U.S.,* 461 U.S. 574, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983) (holding that the government has an overriding interest in eradicating racial discrimination in education).

There is no dispute in this case that HOO is a "public accommodation" as defined in the Fairness Ordinance and to the extent applicable, the Kentucky Civil Rights Act as set out in KRS 344.010 *et seq*., as incorporated therein by the Ordinance. The Ordinance prohibits a public accommodation from discriminating

against individuals on the basis of sexual orientation and gender identity. And there is also no dispute that after HOO owner Blaine Adamson spoke with a representative of the Gay and Lesbian Services Organization (GLSO), HOO refused to print t-shirts for GLSO's Lexington Pride Festival (Festival). The primary reason given to GLSO for HOO's refusal to print the t-shirts is that it would have violated the HOO owners' religious beliefs that sexual activity should not occur outside of a marriage between a man and a woman. This refusal to print the t-shirts occurred after an employee of HOO had submitted a written quote to GLSO to print the t-shirts for the Festival.

The LFUCG's policy behind Section 2-33 of the Code of Ordinances is to safeguard all individuals within Fayette County from discrimination in public accommodations on the basis of sexual orientation or gender identity. The conduct of HOO and its owners clearly violates Section 2-33 of the Code of Ordinances in that HOO's conduct was discriminatory against GLSO and its members based upon sexual orientation or gender identity. Adamson testified that upon believing that the Festival advocated homosexuality, among other things, HOO immediately refused to print the t-shirts. Regardless of whether this guise was premised upon freedom of religion or speech, HOO blatantly violated the ordinance. One member of the majority upholds circumventing the public accommodation issue by holding that GLSO as an entity, has no sexual orientation and thus is not protected by the ordinance. This argument fails on its face. GLSO serves gays and lesbians and

promotes an "alternative lifestyle" that is contrary to some religious beliefs. That lifestyle is based upon sexual orientation and gender identity that the United States Supreme Court has recently recognized. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015), the Supreme Court held that the fundamental right to marry is guaranteed to same sex couples under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The circuit court sets forth several times in its Opinion and Order that HOO and Adamson refused to print GLSO's t-shirts because of their religious beliefs against same sex relationships. However, gay marriage and same sex relationships are now recognized under the United States Constitution as a fundamental right. *Id.* Regardless of personal or religious beliefs, this is the law that courts are duty bound to follow.

The majority takes the position that the conduct of HOO in censoring the publication of the desired speech sought by GLSO does not violate the Fairness Ordinance. Effectively, that would mean that the ordinance protects gays or lesbians only to the extent they do not publicly display their same gender sexual orientation. This result would be totally contrary to legislative intent and undermine the legislative policy of LFUCG since the ordinance logically must protect against discriminatory conduct that is inextricably tied to sexual orientation or gender identity. Otherwise, the ordinance would have limited or no force or effect. The facts in this case clearly establish that HOO's conduct, the refusal to

print the t-shirts, was based upon gays and lesbians promoting a gay pride festival in Lexington, which violated the Fairness Ordinance.

Finally, it is important to note that the speech that HOO sought to censor was not obscene or defamatory. There was nothing obnoxious, inflammatory, false, or even pornographic that GLSO wanted to place on their t-shirts which would justify restricting their speech under the First Amendment. The record in this case does not remotely establish that the depiction of rainbow colors with the number "5" somehow symbolizes illicit or even illegal sexual relationships. Likewise, there is nothing in the message that illustrates or establishes that HOO either promotes or endorses the Festival. For those of us who grew up in the 60s and 70s, a rainbow was a symbol of peace; others view rainbows as symbolic of love, life, hope, promise, or even transformation. Even the Bible provides that a rainbow is a sign from God. Genesis 9:13.

The Kentucky Supreme Court recently emphasized the importance of free speech in our democracy in *Doe v. Coleman*, 497 S.W.3d 740 (Ky. 2016). Therein, the Court stated:

> And it is certainly true that "free speech" is one of the most sacrosanct of freedoms, and one which is at the heart of defining what it means to be a free citizen. The First Amendment of the United States Constitution guarantees this freedom.

Id. at 749.

While free speech is not without its limitations, nothing in the promotion of the Festival by GLSO came close to being outside the protections of the First Amendment. The Fairness Ordinance in this case is simply an extension of civil rights protections afforded to all citizens under federal, state and local laws. These civil rights protections serve the societal purpose of eradicating barriers to the equal treatment of all citizens in the commercial marketplace. *See State of Washington v. Arlene's Flowers, Inc.*, ___ P.3d ___, 2017 WL 629181 (Wash. 2017).

Accordingly, I believe the conduct of HOO in this case violated the Fairness Ordinance. I would reverse the circuit court and reinstate the order of the Commission holding HOO in violation thereof.

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ORAL ARGUMENT:

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FAYETTE CIRCUIT COURT
CIVIL BRANCH
THIRD DIVISION
CIVIL ACTION NO. 14-CI-04474

HANDS ON ORIGINALS, INC. PLAINTIFF-APPELLANT

V

LEXINGTON-FAYETTE URBAN COUNTY
HUMAN RIGHTS COMMISSION DEFENDANT-APPELLEE

and

AARON BAKER FOR GAY AND LESBIAN
SERVICES ORGANIZATION DEFENDANT-APPELLEE

****

OPINION AND ORDER

Following the Hearing Commissioner's Opinion and Order filed on October 6, 2014 and the adoption of said Opinion and Order by the Lexington-Fayette Urban County Human Rights Commission (hereinafter "Commission") on November 19, 2014, the Plaintiff-Appellant, Hands On Originals, Inc. (hereinafter "HOO") timely filed a Complaint and Notice of Appeal of said Order on December 8, 2014 to the Fayette Circuit Court. This Court thereafter entered an Agreed Scheduling Order setting forth deadlines for the filing of a Motion for Summary Judgment by HOO, Response by the Commission, Reply by HOO and scheduling Oral Arguments on March 13, 2015.

The Court has reviewed the Record for the Commission, the excellent Memoranda from all Counsel and has heard oral Arguments thereon as scheduled. The matter was taken under Advisement by the Court. It is now ripe for decision.

PROCEDURAL HISTORY

Although HOO disputes some of the Hearing Commissioner's recitation of facts in the Order of October 6, 2014, the essential facts are not in serious dispute. HOO candidly admits the essential facts are not material to resolution of this case (HOO Memoranda in Support of Motion for Summary Judgment at pp. 14 – 15). The essential facts as found by the Hearing Commissioner and as determined by this Court from the Commission Record are as follows:

On or about March 28, 2012, Aaron Baker filed a Verified Complaint with the Commission on behalf of the Gay and Lesbian Services Organization (hereinafter "GLSO"). The Complaint alleged that on or about March 8, 2012, HOO denied that organization the full and equal enjoyment of a service when HOO refused to print the official t-shirts for the organizations' 2012 Pride Festival. Following an investigation by the Commission, a determination of Probable Cause and Charge of Discrimination was filed by the Commission against HOO on November 13, 2012. The Charge of Discrimination alleged that HOO violated local Ordinance 201-99; Section 2:33 from the Lexington-Fayette Urban County Government (Sometimes referred to as the "Fairness Ordinance"). This Ordinance generally prohibits a public accommodation from discriminating against individuals, *inter alia*, based upon their sexual orientation or gender identity.

HOO is a small business located in Fayette County, Kentucky which prints promotional materials such as shirts, hats, bags, blankets, cups, bottles and mugs and communicates messages for its customers with these promotional materials. The work is

artistic in nature as well as the design of the promotional material in question. HOO employs five full-time graphic design artists to carry out the expressive purposes of its clients. Blaine Adamson is one of three owners of HOO and has been Managing Owner since 2008. He and his co-owners are Christians who believe that the Holy Bible is the inspired Word of God and that they should strive to live consistently with its teachings. HOO's owners, through Blaine Adamson, as Managing Owner, operate HOO consistently with the teachings of the Bible.

HOO has a stated policy on its website which provides:

> Hands On Originals both employs and conducts business with people of all genders, races, religions, sexual preferences, and national origins. However, due to the promotional nature of our products, it is the prerogative of Hands On Originals to refuse any order that would endorse positions that conflict with the convictions of the ownership.

HOO acknowledges that it is a "public accommodation" as that term is defined in the "Fairness Ordinance" and those sections of the Kentucky Civil Rights Act which are incorporated by reference in the aforementioned Ordinance. At all relevant times herein, Adamson instructed his sales representatives to decline to design, print or produce orders whenever the requested material was perceived to promote an event or organization that conveys messages that are considered by Adamson or HOO to be inappropriate or inconsistent with Christian beliefs. HOO has declined at least thirteen orders over the past several years preceding the filing of this Complaint on the basis that HOO believed the designs to be offensive contrary to their Christian beliefs or otherwise inappropriate.

Sales persons were directed by Adamson to bring proposed orders directly to him if there were any questions about the appropriateness of the orders.

At all relevant times, GLSO was an organization located in Lexington, Fayette County which represents and is an advocate for the gay, lesbian, bisexual, transgender, queer, questioning, intersex and ally community. GLSO holds an annual event called the "Lexington Pride Festival" that supports these persons or its message. Aaron Baker, on behalf of GLSO, charges in the Complaint before the Commission that after having accepted an order to print t-shirts for the Pride Festival in 2012, HOO refused to print the t-shirts allegedly because of the sexual orientation of the GLSO members which is prohibited by the Fairness Ordinance. GLSO is an advocacy group. Through its various programs, publications and other media, GLSO speaks in favor of sexual relationships and sexual activities outside of a marriage between a man and a woman. GLSO seeks to change attitudes concerning this issue and similar issues through its programs and publications. GLSO's members and its constituents and supporters come from all walks of life and all sexual orientations. Aaron Baker, GLSO's former president and the person that filed the Complaint on behalf of GLSO in this case, is married to a person of the opposite sex and does not identify himself as gay.

In February 2012, with the 2012 Lexington Pride Festival being scheduled for June 30, 2012, GLSO board member Shepherd contacted 3 t-shirt printing companies to obtain price quotes for the t-shirts to be used at the 2012 Pride Festival. This board member initially spoke with Kaleb Carter, an employee of HOO. Another individual from GLSO sent an email to Carter providing him with a color print of the desired design

of the t-shirt. Carter reviewed the submitted design and did not express any objection to it at that time. Carter gave GLSO a written quote via email. Carter had not yet presented a copy of the design of the t-shirt to Adamson prior to giving GLSO a written quote.

On or about March 8, 2012 a GLSO representative, Don Lowe, contacted HOO to discuss the quote. Lowe spoke with Adamson in that conversation. At the time of that conversation, Adamson had not spoken to Lowe or any other representative of GLSO regarding the order. Adamson had not viewed a copy of the t-shirt design at that point and did not do so during the phone conversation with Lowe. Adamson questioned Lowe about the GLSO organization, its mission and what the organization generally promoted. Lowe advised Adamson that the organization was the sponsor of the Lexington Pride Festival which was a gay pride festival in downtown Lexington scheduled for the summer. Adamson asked Lowe what would be printed on the shirt. Lowe gave Adamson a detailed description of the front of the t-shirt design. Adamson was thus made aware of the type of activities that typically occur at gay pride festivals including the display of signs and other communications promoting romantic relationships and sexual activity outside of marriages between a man and a woman, the sexually suggestive outfits and costumes and the distribution of sex-related items such as condoms and lubricants. Adamson also understood that groups like GLSO promote messages supporting sexual relationships or sexual activities outside of a marriage between a man and a woman.

It was thus obvious to Adamson from his conversation with Lowe of GLSO, that producing the t-shirts as requested would require HOO to print a t-shirt with the words

"Lexington Pride Festival" communicating the message that people should take pride in sexual relationships or sexual activity outside of a marriage between a man and a woman. Adamson has consistently expressed his belief that this activity would disobey God if he were to authorize HOO to print materials expressing that message. Thus, Adamson told Lowe that HOO could not print the t-shirts because those promotional items did not reflect the values of HOO and HOO did not want to support the festival in that way. Several other printing companies later offered to print the t-shirts for GLSO for free or at a substantially reduced price. HOO even offered to contact other printing companies to get the work done at the same price as quoted by HOO. At no time did GLSO representatives Lowe or Shepherd disclose their sexual orientation and no HOO representative inquired of them about that issue. It is the understanding of the Court that GLSO later got their requested t-shirts printed at little or no cost to that group.

STANDARD OF REVIEW

This case is before the Court on Appeal by HOO from an adverse decision issued by the LFUCG Human Rights Commission. Accordingly, the Standard of Review by this Court is found in KRS 13B.150 which provides in part as follows:

> (1) Review of a final order shall be conducted by the court without a jury and shall be confined to the record,... the Court, upon request, may hear oral argument and receive written briefs
>
> (2) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:
>
> (a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Without support or substantial evidence on the whole record;

(d) Arbitrary, capricious, or characterized by abuse of discretion;

(e) Based on a ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;

(f) Prejudice by a failure of the person conducting the proceeding to be disqualified pursuant to KRS 13B. 040(2); or

(g) Deficient as otherwise provided by law.

This Court fully understands it is reviewing this matter under the limitations set out in (2) above. The following analysis and Judgment are based on the evidence in the Commission record before the Hearing Commissioner, the Constitutions of the United States and Kentucky and well-settled precedent from the United States Supreme Court.

ANALYSIS AND OPINION

(I) THE ORDER FROM THE HUMAN RIGHTS COMMISSION VIOLATES THE RECOGNIZED CONSTITUTIONAL RIGHTS OF HOO AND ITS OWNERS TO BE FREE FROM COMPELLED EXPRESSION

HOO and its owners have a Constitutional right of freedom of expression from government coercion. The Commission conceded at oral argument that the Commission was created by the Lexington-Fayette Urban County Government and its members are appointed by the Mayor. Thus, the action and the order of the Commission in this case is government action without dispute.

These Constitutional guarantees are found in both the Constitution of the United States (First Amendment) and in the Commonwealth of Kentucky (§1 § 8). The Commission agreed that HOO and its owners have those Constitutional protections when it adopted the Order of the Hearing Commissioner. ("The Hearing Commissioner agrees that these cases support a finding that when the Respondent (HOO) prints a promotional item, it acts as a speaker, and that this act of speaking is constitutionally protected.) (Hearing Commissioner Order at pp 13 – 14). These Constitutional freedoms as noted by the United States Supreme Court in *Wooley v Maynard*, 430 U.S. 705, 714 (1977):

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.

Wooley, supra involved the issue of whether or not the motorists of New Hampshire could be compelled to display a license plate with the motto of "Live Free or Die". The United States Supreme Court held that this was inappropriate state action and concluded that the government could not require the motorist to display the state motto upon the vehicle license plates.

The Hearing Commissioner in its Order attempted to distinguish *Wooley* from the case at bar with the explanation that "In this case there was no government mandate that the Respondent (HOO) speak." (Hearing Commissioner Order at p 14). If this is characterized as a Finding of Fact, it is inaccurate, is not supported by the Record and is clearly erroneous. In fact, HOO and its owners, because they refused to print the GLSO t-shirts that offended their sincerely held religious beliefs, have been punished for the

exercise of their Constitutional rights to refrain from being forced to speak. The statement is not a fair or accurate Conclusion of Law either based upon precedent from the United States Supreme Court. HOO and its owners have a Constitutional right to refrain from speaking just as much as they enjoy the Constitutional right to speak freely. *Wooley, supra.*

The Commission in oral arguments before the Court and in its Memoranda agreed that HOO and its owners have a sincerely held Christian belief that it is contrary to the Holy Bible for persons to engage in sexual activities outside of a marriage between one man and one woman. The Pride Festival is without dispute a strong advocate for sexual relationships outside of that principle.

The Commission in its oral argument says it is not trying to infringe on the Constitutional Rights of HOO and its owners but is seeking only to have HOO "...treat everyone the same." Yet, HOO has demonstrated in this record that it has done just that. It has treated homosexual and heterosexual groups the same. In 2010, 2011 and 2012, HOO declined to print at least thirteen (13) orders for message based reasons. Those print orders that were refused by HOO included shirts promoting a strip club, pens promoting a sexually explicit video, and shirts containing a violence related message. There is further evidence in the Commission record that it is standard practice within the promotional printing industry to decline to print materials containing messages that the owners do not want to support. Nonetheless, the Commission punished HOO for declining to print messages advocating sexual activity to which HOO and its owners strongly oppose on sincerely held religious grounds.

HOO did not decline to print the t-shirts in question or work with GLSO representatives because of the sexual orientation of the representatives that communicated with HOO. It is undisputed that neither HOO representatives Carter nor Adamson knew or inquired about the sexual orientation of either GLSO representatives Lowe or Shepherd. Rather, as is uncontested and actually found by the Hearing Commissioner at page 4 of the Order, the conversation between GLSO representative Lowe and HOO owner Adamson was about GLSO's mission and what the organization generally promoted. GLSO has admitted that the shirt in question communicates messages. In depositions before the Commission, GLSO representatives conceded that the logo on the shirt in question communicates the message that people should be proud about sexual relationships other than marriages between a man and a woman. This statement, of course, is directly contrary to the beliefs and values of HOO and its owners as expressed in its Mission Statement and actions. It is their Constitutional right to hold dearly and not be compelled to be part of the advocacy of messages opposed to their sincerely held Christian beliefs. In short, HOO's declination to print the shirts was based upon the **message** of GLSO and the Pride Festival and not on the **sexual orientation** of its representatives or members. In point of fact, there is nothing in the record before the Commission that the sexual orientation of any individual that had contact with HOO was ever divulged or played any part in this case.

There is ample precedent from the United States Supreme Court that the Commission in its Order violated the Constitutional rights of HOO and its owners in its Order issued November 19, 2014. *Hurley v Irish-American Gay, Lesbian and Bisexual*

Group of Boston, 515 U.S. 557 (1995) illustrates this principle. In *Hurley*, parade organizers in Boston had refused to allow a group of gay, lesbian and bisexual decedents of Irish immigrants to march in a St. Patrick's day parade. The group sued. This case also involved a "public accommodation" law like the case at bar. The issue in *Hurley* as framed by the United States Supreme Court was whether a government could require a private citizen to include marchers of a group imparting a message the organizers do not wish to convey. The United Stated Supreme Court **unanimously** held that such a mandate violates the First Amendment. The public accommodation law in *Hurley* was similar to, if not a close recitation of, the "Fairness Ordinance" in the case at bar. If Massachusetts could not compel parade organizers to include a group advocating a message that the parade organizers did not support, how can the LFUCG Human Rights Commission interpret the "Fairness Ordinance" to compel HOO and its owners to print a t-shirt conveying a message that HOO and its owners do not support and in fact find blasphemous? The Court holds that the Commission cannot take this action consistent with the U.S. Constitution.

Similarly, in *Boy Scouts of America v Dale*, 530 U.S. 640 (2000) the United States Supreme Court was faced with the issue of whether or not the Boy Scouts of America could expel an assistant scout master under New Jersey's public accommodation law after he publicly declared he was homosexual. The United States Supreme Court held that applying New Jersey's public accommodations law to require the Boy Scouts to admit the assistant scout master violated the Boy Scouts' First Amendment right of expressive association. There is no question in the case at bar that HOO, in designing

and printing promotional materials, engages in "expressive association" which the Unites States Supreme Court upheld as a First Amendment right in *Dale*. Like the Boy Scouts in *Dale*, HOO is entitled to claim First Amendment protection as a for profit corporation in this case. *Hurley, supra*. The message on the t-shirt in question is undoubtedly expressive association in advocating pride in sexual activity outside of a marriage between one man and one woman. HOO and its owners have a Constitutional right to that sincerely held religious principle. The infringement and violation of same by the Commission is contrary to established United States Supreme Court precedent and the Constitution of both the United States and Kentucky.

The Commission Order held and adopted the Hearing Commissioner Opinion that "...the application of the Fairness Ordinance does not violate the Respondent's (HOO) right to free speech, does not compel it to speak, and does not burden the Respondent's (HOO) right to be to the free exercise of religion". This statement is not supported by the facts in the record before the Commission and is contrary to well established precedent from the United States Supreme Court and the Constitutions of the United States and Kentucky. That statement is also clearly erroneous as a matter of law and as a conclusion of law. The exact opposite is, in fact and law, true.

This Court has undertaken review of this case based upon KRS 13B.150 and under the doctrine of "strict scrutiny." The Commission Order applies to "speech", the "free exercise thereof", and violation of the Constitutional right of HOO and its owners to refrain from compelled expression. This Court does not fault the Commission in its interest in insuring citizens have equal access to services but that is not what this case is

> 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 of programs or access to facilities.

Both HOO and its owners are entitled to assert claims under this statute. The statute protects the religious freedom of all "persons" in Kentucky. While "person" is not defined in KRS 446.350 specifically, it is defined in KRS 446.010(33) to include corporate bodies and other companies. The statute's protection applies to corporations like HOO. See *Burwell v Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 – 69 (2014). The fact that HOO is a for profit corporation does not deprive it from having standing on this issue. *Hobby Lobby, supra*

The statute is applicable to the case at bar because HOO and its owners exercise of religion was motivated by the owners sincerely held religious beliefs. The Commission has admitted that HOO and its owners religious beliefs are sincerely held and that the sincerity of their beliefs is not at issue. (Commission Order at p 8). The Commission's Order substantially burdens HOO's and its owners' free exercise of religion wherein the government (Commission) punished HOO and its owners by its order for exercising their sincerely held religious beliefs. This is contrary to established Constitutional law. *Sherbert v Verner*, 374 U.S. 398, 403 (1963). Because the Commission's Order requires HOO and its owners to print shirts that convey messages contrary to their faith, that Order inflicts a substantial burden on their free exercise of religion.

As this Court has determined that the Commission's Order substantially burdens HOO and its owners free exercise of religion, the Court must look to 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. In the case at bar, the Commission has not even attempted, much less shown by "clear and convincing evidence" or otherwise, that it has any compelling government interest in the consequences imposed upon HOO and its owners in this case. As previously mentioned, it is the understanding of this Court based on the record that GLSO was able to obtain printing of the t-shirts in question at a substantially reduced price or perhaps even had them printed for free. This was the offer extended by HOO owner Adamson in the initial phone conversation with a GLSO representative to refer GLSO to another printing company to do the work for the same price quoted by HOO. The Court holds that the Commission has not proven by clear and convincing evidence or otherwise that it has a compelling governmental interest to enforce in this case. Therefore, it must also be concluded as a matter of law that the Commission's Order violates KRS 446.350 as well.

CONSIDERATION OF OTHER ISSUES RAISED

Although HOO has raised other issues, the Court sees no need to address them in light of the foregoing analysis.

CONCLUSION, ORDER AND JUDGMENT

By reason of the foregoing, it is the Order and Judgment of this Court that the Motion for Summary Judgment and Stay Pending Judicial Review filed by the Plaintiff-

Appellant, Hands on Originals, Inc., should be and is hereby GRANTED. Further, it is the Conclusion, Order and Judgment of this Court that the Commission's Order issued on November 19, 2014 which incorporated by reference the Hearing Commissioner's Opinion and Order issued on October 6, 2014 is hereby REVERSED upon grounds that the Court finds the Commission's final Order pursuant to KRS 13B.150, is:

(a) In violation of Constitutional and statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Without support of substantial evidence on the whole record;

(d) Arbitrary, capricious, or characterized by an abuse of discretion; and

(e) Deficient as otherwise provided by law.

It is therefore ORDERED AND ADJUDGED that this case is REVERSED AND REMANDED to the Commission with the directions that the Commission VACATE and SET ASIDE its Order issued on November 19, 2014 and DISMISS ALL CHARGES AGAINST HOO.

Dated this 27th day of April, 2015

HON. JAMES D. ISHMAEL, JR.

This is to certify that a true and correct copy of the foregoing Opinion and Order was served upon the following parties, via First Class Mail and e-mail, this 27th day of April, 2015 as follows:

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FILED

OCT 6 2014

LFUC HUMAN RIGHTS COMMISSION

LEXINGTON-FAYETTE URBAN COUNTY

HUMAN RIGHTS COMMISSION

HRC NO. 03-12-3135

AARON BAKER FOR GAY & LESBIAN

SERVICES ORGANIZATION;

LEXINGTON-FAYETTE COUNTY

HUMAN RIGHTS COMMISSION COMPLAINANTS

vs. **ORDER**

GRANTING SUMMARY JUDGMENT MOTION OF COMPLAINANTS;

ORDER DENYING SUMMARY JUDGMENT MOTION OF RESPONDENT

HANDS ON ORIGINALS, INC. RESPONDENT

* * * * *

BACKGROUND

On March 28, 2012, Mr. Aaron Baker filed a verified complaint with the Lexington-Fayette Urban County Human Rights Commission (hereinafter the "Commission"), on behalf of the Gay and Lesbian Services Organization alleging that on or about March 8, 2012, the Respondent Hands On Originals denied them the full and equal enjoyment of a service when they refused to print the official t-shirts for the organizations' 2012 Pride Festival.

Following an investigation by the Commission, a Determination of Probable Cause and Charge of Discrimination was filed on November 13, 2012. The Charge of Discrimination held

EXHIBIT B

that the Respondent violated Lexington-Fayette Urban County Government local Ordinance 201-99; Section 2-33, (hereinafter sometimes referred to as the "Fairness Ordinance"), which prohibits a public accommodation from discriminating against individuals based upon their sexual orientation or gender identity.

This matter is before the Hearing Commissioner upon motion of the respective parties for Summary Judgment. The Commission seeks summary judgment affirming the Commission's charge of discrimination. The Respondent seeks summary judgment dismissing the charge of discrimination on grounds the Respondent did not refuse to provide the services requested by GLSO on the basis of sexual orientation or gender identity, but upon religious grounds and because the Respondent and its owners did not want to convey the ideological message that people should take pride in engaging in sexual relationships or sexual activity outside of a marriage between one man and one woman.

The Respondent is a commercial business located within Fayette County, Kentucky. The Respondent prints promotional material for business and private organizations, including shirts, hats, bags, blankets, cups, bottles and mugs. At all relevant times herein, the Respondent was an S-Corporation, with three equal shareholders, including Mr. Blaine Adamson, Managing Owner. The Respondent does not deny that it is a "public accommodation," as that term is defined in the Fairness Ordinance, and those sections of the Kentucky Civil Rights Act as incorporated by reference in the ordinance.

The Respondent has a stated policy: "*Hands on Originals both employs and conducts business with people of all genders, races, religions, sexual preferences, and national origins. However, due to the promotional nature of our products, it is the prerogative of Hands On Originals to refuse any order that would endorse positions that conflict with the convictions of the ownership.*" The Respondent's policy is also published on the Respondent's website.

At all relevant times herein, Mr. Adamson instructed his sales representatives to decline

to design, print, or produce orders whenever the requested material was perceived to promote an event or organization that conveys messages that are considered by the sales representative or Mr. Adamson to be inappropriate or inconsistent with Christian beliefs. The Respondent has declined thirteen orders over a period of the two years preceding the filing of its Motion for Summary Judgment, on the basis that the Respondent believed the designs to be offensive or otherwise inappropriate. Sales persons were directed by Mr. Adamson to bring proposed orders directly to Mr. Adamson if there were any questions about the appropriateness of the orders.

At all relevant times the Gay and Lesbian Services Organization (hereinafter "GLSO") was an organization located in Lexington, Fayette County. The GLSO represents the lesbian, gay bisexual, transgender, queer, questioning, intersex and ally community. The GLSO holds an annual event called "Lexington Pride Festival," that supports the gay, lesbian, bisexual and transgender communities in Fayette and surrounding counties. The GLSO scheduled its 2012 Lexington Pride Festival for June 30, 2012.

In February of 2012, GLSO Board Member Don Lowe, contacted three (3) t-shirt printing companies to obtain price quotes for t-shirts for the 2012 Pride Festival.[1] Mr. Lowe initially spoke to Mr. Kaleb Carter, an employee of the Respondent. Mr. Brad Shepherd subsequently sent an email to Mr. Carter providing him with a color printout of the desired design of the shirt. [The design of the shirt is shown in Respondent's Exhibit 203 to its Motion for Summary Judgment as the second of two pages and indexed with Bates stamp HOO 0008]

Mr. Carter viewed the submitted design, did not find the design objectionable in any way, and advised Mr. Shepherd "this should work fine." Mr. Carter then gave Mr. Shepherd a written quote via email. Mr. Carter did not present a copy of the quote or the design of the shirt to Mr. Adamson prior to giving Mr. Carter a written quote via email. This quote was presented to the

[1] The Hearing Commissioner notes that there is a factual dispute as to whether Mr. Lowe or Mr. Brad Shepherd of the GLSO was the first GLSO representative to contact the Respondent regarding the order. However, both parties have stipulated that the fact of whom first contacted the Respondent about the order is irrelevant and immaterial to the case herein.

GLSO Board on or about March 8, 2012.

On or about March 8, 2012, Mr. Lowe contacted the Respondent by phone to discuss the tender of a deposit for the shirts and to determine if a lower price could be negotiated. Mr. Lowe spoke to Mr. Blaine Adamson, owner of the Respondent. At the time of the conversation, Mr. Adamson had not spoken to Mr. Lowe or any other representative of the GLSO regarding the order. In addition Mr. Adamson had not viewed a copy of the t-shirt design, and did not do so during the entirety of the conversation with Mr. Lowe.

Mr. Adamson asked Mr. Lowe about the GLSO organization, what its mission was, and what the organization generally promoted. Mr. Lowe advised Mr. Adamson that the organization was the sponsor of the Lexington Pride Festival. Mr. Adamson informed Mr. Lowe that his is a Christian organization and that they would not print the t-shirts because their religious convictions would not allow them to print t-shirts for an event that encouraged people to be proud of their same-sex behavior. Mr. Adamson offered to give Mr. Lowe the name of another company that would honor the initial price quote of Mr. Carter on behalf of the Respondent and print the t-shirts. Mr. Lowe declined.

The Respondent corporation has a "Christian Division," bearing the name "Hands on Originals Christian Outfitters." Hands On Originals derives approximately seventy (70%) percent of its revenue from this division. This division of the corporation, like the Respondent's parent business is not a religious organization as described in the Ordinance at issue herein.

THE FAIRNESS ORDINANCE AND APPLICABLE STATUTORY LAW

Code of Ordinance 201-99; Section 2-33 (effective July 8, 1999)

> (1) It is the policy of the Lexington-Fayette Urban County Government to safeguard all individuals within Fayette County from discrimination in employment, public accommodation, and housing on the basis of sexual orientation or gender identity, as well as from discrimination on the basis of race, color, religion, national origin, sex, disability and age forty (40) an over.

(2) For purposes of this section, the provisions of KRS 344.010 (1), (5) – (13) and (16), 344.030 (2) – (5), 344.040, 344.045, 344.050, 344.060, 344.070, 344.080, 344.100, 344.110, 344.120, 344.130, 344.140, 344.145, 344.360 (1) - (8), 344.365 (1) – (4), 344,367, 344,370 (1), (2) and (4), 344,375, 344,380, 344,400 and 344,680, as they existed on July 15, 1998, are adopted and shall apply to prohibit discrimination on the basis of sexual orientation or gender identity within Fayette County.

(3) The Commission shall have jurisdiction to receive, investigate, conciliate, hold hearings and issue orders relating to complaints filed alleging discrimination in employment, public accommodation or housing based on the sexual orientation or gender identity of the complaining party…

(4) For purposes of this section, "sexual orientation" shall mean an individual's actual or imputed heterosexuality, homosexuality, or bisexuality.

(5) For purposes of this section, "gender identity" shall mean: (a) having a gender identity as a result of a sex change surgery; or (b) manifesting, for reasons other than dress, an identity not traditionally associated with one's biological maleness or femaleness."

(6) [Omitted]

(7) The provisions of this section shall not apply to a religious institution or to an organization operated for charitable or educational purposes, which is operated, supervised, or controlled by a religious corporation, association or society except that when such an institution or organization receives a majority of its annual funding from any federal, state, local or other government body or agency or any combination thereof, it shall not be entitled to this exemption.

KRS 344.010 (1)

"Person" includes one (1) or more individuals, labor organizations, joint apprenticeship committees, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, incorporated organizations, trustees, trustees in bankruptcy, fiduciaries, receivers, or other legal or commercial entity; the state, any of its political or civil subdivisions or agencies. (5) "Discrimination" means any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or

persons, or the aiding, abetting, inciting, coercing, or compelling thereof made unlawful under this chapter.

KRS 344.120

Except as otherwise provided in KRS 344.140 and 344.145, 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."

KRS 344.130

As used in this chapter unless the context requires otherwise: "Place of public accommodation, resort or amusement: includes any place, store or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public..."

KRS 446.350

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. [History: Created 2013 Ky. Acts ch. 111, sec. 1, effective June 25, 2013]

ARGUMENTS

COMPLAINANT GLSO LACKS STANDING BEFORE THE COMMISSION

The Respondent argues that the GLSO, as a group of individuals, does not have standing to bring a complaint of discrimination before the Lexington-Fayette County Human Rights Commission.Local Ordinance 201-99 Section 2-32(2-a) states that an "individual" who claims to be aggrieved may file a complaint with the Commission. The Respondent argues that the GLSO is not an "individual," and therefore lacks standing to file a complaint of public accommodation

discrimination with the Lexington-Fayette County Human Rights Commission.[2]

Both parties agree that the term "individual" is not specifically or separately defined within the parenthetical confines of Local Ordinance 201-99 Section 2-32(2-a). The Respondent refers only to KRS 344.120, incorporated by reference in the Fairness Ordinance which defines it to be an "unlawful practice" only 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.

The Hearing Commissioner notes that when the Fairness Ordinance was adopted in 1999, it incorporated by reference not only KRS 344.120, but KRS 344.010(1) which defines "Person" to include (in pertinent part) "one (1) **or more** individuals… (and) associations…" The Hearing Commissioner holds that the GLSO, as a group of one or more individuals has standing under the terms of the Fairness Ordinance to lodge verified complaints of discrimination with the Lexington-Fayette County Human Rights Commission.

THE RESPONDENT REFUSED TO PRINT THE T-SHIRTS ON RELIGIOUS GROUNDS AND ENFORCEMENT OF THE FAIRNESS ORDINANCE INTERFERES WITH RESPONDENT'S FREE EXERCISE OF RELIGION

The Respondent contends firstly that its refusal to print the t-shirts was on religious grounds. The Complainants argue that prior to the Respondent's refusal to print the 2012 Pride Festival t-shirts for the GLSO, the Respondent has printed t-shirts which could be interpreted as crude or in conflict with a person's Christian beliefs. These include a t-shirt with the phrase "Size Does Matter," a design depicting a man poking his nipple, a t-shirt with a picture of a horse from behind with the words "Nice Mass," a t-shirt with a picture of a naked woman bent over with the words "liquor in the front, poker in the rear," and a t-shirt with the phrase "Fuck You"

[2] Mr. Baker admits that he did not file the complaint in his individual capacity or on his individual behalf.

readable when read upside down.

The Hearing Commissioner notes that while these designs, words, and depictions might be offensive to some and not others (including atheists, agnostics, and others of Christian or other faiths or religions), the sincerity of Mr. Adamson's religious beliefs and those of his two co-owners is not an issue herein.

In *Ginerich v. Commonwealth*, 382 S.W.3d 835 (Ky. 2012), the Kentucky Supreme Court addressed the issue of whether KRS 189.820 (requiring slow moving vehicles to display a brightly colored emblem) unconstitutionally interfered with the freedom of Amish to practice their religion. The Court held that KRS 189.820 is a statute of general applicability, designed to protect the public and is not specifically targeted at preventing any religious practice, and as such the government need only establish a rational basis for the statute in order to pass constitutional muster. In so holding, the Court stated "Relying on precedent of the United States Supreme court, this court's predecessor held that religious freedom has two components: freedom to believe and freedom to act..." ... "What one chooses to believe is an absolute freedom, which no power on earth can in reality arbitrate." [internal citations omitted.] [382 S.W.3d at 840]

The Hearing Commissioner is fully convinced by the factual evidence of probative value submitted in this case that the religious beliefs of Mr. Adamson and his co-owners of the Respondent, that the Respondent's religious beliefs are sincerely held. This however, does not end the inquiry.

In *Ginerich*, the Kentucky Supreme Court noted: "... "in the nature of things," freedom to act cannot be absolute in human society where beliefs and practices vary, and where a given practice, absolutely freely enacted, can inflict harm on others. Thus religious conduct must remain subject to regulation for the protection of society." [382 S.W.3d at 841]

In *Ginerich*, the Court held that "statutes, regulations, or other governmental enactments which provide for the public health, safety and welfare, and which are statutes of general

applicability that only incidentally affect the practice of religion, are properly reviewed for a rational basis under the Kentucky Constitution , as they are under the federal constitution." [382 S.W.3d at 844]

In 2013, the Kentucky legislature enacted Kentucky Revised Statute 446.350. The Hearing Commissioner notes that KRS 446.350 was enacted after the Kentucky Supreme Court's ruling in *Ginerich*. KRS 446.350 provides that "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."

The Fairness Ordinance is an ordinance designed to protect the public and is not specifically targeted at preventing any religious practice. The ordinance is a neutral one of general applicability. Of note is that the ordinance seeks to protect persons of varying sexual orientation, including not only those who identify themselves as homosexual or bisexual, but those who identify themselves as heterosexual.

The Respondent argues that the ordinance could have provided a less restrictive means by excluding those circumstances where other business of public accommodation were willing and could have provided the same service refused by the Respondent. This argument not only lacks merit but its acceptance would completely eviscerate the purpose of the ordinance to prohibit discrimination by each business engaged in public accommodation.

In its enactment of the Fairness Ordinance, Lexington-Fayette County Urban Government chose to include "sexual orientation" and "gender identity" as classes of persons deserving of protection from the humiliation and other effects of being denied services denied to

others. The ordinance effectively places discrimination based on sexual orientation or gender identity on par with the effects of discrimination based upon race, color, religion, national origin, sex, disability and age forty (40) an over.

"... the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law prescribes (or proscribes) conduct that his religion prescribes." *Emp't Div. Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872,879, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990)

In regards to KRS 446.350, an analysis of the Fairness Ordinance does not support a finding that the ordinance "substantially burden(s)" the Respondent's freedom of religion. In addition, the Commission has presented clear and convincing evidence that the Fairness Ordinance addresses a compelling interest of Lexington-Fayette County government in safeguarding specified classes of individuals from the humiliation and other deleterious subjective and objective effects of being denied equal access to public accommodations.

In addition, the Commission has presented more than sufficient evidence of probative value to support a finding that the ordinance was enacted on a rational basis. [*Gingerich*, supra]

THE RESPONDENT REFUSED TO PRINT THE T-SHIRTS AS AN EXERCISE OF FIRST AMENDMENT RIGHTS

The Respondent argues that in addition to religious grounds, it refused to print the 2012 Pride Festival shirts, because printing of the shirt would convey a message, and it did not want to convey the ideological message that people should take pride in engaging in sexual relationships or sexual activity outside of a marriage between one man and one woman.

The Respondent places great emphasis on the fact that Mr. Adamson did not announce his refusal to print the t-shirts until he was given a verbal description of the shirt by Mr. Lowe

over the telephone, for the proposition that the refusal was not based upon the sexual orientation of the organization or its members, but on the content of the message conveyed by the design of the shirt.

The Hearing Commissioner notes that in an interview with Ms. Marjorie Gonzales, Commission investigator, conducted on June 6, 2012, Mr. Adamson was asked "*On or about March 8th, when you spoke to Don Lowe of the GLSO, did you attempt find out what type of organization the GLSO was during that conversation?*" Mr. Adamson responded "*I don't recall asking that specifically. I recall asking what the project was about, um,* ***'cuz I had somewhat of an idea****, but I wasn't sure...* ***He basically said it was a pride festival downtown that was for the gay and lesbian community****. And then he began to tell me, because I asked him, what was on the shirt. That was my next question, and he said 'pride festival.'*" [Respondent's Exhibit 604, p. 13-14]

The evidence supports a finding that prior to being given the verbal description of the t-shirt, Mr. Adamson was aware that the GLSO was composed of individuals identifying themselves as gay and lesbian. The evidence of record also supports a finding that Mr. Adamson intended to refuse the order prior to learning of the design of the shirt.

In the same interview with Ms. Gonzales on June 6, 2012, Mr. Adamson was shown a color copy of the t-shirt design and was asked "*What about this design that you find offensive? Or what about this picture that you see here would you find offensive enough not to print?*" Mr. Adamson stated "*um, the Lexington Pride Festival, the wording. To me, it's promoting a*

message, um, an event that I can't agree with because of my conscience." Ms. Gonzalez then asked "*Okay. So would you say that it's not exactly the design of the shirt that's offensive, but rather the message that it's portraying and what the GLSO stands for*?" Mr. Adamson responded "*Um,* ***specifically, it's the Lexington Pride Festival, the name, and that it's advocating pride in being gay, in being homosexual****, and I can't promote that message. It's something that goes against my belief system.*" [Respondent's Exhibit 604, p. 15]

The Respondent argues that Mr. Adamson's objection to the printing of the t-shirt was not because of the sexual orientation of the members of the GLSO, but because of the Pride Festivals' advocacy of pride in being homosexual. Acceptance of the Respondent's argument would allow a public accommodation to refuse service to an individual or group of individuals who hold and/or express pride in their status. This would have the absurd result of including persons with disabilities who openly and proudly display their disabilities in the Special Olympics, persons of race or color, who are not only of differing race and color, but express pride in being so, and persons of differing religions who express pride in their religious beliefs.

The Hearing Commissioner notes that human beings are either internally proud or not of their race, color, sexual orientation, disability, age, or religion. Those that are internally proud of their status may or may not outwardly express such pride. It is doubtful that the Respondent would deny that a substantial number of those of the Christian faith are internally proud of being Christian, but never express that pride to others. However, those members of protected classes who outwardly express pride in their own religion or sexual orientation do so because of their

self-identification of being within that classification of persons.

The purpose of the Lexington Pride Festival is to celebrate and exhibit pride in their status as persons of differing sexual orientation or identity. The Hearing Commissioner agrees with the Commission's contention that the Respondent's objection to the printing of the t-shirts was inextricably intertwined with the status of the sexual orientation of members of the GLSO. Mr. Adamson's refusal on behalf of the Respondent was clearly because of the sexual orientation and identity of members of the GLSO.

The Respondent cites several cases for the proposition that the Respondent not only speaks when it prints a shirt, but that its speech is constitutionally protected. *Miami Herald Publ'g co. v. Tornillo*, 418 U.S. 241 (1974) held that a newspaper is a constitutionally protected speaker when it compiles the writings of others on its editorial page. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (A newspaper is a constitutionally protected speaker when its customer pays it to print an advertisement that the customer created.) *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (the Court prohibited the State of Massachusetts from applying its sexual orientation public-accommodations law to punish a parade organization for declining to facilitate the message of a gay-advocacy group.) *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003) (publishers disseminating the work of others who create expressive material come wholly within the protective shield of the First Amendment.)

The Hearing Commissioner agrees that these cases support a finding that when the

Respondent prints a promotional item, it acts as a speaker, and that this act of speaking is constitutionally protected. The issue however is not whether the Respondent's speech, or refusal to speak is constitutionally protected, but the limits of that protection.

The Respondent cites *Wooley v. Maynard*, 430 U.S. 705 (1977), for the proposition that the constitutional right to free speech "includes the right to speak freely and the right to **refrain from speaking.**" (Emphasis added.) [430 U.S. 705, at p. 714] The facts of the case before the Hearing Commissioner are distinguishable from *Wooley*. In *Wooley* the court was addressing a government-mandated message that motorist display the State's motto of "Live Free or Die" on their vehicle license plates. In this case there was no government mandate that the Respondent speak. The Fairness Ordinance merely proscribes discrimination in public accommodations on grounds of sexual orientation and gender identity. In addition, the government mandate in *Wooley* did not did not conflict with the rights of others.

The case of *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), dealt with a State imposed requirement that students salute the American flag and recite the Pledge of Allegiance. The *Barnette* Court noted "the freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine when the rights of one end and those of another begin." [319 U.S. at 630]

The Fairness Ordinance does not require the Respondent to display any message, and does not require the Respondent to print promotional items including t-shirts. The Fairness Ordinance only mandates that if the Respondent operates a business as a public accommodation, it cannot discriminate against potential customers based on their sexual orientation or gender identity.

The refusal to provide the services of printing a t-shirt to GLSO directly harms the rights

of GLSO members to be free of discrimination in the market place. In the case before the Hearing Commissioner, the Lexington-Fayette County Urban Government enacted the Fairness Ordinance to minimize that harm by pronouncing where the Respondent's rights end and the Complainants rights begin.

In the case of *Elane Photography, LLC., v. Willock*, 309 P.3d 53 (N.M. 2013), cert. den. 134 S.Ct. 1787, 188 L.Ed.2d 757, 82, U.S.L.W. 3585 (April 7, 2014), the Supreme Court of New Mexico addressed the issue of whether a photography studio violated the New Mexico Human Rights Act's (NMHRA) prohibition against discrimination in a public accommodation, when it refused to photograph a commitment ceremony between two women. The Court held that the New Mexico Human Rights Act does not violate free speech guarantees because the act does not compel (the photography studio) to either speak a government-mandated message or to publish the speech of another.

The Court noted that the purpose of the New Mexico public accommodation law was to "ensure that businesses offering services to the general public do not discriminate against protected classes of people, and the United States Supreme Court has made it clear that the First Amendment permits such regulation by states. Businesses that choose to be public accommodations must comply with the NMHRA, although such businesses retain their First Amendment rights to express their religious or political beliefs." [309 P.3d at 59] "... when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation." [309 P.3d at 62] The United States Supreme Court denied certiorari of the *Elane* case on April 7, 2014. 134 S.Ct. 1787, 188 L.Ed.2d 757, 82, U.S.L.W. 3585

The Lexington-Fayette County Human Rights Commission, and the Charging Party in this case argue that there is no genuine issue of material fact, and that the Hearing Commissioner should rule as a matter of law that the Respondent, a public accommodation as that term is

defined in the Fairness Ordinance, discriminated against the GLSO when it refused to print t-shirts intended as the official shirt for the 2012 Pride Festival.

The evidence of record shows that the Respondent discriminated against the GLSO because of its members' actual or imputed sexual orientation by refusing to print and sell to them the official shirts for the 2012 Lexington Pride Festival. In addition, the Hearing Commissioner holds that the application of the Fairness ordinance does not violate the Respondent's right to free speech, does not compel it to speak, and does not burden the Respondent's right to the free exercise of religion.

ORDER

Summary Judgment is hereby granted to the Complainant GLSO and the Lexington-Fayette Urban County Human Rights Commission. The Respondent's refusal to provide goods and services of public accommodation to the Charging Party constitutes unlawful discrimination against the members of the GLSO on the basis of sexual orientation and sexual identity in violation of Local Ordinance 201-99. The Respondent is permanently enjoined from discriminating against individuals because of their actual or imputed sexual orientation or gender identity. The Respondent is ordered to participate in diversity training to be conducted by the Lexington-Fayette Urban County Human Rights Commission within twelve (12) months of the issuance of this Order.

R. Greg Munson
Hearing Commissioner

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