COMMONWEALTH OF KENTUCKY
SUPREME COURT
2017-SC-00278
Court of Appeals Case No. 2015-CA-00745
Fayette Circuit Court Case No. No. 14-CI-04474

LEXINGTON-FAYETTE URBAN COUNTY
HUMAN RIGHTS COMMISSION, APPELLANT,

vs.

HANDS ON ORIGINALS, INC., APPELLEE.

MOTION FOR LEAVE TO FILE BRIEF FOR AMICI CURIAE LAW AND ECONOMICS SCHOLARS IN SUPPORT OF APPELLEE HANDS ON ORIGINALS

COMES NOW the *Amici* law and economics scholars listed below, by and through counsel, and pursuant to CR 76.12(7) prays for an Order of this Court allowing leave of the Court to file the attached brief as *amici curiae* in support of appellee Hands On Originals, Inc.; and in further support of the motion the following is submitted for the Court's review and consideration.

The *Amici* are nine scholars in law, economics, and philosophy who study, teach, and have published on the application of economic principles to the law and to public policy. *Amici* include the following individuals:

- Lloyd Cohen, J.D., Ph.D., is Professor of Law at the Antonin Scalia Law School, George Mason University.
- Samuel Gregg, D.Phil. (Oxon.), is Research Director at the Acton Institute.
- Timothy R. Lickness is Adjunct Professor of Law at Trinity Law School, Trinity International University.
- Allen Mendenhall, M.A., J.D., LL.M., Ph.D., is Associate Dean at the Thomas Goode Jones School of Law, and Executive Director of the Blackstone & Burke Center for Law & Liberty, Faulkner University.

- Catherine R. Pakaluk, Ph.D., is Assistant Professor of Economics, at The Busch School of Business and Economics, and Fellow at the Institute for Human Ecology, The Catholic University of America.

- Eric Rasmusen is Professor of Business Economics and Public Policy, Kelley School of Business, Indiana University.

- Lisa A Runquist is Adjunct Professor of Law at Trinity Law School, Trinity International University.

- Andrew Seeley is Tutor at Thomas Aquinas College and Executive Director of the Institute for Catholic Liberal Education.

- Myron Steeves is Dean and Professor of Law at Trinity Law School, Trinity International University, and Director of the Church Law Center of California.

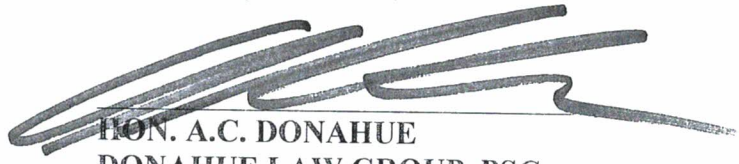
Amici submit this brief to bring to this Court's attention critical economic analyses that bear on the issues in this case. In particular, *Amici* show in the attached brief that proper economic analyses demonstrate that application of antidiscrimination laws in cases such as this diminishes social welfare.

Government entities like Appellant Lexington-Fayette Urban County Human Rights Commission argue that they risk permitting widespread discrimination if they allow conscientious businesses like Appellee to decline to create speech with messages that they find objectionable. Basic economic theory refutes that argument. As *Amici* detail in the attached brief, businesses like Appellee face steep market costs for living by their owners' scruples. Those costs include boycotts and social pressure, including insults and threats of violence from groups with political power and influence far greater than businesses like Appellee. This economic reality ensures that only those firm in their convictions will choose the path that Appellee walks.

Amici believe that the discussion in the attached brief, which expands upon the themes mentioned above, will aid this Court in assessing the important legal questions raised in this case. *Amici* thus respectfully pray for an Order of this Court allowing leave of the Court to file

the attached brief as *amici curiae* in support of appellee Hands On Originals, Inc.; and for any and all such other relief as this Court deems appropriate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 6, 2018, true and accurate copies of the foregoing motion was served by U.S. Mail, postage prepaid, on Hon. Edward E. Dove, Attorney At Law, 201 W. Short St., Ste. 300, Lexington, Kentucky 40507, and Hon. Bryan H. Beauman, Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Ste. 1500, Lexington, Kentucky 40507.

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TABLE OF POINTS AND AUTHORITIES

INTEREST OF AMICI CURIAE

The *Amici* listed in the accompanying motion are nine scholars in law, economics, and philosophy who study, teach, and have published on the application of economic principles to the law and to public policy. *Amici* submit this brief to bring to the Court's attention critical economic analyses that bear on the issues in this case. In particular, *Amici* show that proper economic analyses demonstrate that application of antidiscrimination laws in cases such as this diminishes social welfare.

INTRODUCTION

Appellant, Lexington-Fayette Urban County Human Rights Commission, contends that a county ordinance requires Appellee Hands On Originals and its owner Blaine Adamson to print t-shirts promoting the Lexington Pride Festival—a festival which Appellant describes as "promoting acceptance of one's sexual orientation" (Appellant's Br. at 15)—despite Appellee's sincerely held religious objections to doing so. According to Appellant, any accommodation of Appellee's religious beliefs would "thwart" the government's goals of "full inclusion" and eliminating the "illness" of discrimination. (*Id.* at 14, 16.) Appellee thus contends that the government has a right to coerce Appellee (and any other business) to produce products bearing messages that "support the gay and lesbian population of Fayette County," regardless of any business owner's "religious belief." (*Id.* at 14, 17.) Appellant has thus uniformly contended that allowing *any* exception to any antidiscrimination law, no matter how narrow, would have deleterious consequences.

This absolutist position is entirely without support in logic, policy, or precedent. The very statutes on which Appellant contends are analogous to the county ordinance, such as Title II of the Civil Rights of 1964 (Appellant's Br. at 4), are far more narrow and

contain exceptions. *See, e.g.*, 42 U.S.C. § 2000a(b). More important, basic economic principles demonstrate that application of antidiscrimination laws to coerce those with sincere religious objections is unnecessary to ensure access to goods and services to LGBT individuals. That point is even more true when the only exception sought by the Appellee is limited to that tiny sliver of the market where a customer requests a message that conflicts with the Appellee's religious beliefs.

There is, moreover, no social reason to force such merchants to conform to the dominant social consensus. T-shirt printers like the Appellee are typically small, family-run businesses with no market power. Due to a plethora of online print screen vendors, competition among such businesses is national (if not international) in scope. Competitive market forces have produced, and will continue to produce, providers willing and eager to provide products and services for pro-LGBT advocacy (as revealed by a simple internet search for "gay friendly" t-shirt printers). Indeed, the ordinary give-and-take of the market will lead to better provider-consumer matches, lower prices, and greater market coverage than any coercion regime.

Market forces also ensure that exceptions are narrow and limited. It is not in the interest of any vendor to separate itself from its customer base. It is therefore no surprise that the Appellee and those like it only seek to decline requests to print messages that conflict with their religious scruples. As the Appellee's consistent behavior demonstrates, it neither seeks nor wants a blanket exception to providing services to a class of persons. Appellee simply seeks to avoid being coerced to print messages in violation of its religious beliefs.

At the same time, the Appellee and others like him are all too aware that in today's world of social media they will face inspired boycotts and social pressure, includ-

ing insults and threats of violence from groups with political power and influence far greater than their own. Under Lexington's anti-discrimination ordinance, consumers, gay rights organizations, and other businesses may freely discriminate against merchants such as the Appellee (and have done so), explicitly based on a dislike for their religious beliefs. Thus, the fear that allowing religious-based exceptions will create "an enormous hole from public accommodations laws," *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 559 (2017), is entirely unfounded.

In contrast, enforcing Lexington's antidiscrimination law against isolated religious believers like the Appellee will diminish social welfare in two ways. It will either force unwilling associations or force the exit of a class of market participants. The former market distortion results in poorly matched providers and consumers. The latter reduces social welfare by removing from the market merchants that some consumers may prefer (with or without regard to the merchant's religious views). A smaller marketplace is necessarily less diverse and less competitive than a larger market with a diverse set of providers. Enforcing the ordinance also imposes huge administrative costs, which the Appellant ignores.

Enforcement is not justifiable on the ground that it is necessary to prevent negative externalities, including affronts to personal dignity. The key mistake in this claim is that it looks only at one side when both suffer dignitary losses. Any individual merchant coerced to violate his or her religious conscience or to exit the market certainly has at least an equal claim to dignitary harm. But, as the U.S. Supreme Court has affirmed, the fact that some take personal offense at the conduct of others cannot justify state intrusion into the exercise of First Amendment rights. *Matal v. Tam*, 137 S. Ct. 1744, 1767 (2017).

Accordingly, in the absence of monopoly, there is no economic basis to rule out

the granting of exceptions from antidiscrimination laws to those limited by religious convictions. Refusing to do so reduces social welfare.

ARGUMENT

Our country has a long tradition of accommodating diverse viewpoints, especially those motivated by religion. Such accommodations are of critical importance given the explosive growth of regulation in an increasingly religiously diverse and pluralistic society. *See, e.g.*, STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 124-144 (1993) (showing that accommodations are necessary to avoid tyranny, and debunking the argument that religious persons can simply avoid regulatory conflicts by changing their conduct).

In this case, a thoughtful accommodation of Appellee's religious convictions would enhance social welfare, increase freedom, and constrain no one's opportunities. Conversely, allowing the state to coerce religiously motivated merchants into violating their religion would diminish social welfare, reduce freedom, and harm not only Appellee but other market participants.

I. Markets Enhance Social Welfare by Matching Provider and Consumer Preferences, and Mitigating Discrimination.

It is now beyond debate that markets premised on voluntary exchange serve as bulwarks that protect freedom, advance innovation, and enhance social welfare. *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 8-21 (2002). "Underlying most arguments against the free market is a lack of belief in freedom itself." *Id.* at 15.

Because both sides gain from any voluntary transactions, competitive market dynamics lead to the most efficient allocation of goods and services. While economists typically focus on product, price, terms, and quality, markets match providers and consumers based on a wide spectrum of preferences dealing with many other aspects of a business transaction. Examples abound. Merchants who prefer to engage in "socially responsible"

business practices will be matched with consumers who prefer to deal with such providers. And merchants who deal in only "Made in America" products will be matched with consumers who prefer such wares. At the same time, other merchants aim for a larger audience and systematically avoid adopting any idiosyncratic practices that might offend certain political, ethnic, or religious groups.

Markets thus allow for merchants who decide to cater to the particular tastes of their chosen customer base. Merchants may, and frequently do, cater to certain ethnicities, religious groups, age groups, occupations, economic groups, etc. Consumers are free to choose the merchants who best suit their preferences.

The central insight is that neither providers nor consumers are homogeneous. There is great variety beyond simply product differentiation. This variety and diversity is a social good because it expands opportunities for producers and consumers alike.

In the absence of monopoly, therefore, consumers benefit from being able to choose providers who closely serve their tastes. In the context of printers, for instance, consumers may choose to purchase from a particular printer for numerous reasons other than the price and quality of the product, such as seeking to support members of a particular race or ethnicity, a preference for printers of a particular political persuasion, a like-mindedness with regard to theological issues, etc. By facilitating the accurate matching of consumer and merchant preferences, markets enhance social welfare.

As the U.S. Supreme Court has long recognized, the right of providers and consumers to choose their trading partners is a bulwark that underlies this country's market-based system. The common law guaranteed the right to engage in voluntary trade by protecting the "long recognized" right of a merchant "freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250

U.S. 300, 307 (1919); *see also Hundley v. Louisville & N. R. Co.*, 48 S.W. 429, 430 (Ky. 1898) ("It is the part of every man's civil rights to enter into any lawful business, and to assume business relations with any person who is capable of making a contract. It is likewise a part of such rights to refuse to enter into business relations ...."); *Brewster v. Miller's Sons Co.*, 41 S.W. 301, 303 (Ky. 1897) ("It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever ...."). This right is part and parcel of the right to pursue an ordinary calling or trade, which is the "very essence of the personal freedom" protected by the Fourteenth Amendment. *Truax v. Raich*, 239 U.S. 33, 41 (1915); *see also Hundley*, 48 S.W. at 430 ("Every person *sui juris* is entitled to pursue any lawful trade, occupation, or calling. It is part of his civil rights to do so. He is as much entitled to pursue his trade, occupation, or calling, and be protected in it, as is the citizen in his life, liberty, and property.").

These rights should be understood as part of a broader framework that embraces freedom of contract and voluntary association in religious and economic life. As Thomas Jefferson wrote, "the first principle of association" is "'the guarantee to every one of a free exercise of his industry, and the fruits acquired by it.'" *Letter to Albert Gallatin (Oct. 16, 1815), in* THE WRITINGS OF THOMAS JEFFERSON (Andrew A. Lipscomb, Albert E. Bergh, & Richard H. Johnston, eds., 1903).

These rights cover not only economic issues but religious ones. Thus in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the U.S. Supreme Court struck down a law prohibiting the instruction of children in a foreign language. The Court held the right of the instructor in a parochial school to teach a foreign language "as part of his occupation" and "the right of parents to engage him so to instruct their children" to be "within the liberty of the [Fourteenth] Amendment." *Id.* at 400. And in *Pierce v. Society of Sisters*, 268 U.S. 510,

534-35 (1925), the Court struck down an Oregon law that prohibited all persons, including those with religious beliefs, from attending private schools. In both these cases the Court upheld the right of providers to tailor their services according to their religious preferences.

The only exception to this principle is a monopoly situation, in which consumers are faced with a sole supplier who could decide for all sorts of reasons, including invidious motives, to refuse to deal with a group of potential consumers. Long before the rise of the modern antidiscrimination laws, common law judges held that all common carriers and public utilities—the two main classes of providers that held monopoly powers—were obligated to supply services to all comers at fair, reasonable, and nondiscriminatory rates. The doctrine was explicitly incorporated into English law in *Allnut v. Inglis*, 104 Eng. Rep. 206 (K.B. 1810). Thereafter it was carried into American constitutional law dealing with rate regulation in *Munn v. Illinois*, 94 U.S. 113, 126-28 (1876). *See* RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY AND THE COMMON GOOD 279-86 (1998). The key rationale behind these decisions is that in the presence of a monopoly no consumer can find any close substitute for the needed good or service.

Those conditions do not hold in the absence of a monopoly; the presence of multiple alternatives greatly mitigates, if not eliminates, the effects of discrimination on any consumer and renders the complex structure of rate regulation superfluous. *See* FRIEDMAN, *supra*, at 108-115; RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 15-58 (1992); GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 39-47 (2d ed. 1971). Markets ensure that consumers who face potential discrimination can find other, better suited merchants from which to obtain services.

Markets punish merchants who choose not to serve certain persons, limiting the prevalence of discrimination. In contrast, imposing antidiscrimination laws on merchants with conscience-based objections undermines the workings of the market. And those merchants do not have any easy way to avoid the imposition. They must either go out of business or face ruinous fines and other sanctions.

II. Protecting Merchants Like the Appellee Will Not Undermine the Goals of the Antidiscrimination Laws.

These economic principles give ample basis for protecting merchants like the Appellee and others who have conscience-based objections.

A. Market Forces Prevent the Exclusion of Those Seeking Merchandise with Pro-LGBT Messages.

A ruling for the Appellant cannot be justified on the ground that consumers will be unable to obtain merchandise with pro-LGBT messages. Such a result is precluded by powerful market forces.

Those who contend that people like the Appellee must be punished invariably cite Title II of the 1964 Civil Rights Act. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 79 (N.M. 2013) (Bosson, J., concurring). But the analogy is inapt. The social conditions under segregation that led to the enactment of that law attacked public institutions that actively supported private aggression and backstopped pervasive private discrimination. At the time, therefore, the "best practical argument for Title II was that it functioned as a corrective against private force and public abuse in government." Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1254-61 (2014). Such conditions do not exist today.

There also is no monopoly here. The t-shirt printing industry is highly fragmented

and competitive. Barriers to entry are virtually non-existent, ensuring rapid response to any exclusion. What is more, a legion of well-structured intermediaries reduces search costs as multiple websites cater to LGBT consumers so that they need only turn on a computer to view a rich array of services from *willing* merchants actively seeking their business.

In competitive markets, protecting merchants like the Appellee does not present "a threat to meaningful participation in commercial life." Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 IND. L.J. 693, 719 (2017). Indeed, if these fears were warranted, no merchant could ever refuse service to any potential customer for any reason, including their political orientation or other social beliefs. Yet the same law that makes it impossible for religious individuals like the Appellee to honor their own beliefs allows other merchants to express their political beliefs by refusing, for example, to provide wares that support President Trump. *See, e.g.*, Herb Scribner, *This 9-year-old boy can't find anyone to bake him a pro-Donald Trump cake*, THE DAILY AMERICAN (Somerset, Pennsylvania), August 9, 2017. Redundancy of vendors in a competitive market prevents these individual preferences from dominating social norms.

For these reasons, the prospect of market exclusion is nothing short of fanciful.

B. Market Forces Ensure That Only Those with Sincerely Held Beliefs Will Seek an Exception to the County Ordinance.

Not only does the market ensure that those seeking services will find well-matched providers, the market also limits the number of people who will seek an exception to the county ordinance. *See* BECKER, *supra*, at 39-45 (2d ed. 1971) (showing that competitive forces drive out most forms of market discrimination). Printers who decline requests to create merchandise with pro-LGBT messages face a number of costs, which will winnow out the insincere, leaving only those whose consciences would force them to

leave the marketplace in the face of coercive antidiscrimination law.

First, such merchants bear the cost of lost sales, not only from the declined orders but also from many others who disagree with that provider's stance. For instance, merchants who have declined to provide services for same-sex weddings have faced social-media-led boycotts and a flood of negative reviews on sites such as Yelp.[1]

Potential losses include corporate accounts that fear retribution for doing business with such providers. Indeed, the Appellee experienced the loss of large corporate accounts in this case. And others face the same risk. Consider that the Human Rights Campaign, which rates workplaces on "LGBT equality" and boasts that "199 of the Fortune 500-ranked businesses achieved a 100 percent rating," penalizes companies "found to have a connection with an anti-LGBT organization or activity."[2] The consequences in individual cases can be disastrous, sometimes forcing businesses to close.[3]

Second, merchants who decline requests to create goods with pro-LGBT messages also face *illegitimate* forms of aggressive behaviors, including death threats, abusive phone calls, and a torrent of vitriolic hate mail.[4]

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[1] *See* Amelia Irvine, *How technology and the free market can eliminate discrimination*, THE EXAMINER (Washington D.C.), July 13, 2017; Chris Taylor, *Anti-equality Indiana pizza joint gets seriously trolled, shuts up shop*, MASHABLE.COM, Apr. 2, 2015; Emily Pfund, *Walkerton police still investigating threats to 'burn down' Memories Pizza, prosecutors say*, THE ELKHART TRUTH (Indiana), Apr. 3, 2015; Steve Mocarsky, *Venue reportedly receives threats after refusing to host gay wedding receptions*, THE TIMES LEADER (Wilkes-Barre, Pennsylvania), July 11, 2014.

[2] Human Rights Campaign, Corporate Quality Index at 6, 9 (2017), http://www.hrc.org/campaigns/corporate-equality18index.

[3] *See, e.g.*, George Brown, *Bakery Forced To Close Over Gay Wedding Denial*, CBS-3 WREG (Memphis, Tennessee), Sept. 4, 2013.

[4] *See, e.g.*, Nikki Krize, *Bridal Shop Owners Get Death Threats Over Same-Sex Policy*, ABC-16 WNEP (Wilkes Barre, Scranton, Pennsylvania), Aug. 2, 2017; Warren Richey, *For those on front lines of religious liberty battle, a very human cost*, THE CHRISTIAN SCIENCE MONITOR, July 16, 2016.

Third, merchants like the Appellee must defend against legal challenges. Even if this Court rules in favor of the Appellee, businesses seeking protection from antidiscrimination laws will likely still be forced to litigate. After all, a number of legal organizations have proven themselves eager to challenge such positions.

These huge economic and social costs, some legitimate, but many not, ensure that the goals of antidiscrimination laws are not undermined by protecting the few whose convictions would lead them to endure the consequent losses and abuse.

C. Coercing the Appellee to Print Messages Over Its Religious Objections Diminishes Social Welfare.

By compelling the Appellee and similar merchants to print messages that violate their religious beliefs, the application of antidiscrimination laws in cases like this undermines the workings of market mechanisms. Those merchants forced to violate their beliefs would likely do so reluctantly, decreasing their incentives to do their best work. Moreover, given the threat of legal retaliation, such providers would likely hide their lack of motivation. Consumers search costs are thus increased, and they are less able to find the best provider to match their preferences. In turn, social welfare is diminished by the resulting poor match of provider with consumer.

Alternatively, providers with conscience-based objections will exit the market. This will reduce the variety of providers, diminishing consumer choice. Consumers may prefer such excluded providers for a number of reasons. For instance, some may respect or value the provider's commitment to his or her religious convictions, even if they do not agree with those convictions. Others may hold values that are closely aligned with the provider's religious or moral convictions. Or another group of consumers, not caring about the merchant's convictions, might simply like the style or quality of the provider's services.

By forcing such merchants out of the market, application of the antidiscrimination law not only harms the providers, it also harms other market participants, diminishing social welfare. As one English court recognized nearly three hundred years ago, restraints that cause market exit cannot "be endured; because the publick loses the benefit of the party's labour, and the party himself is rendered an useless member of the community." *Chessman v. Nainby*, 93 Eng. Rep. 819, 821 (1726).

D. Purported Economic Reports Used to Justify Punishment for Merchants Like the Appellee Are Inapposite and Faulty.

In a case relied on by Appellant, a state appellate court cited a one-sided report purporting to demonstrate that discrimination based on sexual orientation "in places of public accommodation has measurable adverse economic effects." *Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 293 (Colo. App. 2015) (citing Mich. Dep't of Civil Rights, *Report on LGBT Inclusion Under Michigan Law with Recommendations for Action* 74-90 (Jan. 28, 2013) ["*Michigan Report*"]). But the report does not support that court's claim.

First, the report (much like similar ones) is irrelevant. It seeks to show economic harm flowing from the failure to enact an antidiscrimination law protecting sexual orientation. *Michigan Report* 74-90. But the issue before this Court concerns only protection for that tiny subset of merchants who, like the Appellee, are asked to print messages that conflict with their sincerely held religious beliefs. Whether sexual orientation antidiscrimination laws are desirous does not speak to that narrower issue.

Second, the report is fundamentally flawed on methodological grounds. Its data largely consists of anecdotes and anonymous statements. And the report does not even address, let alone quantify, the losses to companies like the Appellee and their customers in its economic calculations. Nor does the report try to explain or quantify the damage

that violent and abusive protestors can do to religious merchants like the Appellee and their customers. It is, therefore, wildly speculative to attribute any positive economic effect to government-imposed punishment against a merchant's decision not to print particular messages. By imposing heavy administrative burdens and disrupting voluntary markets, it is far more likely that such punishment will have an adverse effect on economic growth.

Third, the report claims to find support in the fact that most major Fortune 50, 100 and 500 companies have adopted policies that forbid discrimination based on sexual orientation. Rather than justifying the need to apply antidiscrimination laws here, the voluntary and widespread adoption of these policies by major corporations gives assurance that LGBT customers will find merchants willing to serve them.

In sum, state coercion against small businesses like the Appellee will undercut market choices, not improve them.

III. No Negative Externalities Justify a Refusal to Protect the Appellee.

Finally, using government power to coerce religiously motivated merchants into violating their consciences cannot be justified on notions of protecting "dignity." (Appellant's Br. at 16-17.) Each side has claims to violations of their "dignity." *See* Oman, *supra*, at 701. The "indignity" of being forced to provide services in violation of one's conscience or to exit one's profession cannot be easily dismissed. *See* Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 N.W. J.L. & SOC. POL'Y 206, 207-08 (2010).

Moreover, the government seeks to regulate only one side of these voluntary transactions. Its antidiscrimination law (and all others that we are aware of) applies only to providers. Consumers are free (consistent with basic notions of liberty) to refuse to

deal with any provider for any reason. The government would thus condemn the same discrimination by one set of market participants but not the other. There is no basis for doing so. The enforcement of antidiscrimination laws against those with conscience-based objections causes the same negative outcomes that these laws aim to prevent.

The lack of coherent justification is demonstrated by the reasoning of one state supreme court justice who sought to defend such government prejudice. In the end, he simply waved his hands and said that enduring such state coercion in violation of one's conscience or being forced out of the market is simply "the price of citizenship." *Elane Photography*, 309 P.3d at 80 (Bosson, J., concurring). Why being turned down by certain establishments is not a price of citizenship is never explained.

Nor can laws like Lexington's antidiscrimination ordinance be justified simply by insisting that declining to print shirts promoting an LGBT pride festival is offensive to some segments of the community. Standard economic theory takes into account only those externalities whose harm to a stated victim correlates positively with the overall reduction in social welfare. It is for that reason that the standard set of *actionable* externalities, while including aggression, nuisances, and monopolies, do not embrace the offense that some individuals take at the activities of other persons.

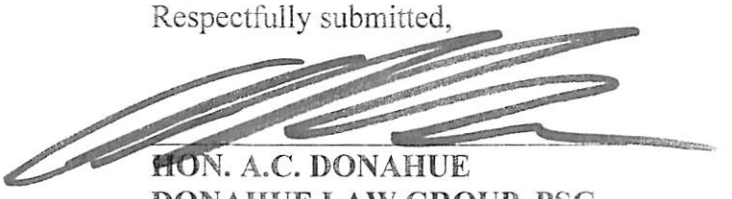
That is for good reason. A broad definition of externality that covers any and all offense taken by others systematically reduces overall social welfare. It would lead to a situation in which every person could veto the activities of others based on a subjective offense. To allow such offense to restrict the activities of other individuals creates a perverse incentive to become ever angrier and more restive in order to gain a leg up on rivals. Let everyone adopt this strategy, and widespread offense by this or that segment of the community will necessarily pit every group in society against others. It is this funda-

mental point that drove the U.S. Supreme Court's recent and emphatic rejection of any government efforts to restrict "offensive" speech. *See Matal*, 137 S. Ct. at 1767.

CONCLUSION

Reversing the decision below would be socially harmful. In the absence of monopoly, markets ensure that all are served and none are coerced—that LGBT groups can obtain materials promoting their causes, and that religiously motivated printers can follow their conscience without being forced to abandon their profession. Imposing antidiscrimination laws to force merchants to violate their religious convictions or to leave the market undermines freedom and diminishes social welfare. The Court should hold that the Appellant cannot coerce such undesirable and oppressive outcomes.

Respectfully submitted,



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