Commonwealth of Kentucky
Supreme Court of Kentucky
2017-SC-278

LEXINGTON-FAYETTE URBAN COUNTY HUMAN RIGHTS COMMISSION — APPELLANT

V.

On Appeal From Court of Appeals, No. 2015-CA-000745
And Fayette Circuit Court, No. 14-CI-04474

HANDS-ON ORIGINALS, INC. — APPELLEE

Motion For Leave to File Amicus Curiae Brief

Pursuant to CR 76.12(7), CatholicVote.org ("CatholicVote") respectfully seeks leave of the Court to file the accompanying amicus brief.

CatholicVote is a nonpartisan voter education program devoted to building a Culture of Life. It seeks to serve our country by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. Given its educational mission and focus on the dignity of the person, CatholicVote is deeply concerned about the First Amendment issues implicated by this case, as well as the effect of public accommodations laws on businesses that seek to incorporate their religious principles in and through their expressive activity. When public accommodations laws, like Lexington-Fayette Urban County's Ordinance, are applied to the expression of businesses, religious liberty and freedom of speech are threatened. CatholicVote,

therefore, seeks to participate in this case to support the right of all citizens to earn their living in a manner that is consistent with their religious faith.

In the accompanying amicus brief, CatholicVote explains that the United States Supreme Court's unanimous ruling in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), controls this case and requires a ruling in favor of Appellee Hands On Originals. CatholicVote also explains why a primary case that Appellant Lexington-Fayette Urban County Human Rights Commission relies upon—*Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006)—is readily distinguishable and does not control the outcome here. Because a proper understanding of these U.S. Supreme Court cases is central to this Court's First Amendment analysis in this case, CatholicVote's amicus brief will aid this Court in resolving the important legal issues presented.

For the foregoing reasons, including the absence of any prejudice to Appellant, CatholicVote respectfully seeks leave of the Court to file the accompanying amicus brief.

Respectfully submitted,

Brian Privett
Brian Privett Law Offices
P.O. Box 736
Paris, KY 40361
(859) 435-0068

Scott Gaylord*
Professor of Law
Elon University School of Law
201 N. Greene Street
Greensboro, NC 27401
(336) 279-9331
**Pro Hac Vice* motion forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2018, true and correct copies of this Motion for Leave to File 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.

Attorney for Movant

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LEXINGTON-FAYETTE URBAN COUNTY HUMAN RIGHTS CAMPAIGN — APPELLANT

V.

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HANDS-ON ORIGINALS, INC. — APPELLEE

Brief of Amicus Curiae CatholicVote.org in Support of Appellee

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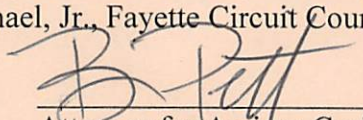

Attorney for Amicus Curiae
Brian Privett
Brian Privett Law Offices
P.O. Box 736
Paris, KY 40361
(859) 435-0068

Scott Gaylord*
Professor of Law
Elon University School of Law
201 N. Greene Street
Greensboro, NC 27401
(336) 279-9331
**Pro Hac Vice* motion forthcoming

** Counsel would like to thank McKenzie Canty, Anthony DeLucia, and Sarah Trombley, Elon University School of Law students who worked on this brief.

TABLE OF POINTS AND AUTHORITIES

INTEREST OF THE AMICUS CURIAE

CatholicVote.org ("CatholicVote") is a nonpartisan voter education program devoted to building a Culture of Life. It seeks to serve our country by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. Given its educational mission and focus on the dignity of the person, CatholicVote is deeply concerned about the First Amendment issues implicated by *Lexington-Fayette Urban County Human Rights Campaign v. Hands On Originals, Inc.* as well as the effect of public accommodations laws on businesses that seek to incorporate their religious principles in and through their expressive activity. When public accommodations laws, like Lexington-Fayette Urban County's Ordinance 201-99, § 2-33 (the "Ordinance"), are applied to the expression of businesses, religious liberty and freedom of speech are threatened. CatholicVote, therefore, comes forward to support the right of all citizens to earn their living in a manner that is consistent with their religious faith.

ARGUMENT

This case requires the Court to consider the intersection of public accommodations laws and the broad protection afforded speakers under the First Amendment. *See New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964) (stating that the First Amendment reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). As the scope of public accommodations laws has grown—in terms of both the types of entities covered and the number of groups protected—the possibility for conflict with First Amendment speech rights has increased. This case is a prime example. The Lexington Fayette Urban County Human Rights Commission (the "Commission") denied that the First Amendment protects businesses,

such as Hands On Originals ("HOO"), from having to create expression that contradicts HOO's sincerely held religious beliefs.

The Commission was wrong for two distinct reasons. First, while *Hurley* acknowledges that public accommodations laws generally are constitutional when applied to a business's conduct, it also holds that antidiscrimination laws must yield to the First Amendment when "the sponsors' speech itself [is taken] to be the public accommodation." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). When the Commission applied the Ordinance to HOO's expression, it violated the "fundamental rule" under the First Amendment that "a speaker has the autonomy to choose the content of his own message" and the right "to shape its expression by speaking on one subject while remaining silent on another." *Hurley*, 515 U.S. at 573-74. And this rule safeguards individuals as well as for-profit businesses. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 341 (2010) ("The Court has recognized that First Amendment protection extends to corporations.").

The Commission's order required HOO either to convey a message with which it disagrees (by creating shirts promoting the Lexington Pride Festival) or to remain silent and lose the ability to create and disseminate only its desired messages. Under the order, any group protected from discrimination under the Ordinance could claim the right to have HOO create t-shirts with any message. But putting businesses that engage in expression to this choice—create a government-mandated message or stop creating expression—violates the freedom of thought and mind that the First Amendment was meant to protect. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *West Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943)) ("The right to speak and the right

to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"). That is, the Commission's order contravenes "the usual rule that governmental bodies may not prescribe the form or content of individual expression," *Cohen v. California*, 403 U.S. 15, 24 (1971), even when others might view "those choices of content" as "misguided, or even hurtful." *Hurley*, 515 U.S. at 574.

The Court's expressive association cases confirm that public accommodations laws cannot be applied if they would "interfere with the [speaker's] choice not to propound a point of view contrary to its beliefs." *Boy Scouts of America v. Dale*, 530 U.S. 640, 654 (2000). When applying antidiscrimination laws to expressive associations or to businesses that engage in expression, the government "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* at 661 (quoting *Hurley*, 515 U.S. at 579). And, as *Wooley* instructs, this is true even if the message is initiated by someone other than the business creating the expression. *See Wooley*, 430 U.S. at 715 (holding that the government cannot compel speakers "to foster ... an idea they find morally objectionable").

Second, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) does not change the First Amendment analysis. The law schools in *Rumsfeld*, unlike HOO here, "[we]re not speaking." 547 U.S. 47, 64 (2006). Consequently, *Rumsfeld* is inapposite because the Solomon Amendment compelled conduct, not speech. Furthermore, *Rumsfeld*'s statement that a viewer "can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy," *id.* at 65, does not articulate a new First Amendment

principle (that compliance with a general law mandating speech does not trench on a speaker's First Amendment rights because an observer would attribute the speech to the government). Such a principle is inconsistent with *Barnette*, *Wooley*, *Pacific Gas*, *Riley*, and *Tornillo* and violates the "fundamental rule" that "a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573.

I. The Supreme Court's compelled speech and expressive association cases prohibit the application of public accommodations laws in a way that interferes with a business's expression.

Although the First Amendment states only that "Congress shall make no law ... abridging the freedom of speech," U.S. CONST., Amend. 1, the Court has long held that it also prevents the government from compelling speech: "the right of freedom of thought protected by the First Amendment against state action, includes both the right to speak freely and the right to refrain from speaking." *Wooley*, 430 U.S. at 714. Compelled expression "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Barnette*, 319 U.S. at 642. Consequently, "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." *Id.*

The First Amendment protects expression in all of its varied forms—books, newspapers, photographs, t-shirts, video games, paintings, music, and more. *Hurley*, 515 U.S. at 569 ("[T]he Constitution looks beyond written or spoken words as mediums of expression."); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) (holding that tattooing is fully protected because "a form of speech does not lose First Amendment protection based on the kind of surface it is applied to"). And this includes

expression that businesses create and sell to the public. *United States v. Stevens*, 559 U.S. 460, 464, 481 (2010) (striking down a federal statute that "criminalize[d] the commercial creation, sale, or possession of certain depictions of animal cruelty," which depictions included videos and photographs in magazines); *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 790 (2011) (confirming "that video games qualify for First Amendment protection").

T-shirt screening falls comfortably within the Court's expansive First Amendment protection. HOO can create an almost infinite number of messages, designs, and symbols, and such expression—whether ideological or factual—is protected under the First Amendment. *See Wooley*, 430 U.S. at 715 (concluding that New Hampshire could not force the Maynards to carry the State's "ideological message"); *Riley v. Nat'l Fed. of the Blind of North Carolina, Inc.*, 487 U.S. 781, 782 (1988) (confirming that "compelled statements of 'fact'" impermissibly "burden[] protected speech"). Through its proposed shirt design, the Gay and Lesbian Services Organization ("GLSO") sought to promote the Pride Festival and possibly the "view that people of [differing] sexual orientations have as much claim to unqualified social acceptance as heterosexuals." *Hurley*, 515 U.S. at 574. Like the parade organizers in *Hurley*, HOO "may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing" not to create t-shirts for the festival. *Id.* at 574-75. "[W]hatever the reason," though, under the Court's compelled speech and expressive association cases "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.

A. Requiring HOO to create t-shirts promoting a message that conflicts with its sincerely held religious beliefs violates the fundamental rule in *Hurley* that a speaker has the autonomy to control the content of its own message.

As *Hurley* notes, public accommodations laws "do not, as a general matter, violate the First or Fourteenth Amendments" because they typically focus "on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the prescribed grounds." *Id.* at 572. But *Hurley* also makes clear that when these laws are "applied in a peculiar way"—*i.e.*, when they "target speech" or "discriminate on the basis of its content"—antidiscrimination laws have "the effect of declaring the sponsors' speech itself to be the public accommodation." *Id.* at 572-73. Treating speech as the public accommodation, though, violates a speaker's right under the First Amendment "to choose the content of his own message." *Id.* at 573.

In *Hurley*, the disagreement between GLIB and the parade organizers did not involve "the participation of openly gay, lesbian, or bisexual individuals in various units in the parade." *Id.* at 572. No member of GLIB alleged that they were excluded because of their LGBT identity from marching as part of an approved parade group, and the organizers disclaimed any such intent to exclude. *Id.* The problem in *Hurley* arose only when GLIB sought to participate in the parade organizers' speech activity by marching in the parade under its own banner. *Id.* Applying Massachusetts antidiscrimination law to the selection of participants forced the organizers "to alter the expressive content of their parade" and transferred authority over the message conveyed to "all those protected by the law who wished to join in with some expressive demonstration of their own." *Id.* at 573.

Similarly, HOO did not refuse service to an individual or a group based on their sexual orientation or gender identity. *Lexington Fayette Urban County Human Rights*

Comm'n v. Hands On Originals, Inc., 2017 WL 2211381 at *6 (Ky. Ct. App. 2017) In fact, when asked to create a t-shirt for GLSO, Mr. Adamson (1) did not know (or inquire about) the sexual orientation or gender identity of Don Lowe and (2) was unaware that GLSO was an organization with ties to the LGBT community. *Id.* at 2, 6. Rather, Mr. Adamson declined to create the t-shirt for GSLO because the proposed message conflicted with his Christian beliefs. *Id.* at *2. Consequently, in requiring HOO to create the shirts, the Commission did the same thing that the lower court did in *Hurley*—treated HOO's expression as the public accommodation. Specifically, the Commission applied the Ordinance to HOO's "speech itself," thereby violating the basic First Amendment principle that the government cannot control "the choice of a speaker not to propound a particular point of view." *Hurley*, 515 U.S. at 573.

Given that "*all* speech inherently involves choices of what to say and what to leave unsaid," *Hurley*'s holding is not restricted to parades. *Pacific Gas and Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion). Rather, the First Amendment shelters all forms of expression, including "[c]rudely violent video games, tawdry TV shows, and cheap novels and magazines" that offer "'nothing of any possible value to society.'" *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 796 n.4 (2010) (citation omitted). Consequently, t-shirts with custom designs and patterns are safeguarded by the First Amendment just as much as photographs, music, movies, paintings, banners, books, and advertisements. *See, e.g., Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (photographs); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music); *Shad v. Mt. Ephraim*, 452 U.S. 61, 66 (1981) (dance); *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501-02 (1952) (movies); *Hurley*, 515 U.S. at 568 (parades).

Moreover, the use of another's design does not cause the business creating the expression to forfeit its First Amendment protection: "Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication." *Hurley*, 515 U.S. at 570. *See also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (stating that newspaper content is protected speech despite the fact that newspapers frequently compile the speech of others); *New York Times Co.*, 376 U.S. at 270 (recognizing that newspapers receive First Amendment protection for advertisements created by customers); *Anderson*, 621 F.3d at 1062 (protecting tattoo artists under the First Amendment even when the customer provides the design); *Coleman v. City of Mesa*, 284 P.3d 863, 871 (Ariz. 2012) (concluding that the fact that "a tattoo artist may use a standard design or message . . . does not make the resulting tattoo any less expressive."). The words, pictures, and symbols on custom-made t-shirts are paradigmatic forms of expression, and "a form of speech does not lose its First Amendment protection based on the kind of surface it is applied to." *Anderson*, 621 F.3d at 1061.

If adopted, the Commission's order would empower local governments to "compel affirmance of a belief with which the speaker disagrees" whenever the speaker is a public accommodation. *Hurley*, 515 U.S. at 573. A Christian t-shirt screener could be required to create a t-shirt for a gay pride festival, a Jewish choreographer could have to stage a dramatic Easter performance, a Catholic singer could be compelled to perform at a marriage of two divorcees, and a Muslim who operates an advertising agency could be required to create a campaign for a liquor company. Local governments also would be able to dictate the content of expressive works by writers, painters, musicians, and

photographers. Yet requiring any of these businesses to convey messages with which they disagree "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Barnette* 319 U.S. at 642. Thus, this Court should affirm the Court of Appeals.

B. The Court's compelled speech and expressive association cases prohibit the government from interfering with a speaker's message or forcing the speaker to foster or promote the message of others.

The Court's expressive association cases confirm that the Ordinance must give way to the First Amendment rights of speakers when the two conflict. In *Hurley*, the unanimous Court contrasted the application of Massachusetts's public accommodations law in the parade context with the application of a New York antidiscrimination statute to an expressive association. *See New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988). Although the Court ultimately determined that "the expressive associational character of a dining club . . . was sufficiently attenuated to permit application of the law," the Court expressly stated that the club retained the right to exclude "those whose views were at odds with positions espoused by the general club membership." *Hurley*, 515 U.S. at 580. The parade organizers in *Hurley* received the benefit of this rule because the forced inclusion of GLIB *did* interfere with the parade organizers' chosen message. Even assuming the parade was a public accommodation, "GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 580-81.

Connecting the Supreme Court's compelled speech and expressive association cases is appropriate, therefore, because *Hurley* and *Dale* adopt the same First Amendment

principle: "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a different one, however enlightened either purpose may strike the government." *Dale*, 530 U.S. at 661 (quoting *Hurley*, 515 U.S. at 579). Under both lines of cases, a speaker (whether an expressive association or a public accommodation engaged in expression) retains "the right to speak freely and the right to refrain from speaking at all," *Wooley*, 430 U.S. at 714, without governmental "interference with a speaker's desired message." *Rumsfeld*, 547 U.S. at 64.

Just as speakers have the right to speak and the complementary right not to speak, the "[f]reedom of association ... plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). When the compelled inclusion of a member "will impede the organization's ability to engage in these protected activities or to disseminate its preferred views," *id.* at 627, the expressive association can invoke the protection of the First Amendment. In *Roberts*, applying the Minnesota public accommodations law to require the Jaycees to accept women members did not implicate the First Amendment because the Jaycees "failed to demonstrate that the Ordinance imposes any serious burdens on the male members' freedom of expressive association." *Id.* at 626. *See also Dale*, 530 U.S. at 657 ("But in [*Roberts*] we went on to conclude that the enforcement of [public accommodations] statutes would not materially interfere with the ideas that the organization sought to express.").

Unlike the antidiscrimination law in *Roberts*, New Jersey's public accommodations law did violate the Boy Scouts' right of expressive association. In reaching this conclusion, the Court relied heavily on *Hurley*:

> As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.

530 U.S. at 654. Furthermore, *Dale* recognized that an association does not have to associate "for the 'purpose' of disseminating a certain message" to qualify for First Amendment protection; it "must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Id.* at 655. Under *Dale*, First Amendment protection is triggered whenever a public accommodations law "interfere[s] with" or "impair[s]" the chosen message of an expressive association or business.

If a business provides non-expressive goods or services to the public (such as the sale of pre-printed t-shirts on racks at Walmart), the First Amendment may not apply because compelled access would not interfere with any message the business sought to communicate. However, when a public accommodations law requires a business "to propound a particular point of view," the First Amendment "shield[s]" the speaker's "choices of content." *Hurley*, 515 U.S. at 574. Under *Hurley* and *Dale*, if a customer seeks to express a view that "trespass[es] on the [business's] message," that customer "could nonetheless be refused" service "just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 580-81.

Moreover, even if one assumes, *arguendo*, that the message on a custom-made t-shirt is partly (or even wholly) the speech of GLSO, HOO still retains the protection of the First Amendment. Under *Wooley*, a speaker has the "right . . . to hold a point of view different from the majority and to refuse to foster . . . an idea [it] find[s] morally

objectionable." 430 U.S. at 715. In *Wooley*, there was no dispute that "Live Free or Die" was the message of the State of New Hampshire, but the Court held that the State could not force the Maynards "to be an instrument for fostering public adherence to an ideological point of view [they] find[] unacceptable." *Id.* Likewise, *Pacific Gas* recognized that a speaker has the right not to carry someone else's speech even when others know that the message is not that of the speaker. TURN, the organization that was granted access to the unused space in Pacific Gas's envelopes, was required to provide a disclaimer stating that it was expressing only its own views. The plurality still found a First Amendment violation because "[t]he disclaimer serves only to avoid giving readers the mistaken impression that TURN's words are really those of appellant." *Pacific Gas*, 475 U.S. at 15 n.11 (plurality opinion). The disclaimer did "nothing to reduce the risk that [Pacific Gas] will be forced to respond when there is strong disagreement with the substance of TURN's message." *Id.*

II. *Rumsfeld* does not insulate public accommodations laws from First Amendment challenge.

In *Rumsfeld*, the Court applied the same "fundamental rule" set forth in *Hurley*—that the First Amendment is violated when "the complaining speaker's own message [is] affected by the speech it [is] forced to accommodate." *Rumsfeld*, 547 U.S. at 63. The critical difference between this case and *Rumsfeld* is that the law schools in *Rumsfeld* were "not speaking when they host[ed] interviews and recruiting receptions." *Id.* at 64. The Solomon Amendment "neither limit[ed] what law schools may say nor require[d] them to say anything"; rather, "[i]t affect[ed] what law schools must *do*—afford equal access to military recruiters." *Id.* at 60. As a result, because the schools were not engaged in speech activity, accommodating recruiters (including military recruiters) could not

affect or interfere with the law schools' own message. To the extent the law schools were required to engage in any expression—sending out emails or posting notices on bulletin boards—such speech was "plainly incidental to the Solomon Amendment's regulation of conduct." *Id.* at 62.

In contrast, the Commission's order compelled speech, namely the creation of a specific message on a shirt. *See Joseph Burstyn, Inc.*, 343 U.S. at 503 (confirming that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" with the medium of communication used). There are not two separate things—the conduct (allowing recruiters on campus) and the incidental speech (making students aware of the recruiters' presence on campus)—there is only the t-shirt, which is HOO's expressive creation. As a result, the Ordinance mandates specific speech—a distinctive saying on a particular t-shirt—not simply expression that is incidental to some independent conduct requirement.

By requiring HOO to either create expression with which it disagrees or remain silent and forego creating speech that promotes views with which it agrees, the Commission violated HOO's right to "choose the content of [its] own message." *Hurley*, 515 U.S. at 573. That is, the Commission forced HOO to make an unconstitutional Hobson's choice—either acquiesce in a speech compulsion (by carrying the government-mandated message) or submit to a speech restriction (by ceasing to print shirts to avoid being punished under the Ordinance). At the same time, businesses that agree with the views promoted by groups like GLSO remain free to express their opinions without governmental interference. In this way, when applied to the expression of businesses, antidiscrimination laws favor "certain preferred speakers . . . taking the right to speak

from some and giving it to others." *Citizens United*, 558 U.S. at 340. In so doing, "the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Id.* at 340-41. Under the Ordinance, HOO loses its right to promote its religious beliefs through its business and, instead, must create government-mandated shirts (promoting the festival and LGBT pride) or get out of the t-shirt screening business altogether.

Moreover, one cannot cure the constitutional violation by arguing that a third party would know that the Ordinance forced HOO to make the shirt. If a reasonable observer understands that compliance with a generally applicable law does not reflect the speaker's own views, then *Wooley*, *Barnette*, *Riley*, *Pacific Gas*, and *Tornillo* were all decided wrongly. Observers would have known that New Hampshire forced the Maynards to be a "mobile billboard" and would have understood that displaying "Live Free or Die" was not a reflection of the Maynards' beliefs. *Wooley*, 430 U.S. at 715. The same holds true for the school children in *Barnette*, the fundraisers in *Riley*, the utility company in *Pacific Gas*, and even the newspaper in *Tornillo*.

The problem, of course, is that the Court struck down the government regulations in each of these cases because the laws *did* compel speech. The First Amendment violation "resulted from interference with a speaker's desired message," *Rumsfeld*, 547 U.S. at 64, not an observer's failing to know that a general law required the expressive activity. "'[T]he fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message,'" would be eviscerated if a reasonable observer's knowledge that a public accommodations law mandated the expression permitted the government to wrest control over the content of a message from

the speaker. *Id.* (quoting *Hurley*, 515 U.S. at 573). The government could force businesses to speak the government's desired message or to stop conveying a disfavored message simply by passing a public accommodations law. But, as *Dale* instructs, the First Amendment protects the "'freedom to think as you will and to speak as you think'" and "eschew[s] silence coerced by law—the argument of force in its worst form." *Dale*, 530 U.S. at 660-61 (citation omitted).

CONCLUSION

As the Supreme Court acknowledged in *Cohen*, the "constitutional right of free expression is powerful medicine" in our diverse society. 403 U.S. at 24. Recognizing that the First Amendment protects the expressive activity of businesses safeguards the right of all speakers—whether individuals or businesses—"to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley*, 430 U.S. at 715. When the government applies its public accommodations law to force HOO or any other business to create expression promoting or supporting a cause, issue, or event with which the business disagrees—through a t-shirt, banner, article, or any other type of speech—it infringes on the "individual freedom of mind" that the First Amendment was meant to guard, *Barnette*, 319 U.S. at 637, and fails to "comport with the premise of individual dignity and choice upon which our political system rests." *Cohen*, 403 U.S. at 24. This Court, therefore, should affirm the Kentucky Court of Appeals.

Attorney for Amicus Curiae