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

LEXINGTON-FAYETTE URBAN COUNTY HUMAN RIGHTS COMMISSION — APPELLANT

vs.

HANDS ON ORIGINALS, INC. — APPELLEE

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On Discretionary Review from
Court of Appeals, No. 2015-CA-00745
Fayette Circuit Court, No. 14-CI-04474

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# BRIEF OF AMICI CURIAE 16 LEGAL SCHOLARS IN SUPPORT OF APPELLEE HANDS ON ORIGINALS, INC.

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## CERTIFICATE REQUIRED BY CR 76.12(6)

I hereby certify that on February 7, 2018, true and correct copies of this brief were served by first-class U.S. Mail, postage prepaid, on Bryan H. Beauman, Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Ste. 1500, Lexington, KY 40507; Edward E. Dove, 201 W. Short St., Ste. 300, Lexington, KY 40507; and the Honorable James D. Ishmael, Jr., Fayette Circuit Court Judge, 120 North Limestone, Lexington, KY 40507.

Joshua D. Hershberger

## STATEMENT OF POINTS AND AUTHORITIES

## INTRODUCTION

It is axiomatic that in the American constitutional system, "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess *by word or act* their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). And yet in its central purpose and essence, this lawsuit seeks to do just that.[1]

Appellee Hands On Originals (HOO) and its owner Blaine Adamson are printers. Adamson cannot in good conscience authorize HOO to print promotional items that express messages inconsistent with his religious beliefs. Adamson Aff. ¶¶ 26-27 (Ex. 1). A representative of the Gay and Lesbian Services Organization (GLSO) called HOO and asked Adamson to print a shirt with a pro-gay message. When Adamson declined on grounds of his religious belief, he offered to refer the GLSO to another printer that would make the shirts. The GLSO declined that offer, filed a complaint with Appellant Lexington-Fayette Urban County Human Rights Commission (the Commission), and issued a press release about the situation. As a result of the publicity, HOO lost several large customers, and another printer offered to print the GLSO's shirts for free.

This dispute is thus not about any deprivation of a needed product, service, or opportunity; indeed, no such damages were claimed or awarded. The case is rather about messages or *expression*—about the offense incurred because of Adamson's unwillingness to print words and a logo celebrating ideas that he believes are contrary to God's law. And

[1] The 16 legal scholars who are the amici curiae on this brief are listed in amici's Motion for Leave to File.

the injunctive remedy sought and awarded is calculated simply and solely to compel Adamson to print such messages in the future.

In short, this lawsuit is little more than an effort to force Adamson to print expression that violates his religious convictions. Although the Commission frames this case in terms of "discrimination," its fundamental violation of the bedrock principles articulated in *Barnette* cannot be justified by any compelling state interest in eradicating discrimination. That is because even if the interest advanced by historic antidiscrimination measures such as the Civil Rights Act of 1964—the interest, namely, in overcoming invidious, status-based discrimination—is deemed sufficiently compelling to override core First Amendment commitments, no such interest is presented in this case. Blaine Adamson is emphatically *not* the much feared merchant who refuses to serve people who are black, or female, or gay. He merely objects to printing messages, no matter who might request them, that contradict his traditionalist Christian convictions. In other instances Adamson has declined violent, hateful, and profane messages; in this instance the message happens to be one celebrating same-sex relationships and LGBT causes.

On these facts, a balanced commitment to both equality and expressive freedom, especially urgent at a time of national polarization, requires that the principle articulated in *Barnette* be honored, not sacrificed or rationalized away.

## ARGUMENT

### I. In Both its Purpose and its Effect, the Commission's Effort to Compel Adamson to Print Messages that Violate His Sincere Convictions Offends the Vital Constitutional Commitment to Freedom of Expression.

#### A. The Longstanding Prohibition Against Compelling Expression "By Word or Act" is Core to Our Constitutional Tradition.

In one of the most revered statements ever uttered by the U.S. Supreme Court, Justice Robert Jackson wrote that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess *by word or act* their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). *Barnette*'s celebrated declaration is one among numerous testaments to the centrality in the American constitutional tradition of the freedom of expression—and, more specifically, to the understanding that this freedom includes not just the right to say what one believes but also, and as importantly, the right *not* to express, *"by word or act,"* ideas or opinions that one does *not* believe.

This commitment is not the product of any passing political fashion or enthusiasm. On the contrary: the commitment has developed against the backdrop of recurrent abuses and injustices committed over the centuries—abuses and injustices to which governments are perennially prone but which the founders and guardians of American constitutionalism have been determined to avoid.

Thus, the book of Daniel in Hebrew scripture narrates the story of Hananiah, Mishael, and Azariah (given the Babylonian names of Shadrach, Meshach, and Abednego), who were thrown into a fiery furnace for refusing to bow before a golden statue. In late antiquity, Christians were often required to burn incense to pagan idols or to pay obeisance to divinized emperors; this practice seemed perfectly innocuous to Roman authorities but was a sacrilege to Christians.[2] Later, under Christendom, Jews, Muslims, and unorthodox

[2] *See* Bruce W. Winter, *Divine Honours for the Caesars: The First Christians' Responses* (2015); 1 Edward Gibbon, *The Decline and Fall of the Roman Empire* 537-538 (David P. Womersley ed., Penguin Press 1994) (1776).

Christians were sometimes compelled to profess approved Christian doctrines with which they did not agree.[3] Still later, in England, affirmation of the prevailing creed became a condition for public office, or for the right to inherit or to attend Oxford or Cambridge.[4]

The oppressiveness of such practices lay not so much in preventing people from expressing their beliefs; rather, it consisted of the even more invasive practice of *forcing people to affirm, utter, or support what they did not believe*. Thus, an early monument to freedom of expression and conscience in the Anglo-American tradition was the martyrdom of Sir Thomas More, formerly Lord Chancellor to King Henry VIII. With regard to the fraught issue of Henry's annulment of his marriage to Catherine of Aragon and marriage to Anne Boleyn, More resolved to remain silent. Despite this, More was imprisoned, condemned, and beheaded because he would *not* express support, contrary to his beliefs, for the validity of the annulment and the succession.[5]

The American founders rebelled against the oppression inherent in such compulsion. It is "sinful and tyrannical," Thomas Jefferson insisted, opposing a tax for the support of Christian ministers, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves."[6] But if it is "tyrannical" to compel people

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[3] *See* Brian Tierney, *Religious Rights: A Historical Perspective, in* Religious Liberty in Western Thought 29 (Noel B. Reynolds & W. Cole Durham, Jr. eds., 1996); Norman F. Cantor, *The Civilization of the Middle Ages* 512-13 (rev. ed. 1993); Jane S. Gerber, *The Jews of Spain* 115-44 (1992).

[4] *See* Alexandra Walsham, *Charitable Hatred: Tolerance and Intolerance in England, 1500-1700* 86-87 (2006); Alec R. Vidler, *The Church in An Age of Revolution* 40-41 (1st ed. 1961).

[5] *See* Richard Marius, *Thomas More* 461-514 (1984).

[6] 2 *The Papers of Thomas Jefferson, 1777 – 18 June 1779*, 545-553 (1950, Julian P. Boyd ed.)

In short, the Commission's central purpose in this lawsuit is censorial in character: it is concerned not with the denial of a needed product or service, but rather with an unwanted message. For his part, similarly, Adamson objects to creating the shirts solely because of the messages they would convey, which would contradict his Christian beliefs. He manifestly does not object to serving homosexuals; on the contrary, he has printed and will continue to print for all people (including homosexuals). The sincerity of this profession is undisputed and corroborated by his decision not to print many other messages he deems objectionable, including violent or profane themes.

Because this case is *solely* about expression, it falls squarely within the rule articulated in *Barnette*.

### C. If Accepted, the Commission's Arguments Would Effectively Eviscerate the Constitutional Prohibition on Compelled Speech.

It is undisputed (1) that the GLSO asked Adamson to print words and a logo that promote same-sex relationships and LGBT ideology and (2) that Adamson declined solely because of the messages that he was asked to print. The Commission nonetheless attempts to minimize or mitigate Adamson's constitutional rights. But those arguments, if accepted, would have the effect of negating altogether the venerable commitment described in *Barnette* as the "fixed star in our constitutional constellation."

The Commission argues that a "reasonable observer" would not think that Adamson endorsed the messages on the shirts because he was legally compelled to print them. Yet that rationalization would effectively eviscerate the principle against compelled speech (except perhaps in the exceedingly rare case in which observers are unaware that legal compulsion is being exerted). Thus, to the Jehovah's Witness schoolchildren in *Barnette*—or, for that matter, to Sir Thomas More struggling to avoid affirming the validity of Henry's

annulment, or to the Jews who were punished for refusing to bow to Nebuchadnezzar's golden statute—the proponents of the prevailing orthodoxy could always insist: "You're making a big deal out of nothing. Nobody will assume that you actually believe what you're helping to promote; they'll know you're just doing what the law compels you to do."

The Commission also argues that if Adamson is concerned about perceptions that he endorses the gay pride festival, he could simply put up a sign in his window or a post on the Internet declaring his true beliefs. Once again, the same rationalization might have been offered to the schoolchildren in *Barnette*: "Just salute the flag and recite the Pledge—everybody will know that you were forced to do it, and that you don't really mean it—and then explain to your friends and classmates what your real beliefs are."[8] This possibility, however, does nothing to negate the constitutional offense of compelled speech. The right in question is a right *not* to speak. The crucial importance of that right—the right to keep silent with respect to an issue—is manifest this case. After all, citizens who do not want to create speech promoting a gay pride festival contrary to their convictions may at the same time have no desire affirmatively and publicly to proclaim that they believe same-sex relationships are sinful. And such a public proclamation (which of course would likely cause widespread offense and, ironically, would aggravate exponentially the dignitary harm that the Commission is ostensibly attempting to redress) is hardly a cure for the injury of being compelled to affirm what one does not believe.

[8] *Cf. Pacific Gas*, 475 U.S. at 16 ("Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next.") (plurality); *see also Hurley*, 515 U.S. at 575-76 (similar).

religion. Both kinds of commitments are cherished and essential components of the American constitutional tradition. Antidiscrimination policies, as reflected in federal and local antidiscrimination laws, manifest evolving conceptions of equality traceable back to the lofty assertion in the Declaration of Independence that "all men are created equal." By the same token, the commitment to expressive and religious freedom resonates with what have often been deemed the "first freedoms," as collected in the First Amendment.

Both kinds of commitments are held dear by Americans—and have been for generations. If treated as categorical and expanded to its utmost possible scope, however, either kind of commitment *could* subordinate or displace the other; but given the vital importance of each, it is imperative that courts preserve and respect each through a sensitive and prudent construction and application of laws reflecting each commitment.

Indeed, that imperative is all the more urgent now given the nation's increasing polarization, noted by numerous observers. Under such conditions, advocates of one policy will sometimes press an aggressive "scorched earth," "take no prisoners" agenda. Recently, for example, a leading progressive academic declared victory in the so-called culture wars. "*The culture wars are over; they lost, we won.*"[9] And he urged a "hard line," no compromises approach to religious traditionalists (like Adamson): "You lost; live with it."[10] A similar attitude is discernible in other advocates and advocacy groups, as well as in some lower court decisions.

Tempting as such a position might be, though, and exhilarating as it might be simply to crush one's opposition while the political and cultural momentum happens to be

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[9] *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKIN.COM (May 6, 2016), https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html.
[10] *Id.*

on one's side, this course exalts one important public commitment at the expense of other equally important commitments. Moreover, at a time when national unity seems desperately needed, a course of uncompromising zeal will predictably exacerbate rather than assuage cultural conflicts. The judicial role, surely, is not to act as champion for one or another faction, but rather to respect and reconcile the vital, longstanding policies and commitments expressed in various laws that sometimes come into tension.

Not every scholar or judge or citizen will arrive at the same balance or reconciliation, of course. The signatories to this brief are far from agreeing in all particulars about the proper resolution of competing commitments to equality and to expressive freedom. Thus, in a case in which a person or business simply asserted a personal, moral, or religious objection to serving gays or lesbians (if such a case were to arise), some might conclude that the antidiscrimination policy should always and automatically prevail; others might incline to a less categorical, more contextual approach.

But however that conflict might resolve if it ever arises, the crucial fact is that *the issue is not presented in this case.* Once again, Adamson is emphatically *not* the much-feared (and possibly hypothetical) merchant who declines on personal, moral, or religious grounds to serve gays and lesbians. On the contrary: Adamson's Christian faith permits and indeed demands that he serve all people, regardless of sexual orientation; it merely forbids him to print messages (regardless of who might request them) that he believes are contrary to God's law and biblical teachings.

To ignore such distinctions is to exalt and extend one important policy in disregard of the longstanding commitment to freedom of belief, expression, and religion. It is in effect to adopt the agenda of advocates who would simply bulldoze the opposition in a

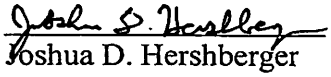
cultural struggle: "You lost; live with it." Such a course is neither prudent, nor inclusive, nor faithful to our pluralistic constitutional traditions. Conversely, in tense times, for this Court to recognize and affirm the crucial distinction between an objection to a *message* and an objection to a *person* would be an important step toward a sensible reconciliation of laws and policies promoting both antidiscrimination and expressive freedom.

In short, the cause of reconciliation would be furthered by judicial recognition that although no one has a constitutional right to engage in invidious status-based discrimination, our nation's central and historic commitment against compelled expression will continue to be honored when a business person's only objection is to printing expressive products that convey messages contrary to that person's deeply-held beliefs.

## CONCLUSION

It is undisputed that Blaine Adamson has no objection to serving gays and lesbians; his only objection is to printing messages that he believes are contrary to God's law. In this lawsuit, the Commission seeks to compel Adamson to print those messages. This purpose directly contradicts the cherished constitutional principle, eloquently articulated in *Barnette*, that the government may not establish an orthodoxy and compel citizens to affirm that orthodoxy "by word or act." The present appeal provides this Court with an opportunity to reaffirm that historic principle and to strike a more measured and inclusive balance between the community's vital commitments both to equality and to expressive freedom. Toward that end, this Court should affirm the Court of Appeals' ruling.

Respectfully submitted,



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