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

Court of Appeals of Kentucky
Case No. 2015-CA-00745

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

LEXINGTON FAYETTE URBAN COUNTY HUMAN RIGHTS COMMISSION — **APPELLANT /MOVANT**

v.

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

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

Certificate required under CR 76.12(6)

The undersigned does hereby certify that copies of this brief were served upon the following individuals by U.S. mail on this 5th day of February, 2018: Hon. Judge James D. Ishmael, Jr., Robert F. Stephens Circuit Courthouse, 120 N. Limestone, Lexington, KY 40507; Hon. Edward E. Dove, 201 West Short St., Suite 300, Lexington, KY 40507; Hon. Bryan H. Beauman, Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine St., Suite 1500, Lexington, KY 40507; and Hon. James A. Campbell, Alliance Defending Freedom, 15100 North 90th St., Scottsdale, AZ 85260.

Hon. Thomas Patrick Monaghan
AMERICAN CENTER FOR LAW & JUSTICE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020
(502) 544-5252 fax
monaghan@bellsouth.net
Attorney for Amicus Curiae

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF PURPOSE AND ISSUES

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

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

ARGUMENT

I. HOO DID NOT VIOLATE THE LEXINGTON ORDINANCE.

Hands On Originals (HOO) declined to print message-bearing t-shirts because of HOO's objection to the nature of the product, rather than the identity of the customer. The circuit court therefore ruled that applying the nondiscrimination ordinance to HOO would violate the federal right to free speech and the Kentucky statute protecting religious liberty. The Court of Appeals affirmed on an alternative, simpler basis: statutory

interpretation. This Court should affirm on that ground: The ordinance banning "sexual orientation" discrimination should be read not to apply to refusals based upon the *nature of the project*, rather than the *identity of the customer*.

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

There is a fundamental difference between *invidious discrimination* on the basis of *who a person is*, versus *legitimate selectivity* on the basis of *what is being asked* (i.e., the nature of an event, service, or product). This is the common-sense difference between the professional event coordinator who categorically refuses to serve members of the U.S. Marijuana Party (www.usmjparty.com), Antifa (https://nycantifa.wordpress.com), or the National Socialist Movement (www.nsm88.org), on the one hand, and one who will handle projects for *all* individuals, including members of such groups, but will just not handle official *events* for those organizations. This is likewise the difference between a restaurateur who does not serve Muslim customers, versus a restaurateur who welcomes customers regardless of religion but does not carry halal food options. *Cf. Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2766 (2014) ("The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use"). Or an evangelical sculptor who won't handle projects for Catholics, versus one who welcomes Catholic patronage but, as a matter of religious conscience, will not sculpt devotional images of saints. Or a toy shop owner who won't serve Japanese patrons, versus one who welcomes all ethnicities but refuses, based upon painful memories from World War II, to carry products manufactured in Japan. Or a caterer who will not serve Jews, on one hand, versus one who will just not handle a reception for a *brit milah* (ritual Jewish

circumcision) because of strong personal objections to performing circumcisions. *See, e.g.*, www.doctorsopposingcircumcision.com. In each such case, the one who categorically rejects members of a group, as such, discriminates against the *who* — on the basis of politics, race, or religion, in these examples — while one who declines only to facilitate certain events or messages discriminates against the *what*, which is not invidious.

Recognition of this distinction is essential to liberty and to a sensible reading of nondiscrimination laws. One who discriminates based upon the *identity* of the patron generally[1] indulges in essentially arbitrary and invidious bias, withholding business from otherwise perfectly suitable patrons purely because of *who they are*. Such a person is the quintessential target of nondiscrimination laws. But the decision to supply *all comers* with *only certain* products or services and not others, or to handle *certain* events but not others, simply represents a business decision necessary for all commercial enterprises: how will this business operate? Importantly, that business decision can reflect a variety of motives: profit judgments, personal taste, ethical norms, religious principles, concern about brand and image, etc.

Whether or not the business owner in fact deeply disagrees with some belief or practice of the pertinent class of customers is irrelevant. A refusal to serve black customers is impermissible discrimination even if the bar owner has no animosity toward blacks (he may even be black himself), agrees they are entitled to equal rights, but nevertheless excludes them to please other, bigoted customers. On the other hand, a bar

[1] Cases where the identity of the individual is a *bona fide*, germane qualification (e.g., being old enough to purchase alcohol or cigarettes, or being a resident of a district eligible to vote there, or being tall enough safely to ride certain roller coasters, etc.) are a different matter.

owner who serves all customers regardless of race does not discriminate even if he has the heart of Archie Bunker or Bull Connor.

Similarly, it is legally irrelevant whether a business decision reflects personal beliefs that an opponent might characterize as biased. In the examples above, the restaurateur who does not carry halal options may (or may not) harbor resentment against all Muslims based upon the acts of some Muslims in the World Trade Center bombing or the more recent beheadings in the Middle East; the evangelical sculptor who won't sculpt a statue of St. Francis may find certain Catholic devotional practices theologically repugnant, perhaps even idolatrous; the toy shop owner who doesn't carry Japanese goods may hold a grudge against all Japanese for their nation's hostilities in World War II. Anti-discrimination laws, however, target discriminatory *acts*, not bad attitudes or thoughts. Indeed, the latter are sacrosanct under the First Amendment, even when repugnant to some. *Schneiderman v. United States*, 320 U.S. 118, 144 (1943) ("If any provisions of the Constitution can be singled out as requiring unqualified attachment, they are the guaranties of the Bill of Rights and especially that of freedom of thought contained in the First Amendment").

Thus, nondiscrimination does not mean a customer is entitled to whatever service he or she might want. That would be a right to commandeer a business, not a right to equal treatment. A Frenchman cannot insist, on pain of a charge of nationality discrimination, that a private language school teach French in addition to Arabic and Mandarin. Instead, a customer is entitled not to be denied goods or services because of who the patron is. Thus, a bookstore does not discriminate on the basis of the identity of its patrons if it fails to carry Christian publications that a Christian clientele might desire,

even if the owner does this because he is a fervently anti-Christian atheist. Conversely, the Christian bookseller does not discriminate on the basis of religion by declining to carry books promoting Hinduism, regardless of motive. In such cases customers of all stripes are welcome to patronize the store, but the seller is not obliged to add other products to satisfy a subgroup, even if that subgroup is statutorily protected from discrimination based upon its identity.

Some courts have held that a special, contrary rule applies to the refusal of a business to provide services for a same-sex marriage. The Colorado Court of Appeals, for example, held that a same-sex marriage is "inextricably tied to sexual orientation." *Mullins v. Masterpiece Cakeshop*, 215 COA 115 at *35, 370 P.3d 272, 281 (Colo. Ct. App. 2015) (internal quotation marks and citation omitted), *cert. granted sub nom. Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 2017 U.S. LEXIS 4226 (U.S. June 26, 2017). The decision in *Elane Photography v. Willock*, 2013-NMSC-040 at *16-*17, 309 P.3d 53, 61-62 (N.M. 2013), is to the same effect. Essentially, these courts held that only homosexual individuals would enter a same-sex marriage; hence, refusal to help with such an event is tantamount to sexual orientation discrimination. *Accord Klein v. Oregon Bureau of Labor & Industries*, 289 Or. App. 507, 519-23 (2017); *State v. Arlene's Flowers*, 187 Wash. 2d 804, 823-25, 389 P.3d 543, 552-53 (2017), *petition for cert. pending*, U.S. No. 17-108 (docketed July 21, 2017). That rationale obviously distinguishes the present case, since one need not identify as homosexual to support events like the Lexington Pride Festival or the mission of that event's organizers. Indeed, the *Mullins* court expressly distinguished cases, including by name the instant case involving HOO, where the objection was to a *message* the business was asked to

reproduce. 2015 COA 115 at *40 n.8, 370 P.3d at 282 n.8. This Court therefore need not decide whether a decision not to cater to a same-sex marriage is better characterized as based upon the identity of the participants or the nature of the event. *Compare Bray v. Alexandria Women's Health Center*, 506 U.S. 263, 271-73 (1993) (disparate treatment of abortion is not sex-based even though only women have abortions), *with id.* at 270 (*irrational* disfavor of activities associated with a particular class of people can indicate intent to disfavor that class).

B. THE ORDINANCE REFLECTS THIS CRUCIAL DISTINCTION.

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

satisfy a subgroup, even if that subgroup is statutorily protected from discrimination based upon their identity.

C. RESPECTING THIS DISTINCTION AVOIDS CONSTUTIONAL QUESTIONS.

It is well settled that a law should be construed in a way that avoids raising constitutional questions. *Elery v. Commonwealth*, 368 S.W.3d 78, 94 (Ky. 2012) (that a more limited reading of the statute would avoid any concern about the constitutionality of the law "alone would require us to read the statute in such limited fashion, so long as the reading is a reasonable one"). Here, the parties raise, and the circuit court addressed, important questions of constitutional law under the First Amendment to the U.S. Constitution. There is, however, no need to address or resolve those constitutional questions if HOO simply did not violate the Lexington nondiscrimination ordinance. Reading that ordinance to incorporate the common sense difference between rejecting a *person* versus rejecting a *project* obviates any need to reach the constitutional questions. This Court should therefore resolve the case on statutory grounds, rather than constitutional grounds. *Curd v. Kentucky State Bd. of Licensure for Professional Engineers & Land Surveyors*, 433 S.W.3d 291, 304 (Ky. 2014) ("we have a strong policy of avoiding constitutional questions unless absolutely necessary for the proper resolution of the case") (footnote omitted).

D. THIS DISTINCTION DISPOSES OF THE PRESENT CASE.

In the present case, HOO and its owners rejected the t-shirt order because it represented an objectionable *project*, not because of the identity of the owners. Adamson

MSJ Aff. at 7-9.[2] HOO did not know the sexual orientation of the agents or officers of GLSO — the entity placing the order. *Id.* at 9. Obviously the mission of GLSO is one that people of differing sexual orientations can and do embrace. In fact, the record reflects that a past president of GLSO was a man married to a woman. Baker Dep. at 7, 13. Nor is there any indication that it would matter to HOO whether the persons requesting the shirt — like individuals employed by HOO — personally considered themselves to be same-sex attracted. Adamson MSJ Aff. at 9-10 (HOO serves and employs "individuals who identify as gay"). An exclusively heterosexual group that wanted to promote the message of GLSO's Pride Festival would have no reason to expect that HOO would suddenly change course and agree to the very same objectionable message, if only it had come from a different source.

Nor can HOO's objection fairly be characterized as a *post hoc* pretext. HOO had previously rejected a number of project requests on the grounds that they had objectionable content, and thus had a clear track record of being selective in deciding what projects to undertake. Adamson MSJ Aff. at 6, para. 30; HOO Supp'l Resp. to First Set of Interrogs. at 5 (listing projects that HOO declined to handle because of their content). HOO was by no means an uncritical "hired gun" for any and all projects. Rather, HOO offered certain products and services, and not others. That such selectivity reflected moral and religious norms is no more relevant for purposes of the nondiscrimination ordinance than if the selectivity reflected aesthetics, profitability projections, or personal quirks. In neither case does the identity of the would-be patron matter. Hence, there is not discrimination "on the ground of" such identity.

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[2] The Adamson affidavit is Exhibit 2 to the appendix of the Commission's opening brief.

To be sure, the distinction is less obvious when the service or product is closely linked to a particular group. While anyone can buy and wear a yarmulke, the practice is characteristic of Judaism, which is why "[a] tax on wearing yarmulkes is a tax on Jews." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). But a tax on "wearing yarmulkes" is quite different from a decision not to *sell* yarmulkes. A tax on "wearing" yarmulkes is an imposition on "those persons who wear yarmulkes" — the "who," not the "what". By contrast, a decision of a haberdasher not to offer yarmulkes (or mitres, for that matter) is not discrimination against those who wear yarmulkes (or mitres). While avoiding a tax on wearing yarmulkes would require individuals to forswear that practice, a particular merchant's inventory decisions have no such consequence. Individuals retain their freedom to wear their preferred headgear; the merchant retains the freedom not to be dragooned into selling those items. And as noted above, it is not relevant whether the haberdasher declines to offer such products because of a principled antipathy to the religion (Judaism or Christianity) such head coverings reflect. After all, no one is required to profess or even act as if any particular religion, creed, or ideology is correct, desirable, or beneficial. The curmudgeon and the idealist are alike entitled to their confessional autonomy.

The U.S. Supreme Court applied this very approach to statutory construction in the abortion context. That Court, viewing some twenty years of struggle in the wake of *Roe v. Wade*, 410 U.S. 113 (1973), acknowledged that "men and women of good conscience can disagree" over the issue of abortion, *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992), and that there were "common and respectable reasons for opposing" abortion, *Bray*, 506 U.S. at 270. Opposition to abortion — even direct,

physical obstruction, as in *Bray* — therefore did not qualify as "animus" against a class (namely, women, the only sex capable of obtaining abortions). 506 U.S. at 269-74. As the *Bray* Court explained, discrimination requires that the act in question be taken "*by reason of*" the protected characteristic. *Id.* at 270 (emphasis in original). Members of the group must be targeted "*because they are*" members, *id.* (emphasis in original), i.e., on the basis of the *who*, not the *what*, *id.* at 272 n.4 ("the characteristic that formed the basis of the targeting here was not womanhood, but the seeking of abortion"). Thus, the very different purpose or motive of "stopping" a "practice" (there, abortion) would not qualify as discrimination unless such opposition was, in essence, inherently class-based. *Id.* at 270. But that proposition was not "supportable." *Id.* As the *Bray* Court explained, even though as a matter of biology only women could get abortions,[3] "it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class." *Id.* As the *Bray* Court concluded:

> Whether one agrees or disagrees with the goal of preventing abortion, that goal in itself (apart from the use of unlawful means to achieve it, which is not relevant to our discussion of animus) does not remotely qualify for such harsh description, and for such derogatory association with racism.

Id. at 274.

The same logic holds for same-sex marriage (and, by inference, to sexual activity outside of opposite-sex marriage). The U.S. Supreme Court has expressly recognized that men and women of good conscience can disagree over same-sex marriage. "Many who

[3] "While it is true . . . that only women can become pregnant, it does not follow that every . . . classification concerning pregnancy is a sex-based classification. . . . Discriminatory purpose . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 271-72 (internal quotation marks and citations omitted).

deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). It follows that opposition to the *what* — same-sex sexual activity — cannot be equated with opposition to the *who* — homosexual or lesbian persons. There are common and respectable reasons for opposing same-sex unions, whether as a matter of adherence to "divine precepts," *id.* at 2607, or "for other reasons" grounded in secular principles, *id.* That same-sex sexual acts are typically engaged in by persons of homosexual orientation no more refutes that proposition than does the fact that women, and only women, can get pregnant and thus have abortions. Similarly, in *Hurley v. Irish-American GLIB*, 515 U.S. 557 (1995), the parade organizers did not "exclude homosexuals as such," *id.* at 572, but simply invoked their constitutional right not to let their parade become a platform for celebrating homosexuality, *id.* at 570, a constitutional right the U.S. Supreme Court unanimously endorsed. HOO's owner likewise objects to having his business conscripted to celebrate same-sex sexual acts.

CONCLUSION

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

Respectfully submitted,

Hon. Thomas Patrick Monaghan
Hon. Geoffrey R. Surtees
AMERICAN CENTER FOR LAW & JUSTICE
6375 New Hope Road
New Hope, KY 40052
(502) 549-7020
(502) 544-5252 fax
monaghan@bellsouth.net
Attorneys for Amicus Curiae