COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
SUPREME COURT CASE NO. 2017-SC-00278
COURT OF APPEALS CASE NO. 2015-CA-000745

On Appeal from

FAYETTE CIRCUIT COURT
THIRD DIVISION
CASE NO. 14-CI-04474

LEXINGTON-FAYETTE URBAN COUNTY HUMAN RIGHTS COMMISSION — **APPELLANT**

v.

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

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BRIEF OF AMICUS CURIAE SUTHERLAND INSTITUTE

I hereby certify that 10 true and accurate copies of the foregoing were sent via registered mail to the Clerk, Supreme Court of Kentucky, State Capitol Room 235, 700 Capitol Avenue, Frankfort, KY 40601; and that a true and accurate copy was also served via regular mail upon Hon. Joy A. Kramer, Chief Judge, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Debra H. Lambert, Judge, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Jeff S. Taylor, Judge, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. James D. Ishmael, Jr., Judge, Fayette Circuit Court, 120 North Limestone Street, Lexington, KY 40507; Bryan H. Beauman, 333 West Vine Street, Suite 1400, Lexington, KY 40507; James A. Campbell, Byron J. Babione, and Kenneth J. Connelly, 15100 North 90th Street, Scottsdale, AZ 85260; and Edward E. Dove, 201 W. Short Street, Ste. 300, Lexington, KY 40507; on this the **29th** day of January, 2018.

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The appeals court correctly recognized that a nondiscrimination ordinance cannot be applied in a way that overrides constitutional and other statutory protections. That principle ensures fundamental fairness by allowing the ordinance to operate as intended without impinging on long-established rights (as the drafters of the ordinance no doubt intended).

Appellant finds fault with the application of that common-sense principle here but does so by mistakenly conflating two different lines of precedent. The relevant cases are those that establish that the government cannot require individuals or other private entities to make or endorse speech to which they conscientiously object, for religious or other reasons. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to . . . the most exacting scrutiny").

Appellants, by contrast, assert that the relevant cases are those in which the government required neutral access to fora for purposes of allowing it or a third party to communicate its message. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 US 47 (2006) (condition of federal aid that military recruiters cannot be excluded from campuses); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (cable operators must reserve some channels for traditional broadcast channels); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (allowing petitions and free speech on property of shopping mall).

These cases, however, are totally inapposite. This is illustrated by a simple analogy. While the government might be able to ensure access to a poster board to be

used to print a slogan, the government cannot require a third party to write the slogan or carry it at the behest of another. The latter, illegitimate, type of requirement is at issue here and has been foreclosed by the Supreme Court on numerous occasions. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

Notwithstanding, Appellants have asserted that the underlying discrimination ordinance was "passed for the public good" and was thus constitutional. Court of Appeals Appellant Brief at 17. That the motivation for the ordinance may indeed have been for the public good may be true but is irrelevant to question of whether its *application* in this instance—where a government agency requires a private business to print a message of a third party contrary to the owner's religious beliefs—is constitutional. This case is like those the district court below relied on, which hold that such an imposition is unconstitutional as an instance of compelled speech.

These constitutional principles and the state's clear statute are consistent with the longstanding practice in the United States of accommodating the religious practice and free speech of individuals and organizations even when seemingly countervailing government interests or perceptions of the "public good" are involved.

The Longstanding Practice in the United States is to Accommodate as Broadly as Possible the Religious Exercise of Citizens.

As an eminent legal scholar of religious liberty has noted, the practice of accommodating religious speech, expression and practice, including by preventing government-compelled speech at odds with religious commitments, goes back to colonial times: "The colonies exempted Quakers from swearing oaths and exempted dissenters

from paying taxes to support the established church. They exempted members of pacifist faiths from bearing arms in person, although those conscientious objectors had to perform alternative service or pay extra taxes to support the war effort." Douglas Laycock, *The Religious Exemption Debate* 11 RUTGERS JOURNAL OF LAW & RELIGION 139, 140 (2009). As a recent historian's expert report in litigation from Washington explains, "even in areas of utmost significance, accommodations of religious citizens have not prevented the nation or individual states from meeting important policy goals." Mark David Hall, Expert Report, *Ingersoll v. Arlene's Flowers*, No. 13-2-00953-3 at 5 (Washington Superior Court 2014). Drawing on the expert report and other sources, this brief highlights significant examples.

Military Service. It is hard to imagine a government interest more compelling than its own military defense, and compulsory military service requirements are understood as a necessary part of that defense. Despite this undoubtedly valid interest, accommodations for conscientious objectors to military service are an accepted feature of the law. Like Professor Laycock, Dr. Hall explains that some form of exemption from compulsory military service was recognized as early as the 1670s in Rhode Island, North Carolina, and Maryland. During the Revolutionary War, Congress expressly accepted this kind of accommodation. The Selective Draft Act of 1917 includes a combat exemption for members of "any well recognized religious sect or organization at present organized and existing whose creed or principles forbid its members to participate in war in any form." Expert Report at 15-18. The Supreme Court has approved this type of exemption. *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918). The Kentucky Constitution

contains a similar exemption for mandatory militia service. Kentucky Constitution, section 220.

Mandatory Oaths. As the quote from Professor Laycock that begins this section indicates, some of the colonies acted to prevent religious objectors from the compelled speech inherent in mandatory oaths. Dr. Hall identifies similar provisions in the colonial laws of New York, Maryland, New Jersey and Massachusetts. Expert Report at 23. These kinds of practices were continued after independence and the U.S. Constitution itself contains an important religious accommodation, that notwithstanding the undoubted importance of ensuring that all officers of the United States support the Constitution, the requirement that they be "bound by oath" is qualified to allow for those who have religious objections to swearing oaths to affirm that duty instead. U.S. Constitution, article VI. Kentucky's Constitution makes the same accommodation. Kentucky Constitution, section 228.

An analogous situation involves laws enacted many decades ago which required saluting the American flag and reciting the Pledge of Allegiance. In 1943, the U.S. Supreme Court required school officials to exempt students with religious objection to participating in those observances, and the Court specifically disavowed "forc[ing] citizens to confess by word or act their faith" in government mandated orthodoxy of any type. *West Virginia v. Barnette*, 319 U.S. 624 (1943).

School Attendance. It is widely understood that providing educational opportunities is an important function of state governments, at least in part because of the recognition that an educated citizenry is necessary to ordered liberty. Mandatory education laws have been enacted to advance this interest, but here too accommodations

have been made to ensure school attendance requirements don't infringe religious practice. In 1925, the Supreme Court invalidated an Oregon law that banned all private schools, including parochial schools. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In 1972, the Court invalidated a Wisconsin requirement that Amish children attend school after the eighth grade as a violation of their religious freedom. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Kentucky's compulsory attendance law specifically exempts students "enrolled and in regular attendance in a private, parochial, or church regular day school." KRS 159.030.

Prohibition of Controlled Substances. During Prohibition, Congress included in the Volstead Act a specific accommodation of sacramental or ceremonial uses of alcoholic beverages: "Nothing in this title shall be held to apply to the manufacture, sale, transportation, importation, possession, or distribution of wine for sacramental purposes, or like religious rites." National Prohibition Act, 41 Stat. 305-323, ch. 83. More recently, a unanimous U.S. Supreme Court has held that, under the federal Religious Freedom Restoration Act, a small religious sect could use a substance in their rituals that is "exceptionally dangerous," despite its being classified as a controlled substance under federal law. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 US 418 (2006). In its decision, the Court pointed to a statutory exemption in drug laws for the use of peyote in Native American Churches. *Id.* at 433. This exemption was provided by Congress in 1994 in the American Indian Religious Freedom Act. 42 U.S.C. §1996a.

Anti-Discrimination Provisions. Our society is appropriately concerned that individuals are not denied employment, housing, and essential services because of invidious discrimination based on characteristics unrelated to fitness, such as racial bias.

Governments have enacted anti-discrimination laws in an attempt to address this concern. Yet, even in this important matter, statutes and court interpretations have often sought to ensure that general anti-discrimination principles not burden the free-exercise of religion and will accommodate conscientious objections.

At the federal level, Title VII of the Civil Rights Act of 1964 does not apply "to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. 2000e-1. Further, the law constrains employers' ability to take adverse employment action because of religion, which is defined as "all aspects of religious observance and practice, as well as belief," unless "an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e. The exemption for religious organizations was upheld by the U.S. Supreme Court against an Establishment Clause challenge. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

The Supreme Court has also qualified the reach of state public accommodations anti-discrimination laws. In 1995, the Court unanimously held that applying the Massachusetts public accommodations statute to a private parade in order to require parade organizers to include a contingent in the parade whose message was considered to be at odds with the message of the organizers for religious and other reasons, was unconstitutional. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). As in this case, those challenging the organizers' decision

argued that it was the identity of the prospective marchers that was at issue, making what might seem like protected expression, really a case of sexual orientation discrimination. The Court disagreed, noting the organizers might have a number of reasons for the exclusion but, "whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id.* at 575.

Five years later, the Court held unconstitutional the application of New Jersey's public accommodations law to the leadership standards of the Boy Scouts of America. The Court focused on the imposition such an application would have on the ability of the organization to control the messages it disseminated: "Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. . ." *Boy Scouts of America v. Dale*, 530 U.S. 640, 654 (2000). Both *Dale* and *Hurley* are very similar to this case in that all three involve the application of public accommodations statutes to the conduct of organizations seeking to control the messages they send.

To take one more federal example, when the Court recently ruled that each state had to license and recognize same-sex marriages as a matter of fundamental right, the Court made clear that contrary views by groups and individuals could be held "in good faith by reasonable and sincere people." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2594 (2015). The Court emphasized that it intended its holding to accommodate religious teaching and speech on marriage: "Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First

Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." *Id.* at 2507.

Kentucky's approach to anti-discrimination laws also illustrates a policy of accommodating religious practice. Kentucky's employment discrimination statute allows a "religious corporation, association, or society to employ an individual on the basis of his religion to perform work connected with the carrying on by such corporation, association, or society of its religious activity" and allows a "school, college, university, or other educational institution to hire and employ employees of a particular religion if the school, college, university, or other educational institution is, in whole or substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of the school, college, university, or other educational institution is directed toward the propagation of a particular religion and the choice of employees is calculated by such organization to promote the religious principles for which it is established or maintained." KRS 344.090. Similarly, Kentucky has adopted "the ministerial exception as applicable to employment claims—especially discrimination claims" for those "directly involved in promulgating and espousing the tenets of the employer's faith." *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597 (2014).

The state's housing discrimination statute exempts those with moral objections to unmarried cohabitation to act on that objection by exempting from coverage a landlord "who refused to rent to an unmarried couple of opposite sex." KRS 344.362. The statute

also does not apply to "a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, which limits the sale, lease, rental, occupancy, assignment, or sublease of a housing accommodation which it owns or operates for other than commercial purpose to persons of the same religion, or from giving preference to those persons, unless membership in the religion is restricted on account of race, color, or national origin." KRS 344.365.

Other Examples. There are many more examples of laws where general principles are modified to ensure accommodation of religious speech, expression, and practice. For instance, after the U.S. Supreme Court held there was a constitutional right for a woman to have an abortion, Congress enacted conscience protections to ensure that medical personnel would not be forced to participate in abortions. 42 U.S.C. § 300a-7(c)(1). Congress has also required that decisions about land use and even prison regulations that create a substantial burden on religious interests must be justified by compelling interest and be narrowly tailored to advance that interest. 42 U.S.C. §2000cc, *et seq*. The portion of this statute applicable to prisoners was challenged but unanimously upheld by the U.S. Supreme Court. *Cutter v. Wilkinson*, 544 U.S. 709 (2005). In a case involving animal sacrifice, the Court held that legitimate concerns about public health had to yield to the religious practices of a small church. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538-539 (1993). When the Department of Health and Human Services mandated employers provide no-copay insurance coverage for contraception, a closely-held business that objected on religious grounds to paying for some drugs that they believed had an abortifacient effect, challenged the requirement. The Court,

applying the federal analog to KRS 446.350, held the employers' concerns had to be accommodated in the application of the regulations *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

In short, accommodations for the free exercise of religion, including protections from compelled speech, are embedded throughout our statutory and common law. Indeed, the laws of the United States have consistently recognized that the "generous and sympathetic accommodation of religion is a crucial part of, not an obstacle to, the practice and promotion of civil rights." Richard W. Garnett, *Religious Accommodations And-And Among-Civil Rights: Separation, Toleration and Accommodation* 88 SOUTHERN CALIFORNIA LAW REVIEW 493 (2015).

Appellants suggested that their proposed application of the discrimination ordinance to require Appellee to disseminate a message contrary to his beliefs could be justified by a concern with "remov[ing] the daily affront and humiliation" experienced by "the homosexual community." Brief at 6-7. They argued that accommodating the owner's rights would tell the community "that they are protected by the Ordinance as long as they don't act gay." *Id.* at 6. It is not at all clear what this refers to since there is nothing in the case that suggests that the owner declined to print the message because of the actions of appellant. This argument is essentially the same as the argument rejected in *Hurley*; the printer's decision was a choice "not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Hurley* at 575.

Whatever the potential impact of the printer's decision, the law is clear that accommodating religious expression and practice is appropriate even when doing so may have incidental effects on others who do not share the religious beliefs of those being

accommodated. As Professor Michael McConnell has noted: "Religious accommodations often impose burdens on third parties." *Prof. Michael McConnell (Stanford) on the Hobby Lobby Arguments* WASHINGTON POST (March 27, 2014) at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/27/prof-michael-mcconnell-stanford-on-the-hobby-lobby-arguments/. These include such things as staffing around an employee's day of worship, an increased possibility of being drafted for non-conscientious objectors, having to find alternative place to have an abortion if a religious hospital does not perform them, potential health risks associated with animal sacrifice, modified schooling requirements for Amish children, etc. *Id.* Many of these impacts involve significant state interests but that has not prevented courts and legislatures from approving the accommodations.

Of course, each of these examples arguably presents more of an actual burden than the one in this case since here the printing appellants sought was provided elsewhere. Absent tangible harm that could not be demonstrated in this case, all that is left is speculative dignitary harm that amounts to a claim that one experiences harm anytime someone disagrees with your view of sexual morality. That is hardly a legitimate reason to depart from the practice of accommodating alternative views by declining to compel government-approved speech.

In any event, people of faith have a right not to be stigmatized for their views just as do members of the homosexual community and the rights of both can be easily accommodated by applying the common sense (and statutorily mandated in KRS 446.350) principle that state laws will not compel a private individual or organization to disseminate or endorse a message with which they do not agree.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully request this Court to affirm the decision of the court below.

Respectfully submitted,

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