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

LEXINGTON-FAYETTE URBAN COUNTY HUMAN RIGHTS COMMISSION — APPELLANT

vs.

HANDS ON ORIGINALS, INC. — APPELLEE

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

BRIEF OF AMICUS CURIAE SHERIF GIRGIS IN SUPPORT OF APPELLEE

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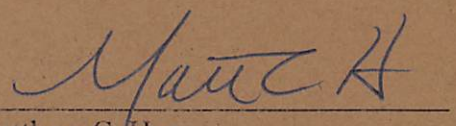
CERTIFICATE REQUIRED BY CR 76.12(6)

I hereby certify that on this the 5th day of February, 2018, a true and correct copy of the foregoing was filed with the Clerk Supreme Court of Kentucky, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, KY 40601-3415 (original and ten (10) copies), by express mail, and served on the following by U.S. Mail and/or electronic mail to:, on the Honorable James D. Ishmael, Jr., Fayette Circuit Court Judge, 120 North Limestone, Lexington, KY 40507; Edward E. Dove, 201 W. Short St., Ste. 300, Lexington, KY 40507; Bryan H. Beauman, Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Ste. 1500, Lexington, KY 40507.



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STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

Appellant Lexington-Fayette Urban County Human Rights Commission claims that the government has a compelling interest in eliminating dignitary harms that might result when someone declines to speak as requested by another. Appellant insists that this explains why Hands On Originals and its owner Blaine Adamson should be coerced even if their claims draw strict scrutiny, and even if they have caused no material harm.

But in several cases, the U.S. Supreme Court has held that the government has no legitimate interest—much less a compelling one—in blunting negative reactions to moral or political ideas that authorities find offensive or even demeaning to minorities. To allow the government to assert this justification for coercing speech would cut against decades of First Amendment jurisprudence. It would imperil a wide range of civil liberties. And it would be self-defeating. After all, a ruling against Adamson would tell him—with the authority of this Court—that choices central to *his* identity are wrong, indeed bigoted.

Context matters under U.S. Supreme Court precedent. Here it reveals a difference in kind between the social meaning of Adamson's practice of printing for all customers but declining to print certain messages, and the dignitary harms rightly disrupted by antidiscrimination laws (against, say, Jim Crow). Only the latter involve cultural assumptions that hamper a group's social, political, or economic mobility by disparaging the group's competence, character, interests, or proper place in society. *See infra* Part III.

But even if Adamson's decision conveyed truly demeaning ideas, that wouldn't establish the constitutionality of compelling his speech in order to contradict the message that his refusal would have sent. In every case where the U.S. Supreme Court has touted the dignitary benefits of antidiscrimination laws, those laws were coercing mere conduct: e.g., a restaurant's "no blacks allowed" policy. States were not applying those laws to

interfere with expression, as Appellant has done here.

In fact, in the two cases where antidiscrimination laws *were* applied to coerce expression, the Court granted defendants' First Amendment claims—over the objection that doing so would reinforce demeaning ideas about LGBT people. *See Boy Scouts v. Dale*, 530 U.S. 640, 659–61 (2000); *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 579 (1995). The Court did so on the ground that governments may not interfere with expression just because they find it harmful or demeaning. *See Hurley*, 515 U.S. at 579 (government may not "interfere with speech" to eradicate "biases" against LGBT people or "promot[e] an approved message or discourag[e] a favored one, however enlightened"); *see also Boy Scouts*, 530 U.S. at 661.

In strictly scrutinizing burdens on Adamson's First Amendment rights, then, this Court should not count as a legitimate public interest the goal of reducing any distress caused by ideas that Appellant deems offensive, harmful, or demeaning. As the Court has held, coercing otherwise protected expression to serve an "interest in protecting . . . dignity" would violate our law's "longstanding refusal to punish speech" on account of its "adverse emotional impact on the audience." *Boos v. Barry*, 485 U.S. 312, 322 (1988) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

ARGUMENT

I. The government may not override constitutional rights in order to shield citizens from the distress of being confronted with moral or political ideas deemed offensive or demeaning.

A. The government has no legitimate interest in reducing negative reactions to ideas it finds demeaning.

Appellant would have this Court conclude that it has a *compelling* interest in reducing citizens' distress at being confronted with moral or political ideas they find

offensive. That holding would require drilling through decades of cases to shatter the "bedrock principle underlying the First Amendment, [which] is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (speech "cannot be restricted simply because it is upsetting or arouses contempt."). Indeed, in a case quite like this one—involving public accommodations protections for LGBT people—the U.S. Supreme Court went so far as to say that "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley*, 515 U.S. at 574.

Nor can states try to separate the offending idea from the reaction it evokes so as to isolate the latter for attack. As the Court held last year, "[g]iving offense *is* a viewpoint." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality) (emphasis added). In other words, "[t]he emotive impact of speech on its audience is not a 'secondary effect' unrelated to the content of the expression itself" but of a piece with it. *Johnson*, 491 U.S. at 412. For this reason, as Justice Kennedy has warned, the government "may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience." *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring). And so our law protects expression of the vilest slurs, even when their delivery at a funeral is calculated to be so "hurtful" that the term "emotional distress" "fails to capture" the "anguish" of a bereaved father subjected to those slurs. *Snyder*, 562 U.S. at 456. It is hard to imagine a more direct repudiation of the idea that government can use coercion to reduce the anguish of encountering offensive or demeaning ideas.

Finally, it is no answer to say that some ideas do not merely cause anguish but

impugn the dignity of others. The Court has dispatched that argument directly: allowing government to coercively pursue an "interest in protecting the dignity" of those on the receiving end of otherwise protected expression would violate our "longstanding refusal to punish speech" on account of its "adverse emotional impact on the audience." *Boos*, 485 U.S. at 322 (quoting *Hustler Magazine*, 485 U.S. at 55). That is why it "strikes at the heart of the First Amendment" to use regulations to "encourag[e] racial tolerance" or prevent any group—including long-burdened minorities—from being "bombarded with demeaning messages." *Matal*, 137 S. Ct. at 1764 (plurality). Such goals cannot count as "substantial" interests, let alone compelling ones. *Id.*

In short, the Constitution bars governments from punishing "expressive activity" to blunt audience reactions to "ideas" it finds offensive or demeaning to minorities. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 385 (1992). Thus, pressed to justify its coercion of Adamson, Appellant may not appeal to distress caused by ideas his conduct might convey, even if Appellant deems those ideas insulting to LGBT people's dignity: "[D]isplaying the [Appellant's] special hostility towards the particular biases thus singled out . . . . is precisely what the First Amendment forbids." *Id.* at 396.

It is essential that society defend the equal dignity of all, sexual minorities included. The government remains free to teach that this duty requires private business owners to print speech that promotes gay advocacy events. That "officials may foster [this view] by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." *Johnson*, 491 U.S. at 418. The way for Appellant to accomplish its goal "is not to punish those who feel differently about these matters. It is to persuade them that

they are wrong." *Id.* at 419.

B. Allowing the government to curtail First Amendment rights in order to reduce distressed reactions to offensive ideas would impair civil liberties while making no meaningful difference to whether people might experience such distress.

In a pluralistic society, most religious activity and a great deal of expression will convey ideas offensive to some. Curtailing our liberties when they confront others with distressing ideas would require trimming the whole field of religious liberty and pure speech, not just under specific facts at issue here. On the other hand, trying to reduce offensive ideas by coercing Adamson to print but compelling no *other* First Amendment conduct would make almost no net difference to the amount of ideological strife in society, ensuring that burdens on printers like Adamson were entirely in vain.

Various spoken messages can inflict the kind of distress that Appellant would coerce Adamson to prevent. Yet our nation has a "profound . . . commitment" to protecting it. *Snyder*, 562 U.S. at 452. How can the government have a profound interest in allowing distress when it flows from *spoken* words, and a *compelling* interest in *quashing* distress when it flows from a defendant's choice of which words to *print*?

For example, we know people have a constitutional right to tell LGBT citizens that God hates them and sent the 9/11 attacks and IED explosions in Iraq to punish the Nation on their account. *See id.* at 448. And we know they are free to attend the Pride Festival and "launch[] a malevolent verbal attack" against same-sex relationships. *Id.* at 463 (Alito, J., dissenting). But Appellant would claim a compelling interest in preventing the particular margin of distress caused by a printer's decision not to print a shirt.

It isn't only extremist protesters and the occasional conscientious printer that might see their rights eroded if governments can use coercion to reduce the anguish of

encountering offensive ideas. In a diverse society, religious liberty, too, will always subject others to ideas they might find offensive. Religious freedom includes nothing if not the rights to worship, proselytize, and convert—forms of conduct (and speech) that can express the conviction that outsiders are wrong. In a world full of conflicting faiths and denominations, religious freedom is the *ultimate* source of distressing contact with offensive ideas. Given that we never treat offensiveness or emotional distress as reasons to override core religious activity or spoken messages, allowing these very same factors to override Adamson's freedom would be both arbitrary and pointless.

Of course, Appellant would never ask this Court to whittle away at rights to worship or seek converts, or picket or protest, whenever their exercise would imply that others are sinning or immoral. Since this Court certainly *won't* suppress these far more pervasive exercises of liberty, how much good would it do to stamp out only the negative reactions created by conscientious decisions not to print certain messages? The reduction in public rancor would be slight, while the cost for each person coerced against conscience would be grave. So would damage to the integrity of the "bedrock principle" of First Amendment jurisprudence that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson,* 491 U.S. at 414.

C. The goal of avoiding distressing ideas for the sake of dignity cuts both ways in this case.

Here both sides could claim with equal force that a decision against them would stigmatize them. Indeed, the U.S. Supreme Court has expressly affirmed that dignity is at stake in religious belief and self-expression, such that guarantees of free expression honor the "individual dignity . . . upon which our political system rests." *Cohen v. California,*

403 U.S. 15, 24 (1971). Religious believers' freedom to live by their convictions is "essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts." *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). That is no less true when believers step into the marketplace or the public square. *See id.* (discussing the right "to establish one's religious (or nonreligious) self-definition *in the political, civic, and economic life of our larger community*") (emphasis added).

Grant, then, that declining to print a shirt promoting a gay advocacy event conveys to LGBT citizens that intimacies they regard as central to their identity are wrong. What about denying Adamson's claims? Won't that tell him—and *all* traditional Muslims, Orthodox Jews, and Christians—that acting on beliefs central to his identity is wrong, benighted, even bigoted? In most cases, any side might feel stigmatized by rival decisions or policies. That favors freedom over coercion on such matters.

II. The U.S. Supreme Court has noted the intangible dignitary benefits of eliminating discriminatory *conduct*, but it has never approved of coercing *expression*; twice it has done just the opposite.

In the absence of material harms, Appellant tries to justify coercing Adamson by appeal to what it considers the harmful social meaning of his conscientious decision. Appellant sees in Adamson's decision the kind of dignitary harm fought by the Civil Rights Act of 1964, which sought to "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (citation omitted).

But in every case where the U.S. Supreme Court has noted antidiscrimination laws' dignitary benefits, those laws were coercing mere *conduct*: for example, restaurants' "no blacks allowed" policy, *id.*; or a civic organization's "no women

allowed" policy, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). *See also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 141–42 (1994) (lamenting the dignitary harms of excluding women from juries). After all, as the Court noted in *Hurley*, antidiscrimination laws generally have not "target[ed] speech or discriminate[d] on the basis of its content." 515 U.S. at 572.

In other words, none of the Court's antidiscrimination cases has involved the coercion or compulsion of otherwise protected *speech or expression*. None has involved government efforts to prohibit or compel expression in order to muffle or displace the speaker's messages, simply on the ground that they're offensive or even bigoted.

To be sure, the Jaycees in *Roberts* did claim that forcing them to accept women would curtail their freedom of expressive association. However, the Court did *not* concede that point and then find the burden on expressive association justified anyway (as such burdens can be, 468 U.S. at 623) by a compelling interest (e.g., fighting misogyny). Rather, the Court held that the Jaycees hadn't shown that the law imposed "any serious burden[] on [their] freedom of expressive association" in the first place. *Id.* at 626. For that reason, *Jaycees* offers no precedent for thinking that a genuine burden on Adamson's free speech rights could be justified by an interest in stopping the dignitary harm that Appellant asserts.

Indeed, in the two cases that *did* involve expressive burdens designed to achieve the dignitary benefits of fighting sexual-orientation discrimination, the Court rejected this rationale as illegitimate, and found First Amendment violations. In both cases, the Court noted that ruling otherwise would contradict its case law against punishing offensive messages *because of their offensiveness*. *See Boy Scouts*, 530 U.S. at 657–59 (forbidding

New Jersey to suppress expressive activity that conveys "oppos[ition]" to "homosexual conduct"); *Hurley*, 515 U.S. at 578–79 (holding that expression may not be coerced under antidiscrimination laws in order to reduce "biases" against LGBT people).

In short, the U.S. Supreme Court has never endorsed the use of antidiscrimination law to *coerce expression so as to silence or contradict a speaker's message, simply on the ground that it's bigoted.* Indeed, the Court has done just the opposite in two cases.

III. Even if the government may sometimes compel speech to fight dignitary harms, there is a *difference in kind* between the social meaning of Adamson's conscientious decision and the social harms addressed in other cases.

Suppose that despite the cases reviewed in Parts I and II, governments may indeed fight dignitary harm by compelling expression. Suppose they may fight Jim Crow-style "deprivation[s] of personal dignity" by compelling expression like the printing of words and symbols. Even then, the U.S. Supreme Court's cases on dignitary harm—read in light of its cases against punishing offensive speech—would show that Appellant may not compel Adamson to create speech. For doing so could not offer the *kind* of social effects at issue in cases like *Heart of Atlanta Motel.*

That case was about Jim Crow, which was about avoiding contact on socially equal terms with African Americans, by refusing them any service. This case is about declining a request to print a particular message—regardless of who requests it—while avoiding contact with no one. It is not about refusals to serve sexual minorities, but about refusals to print messages and promote events at odds with Adamson's faith. His choice may convey ideas that Appellant finds offensive, but it does not perpetuate the kind of assumptions that might impede social, economic, or political mobility. Affirming Adamson's expressive freedom here would not inflict the dignitary harm rightly targeted by the Civil Rights Act and decried in a number of the U.S. Supreme Court's opinions.

The point is not simply that Adamson's decision turned on conduct rather than status. The divide between his decision and Jim Crow-era policies is different and far deeper. What sets Jim Crow-style discrimination apart is that it reflects and solidifies cultural assumptions that lock a group out of markets, income brackets, social tiers, and political power. That sort of discrimination always rests on unfair assumptions about a group's basic abilities, interests, character, or proper place in society. That is why bans on such discrimination naturally disrupt these humiliating assumptions—which then reduces the impulse to discriminate, and so on.

Put simply, antidiscrimination laws promote dignity by eroding those humiliating assumptions that also debilitate a group socially, politically, and economically. The dignitary harms that the government may punish do *not* span the full range of demeaning ideas, *see supra* I.A., but only *cultural assumptions that* "reflect and reinforce" *barriers to a group's social, economic, and political mobility. J.E.B.*, 511 U.S. at 141.

Those harms were surely at stake in Jim Crow-era actions and policies, which assumed that African Americans were incompetent, unreliable, and vicious. *See generally* 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014). But above all, Jim Crow was openly premised on the cultural assumption that it was improper for African Americans to mingle with whites on equal terms. That assumption didn't simply lead to other barriers to social mobility; it *was* such a barrier.

No such dignitary harms are in the offing here because Adamson's convictions do not reinforce or rest on *any* assumptions about LGBT people's abilities, interests, character, or proper place in society. That is confirmed by context. Adamson otherwise serves LGBT patrons and would have printed other materials for the LGBT group that

requested the shirts. Indeed, he has even printed materials for a lesbian singer who performed at the very Pride Festival at issue in this case. This context proves that what motivates Adamson is his conviction concerning the message that he is asked to print.

Jim Crow could not be in sharper contrast—and not simply because Adamson's convictions are rooted in sincere faith. It doesn't matter if some had sincere religious grounds for thinking that, say, African Americans shouldn't marry whites. The point is that this idea itself—whatever its roots—*just is* one of the social norms that impedes mobility: it impedes a group's progress in every sphere, by holding that the group ought not to mix with others on equal terms. But whatever the status of Adamson's religious views, they don't give effect to—or rest on—the idea that it's improper for LGBT people to mingle on the same plane with others.

Thus we come to a difference in kind between the humiliation of being denied a seat at the table of public life and the distress of sitting next to people who oppose conduct you prize. The first, rooted in harmful assumptions and ramifying into wider exclusions, must be avoided. The second, stemming from conflicting consciences, is unavoidable in a pluralistic society that cherishes First Amendment values. Somewhere behind the first, one will find unfair ideas about a group's basic competence, character or place in society. Behind the second are—at worst—false and offensive moral convictions that needn't rest on unfair ideas about competence or character. Whatever material harms we fight, the law brooks no freestanding right not to be offended. We should not change course now.

IV. Case law confirms that the kind of dignitary harms that the U.S. Supreme Court has found to satisfy strict scrutiny are not at issue here.

The U.S. Supreme Court's antidiscrimination cases—from *Heart of Atlanta* to *Jaycees*—show that the dignitary harms rightly fought by legal coercion are those cultural norms that naturally flow from, and then fortify, *barriers to social, economic, and political mobility*. This specific reading of "dignitary" harm is needed for coherence. It reconciles the Court's approval of laws fighting dignitary harm with its rejection of laws that merely fight the pain of being confronted with offensive or demeaning ideas.

To be precise, the case law shows that when embracing the intangible, dignitary benefits of antidiscrimination laws, the Court has been referring to the disruption of cultural assumptions that (i) deprive a group of social, economic, or political mobility, by (ii) perpetuating unfair ideas about the group's abilities, interests, character, or proper place in society. Thus, in *Jaycees*, 468 U.S. at 625, when the Court spoke of harms to women's "individual dignity," it referred specifically to discrimination (i) that hampered "wide participation in political, economic, and cultural life" by perpetuating (ii) "archaic and overbroad assumptions" about women's "needs and capacities." *Id.* Indeed, the Court noted with approval the state's action to remove "*barriers to economic advancement and political and social integration* that have historically plagued certain disadvantaged groups . . . ." *Id.* at 626 (emphasis added).

It's easy to see why attacks on a group's basic competence, character, interests, or proper place in society are the cultural assumptions naturally disrupted by antidiscrimination law. These assumptions don't simply offend or provoke; they keep people from climbing socially, economically, and politically. If people think ill of your abilities, character, or worth—if they assume you're incompetent or beneath them

socially—they'll be less likely to hire you, trust you, vote for you, or include you. They'll think it unwise, dangerous, or wrong to mingle with you on equal terms at all. You'll have a hard time exchanging freely, rising professionally, participating politically, or doing anything else that hangs on the cooperation of others. That's why antidiscrimination laws—which seek to remove the "barriers to economic advancement and political and social integration," *Jaycees*, 468 U.S. at 626—will naturally disrupt harmful assumptions about people's abilities, interests, character, and proper social role.

These sorts of assumptions are not at play here. Under First Amendment strict scrutiny, courts must consider the *marginal* harms and benefits of granting or denying a *particular kind* of claim. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). That particularized, contextual inquiry proves that the only effect of imposing a burden on First Amendment rights here is not some material benefit—or even disruption of the kinds of assumptions about minorities that impede mobility—but only a reduction in people's distress at being confronted with offensive ideas. Yet as explained, that is not a permissible public goal, much less a compelling one.

Adamson's business policy is simple: the messages that he prints, he'll print for anyone, but there are some messages—those that conflict with his faith—that he can't print for anyone. He serves LGBT people; all he refuses to do is to print messages that conflict with his beliefs about marriage and sex, no matter who orders them. Thus, the only claim at issue here involves a religious objection to printing a particular message—not to serving a class of people. Affirming that particular claim does not "reflect and reinforce" the kinds of dignitary harms rightly fought by antidiscrimination laws. *J.E.B.* 511 U.S. at 141. Adamson and his business should thus prevail.

Appellant might answer that while it was possible for earlier generations to hold views like Adamson's without animus, it isn't possible for us in the 21st-century, now that same-sex relationships and sexual activity are widely accepted. But the U.S. Supreme Court has held that the growing marginalization of traditional religious views on homosexuality only *strengthens* their claim to First Amendment protection. *See Boy Scouts,* 530 U.S. at 660 ("Indeed, it appears that homosexuality has gained greater societal acceptance . . . . But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views . . . . [T]he fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.").

This leaves only one basis for allowing Appellant to coerce Adamson: that the government finds his convictions offensive or hurtful or biased. But again, our law unambiguously declares that expression "cannot be restricted simply because it is upsetting or arouses contempt . . . . Indeed, 'the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.'" *Snyder*, 562 U.S. at 458 (citations omitted). To justify coercion on the ground that the messages conveyed by Adamson's decision not to print are "too harmful to be tolerated" would be a "startling and dangerous" proposition. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791–92 (2011). Nor could Appellant seek to regulate Adamson's expressive choices *not* as "an end in itself, but [as] a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes." *Hurley*, 515 U.S. at 578–79. *See also Boos*, 485 U.S. at 322 (looking askance at the goal of protecting listeners' "dignity" against hateful messages); *R.A.V.*, 505 U.S. at

396 (pursuing the goal of suppressing "particular biases" in society through coercion "is precisely what the First Amendment forbids").

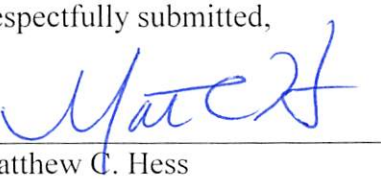
CONCLUSION

Appellant claims that its asserted interest in eliminating dignitary harms outweighs Adamson's First Amendment rights. But the case law is clear: Governments have no legitimate interest in fighting the expression of offensive ideas. *Johnson,* 491 U.S. at 414. They have no legitimate interest in fighting the distress *caused* by those ideas. *Id.* at 412. They even lack the authority to fight ideas the majority finds demeaning or biased toward minority groups. *See Matal*, 137 S. Ct. at 1764 (plurality). They lack that authority even in the context of public accommodations laws, and even when those laws are designed to protect sexual minorities. *See Boy Scouts*, 530 U.S. at 657–58; *Hurley*, 515 U.S. at 572–73.

In short, Appellant's dignitary-harm argument asks this Court to hold that majorities may punish decisions not to speak that they find abhorrent, just because they deem them abhorrent. Against this plea, our First Amendment jurisprudence speaks with one confident voice.

For these reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,



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