ALLIANCE DEFENDING
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May12, 2017

The Hon. Scott S. Harris, Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543-0001

Via U.S. First Class Mail and Email

Re: Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16-111

Dear Mr. Harris:

This letter is to inform the Court of a recent decision by the Kentucky Court of Appeals that is relevant to the petition for writ of certiorari currently pending in this case because it demonstrates the general confusion regarding the law in this area. In *Lexington Fayette Urban County Human Rights Commission v. Hands on Originals, Inc.*, No. 2015-CA-0745-MR (Ky. Ct. App. May 12, 2017), the panel majority held that Blaine Adamson and his t-shirt printing company, Hands on Originals, could not be held liable for sexual orientation discrimination under a local ordinance for declining to print shirts promoting the Lexington Pride Festival for the Gay and Lesbian Services Organization.

Chief Judge Kramer's lead opinion reasons that the service offered by Adamson's business "is the promotion of *messages*." Slip Op. 17. Thus, "[t]he 'conduct' [Adamson] chose not to promote was pure speech." *Id.* Because the local nondiscrimination ordinance prohibited businesses "from engaging in *viewpoint* or *message* censorship," Chief Judge Kramer reasoned that Adamson did not violate it. *Id.* at 18. She indicated, nonetheless, that Adamson's refusal to create speech based on a "disapprov[al] of ... same-sex marriage, would be the legal equivalent of sexual orientation discrimination" and therefore prohibited. *Id.* at 14. Judge Lambert concurred in the result based on the Kentucky Religious Freedom Restoration Statute, Ky. Rev. Stat. 446.350, and this Court's analysis in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Slip. Op. 18-19. Judge Taylor dissented based on his conclusion that Adamson violated the ordinance and his rights to free speech and the free exercise of religion were not relevant after this Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Slip. Op. 23-24.

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Sincerely,

Jeremy D. Tedesco
Counsel for Petitioners

cc: See Attached Service List

RENDERED: MAY 12, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000745-MR

LEXINGTON FAYETTE URBAN COUNTY
HUMAN RIGHTS COMMISSION AND
AARON BAKER FOR GAY AND LESBIAN
SERVICES ORGANIZATION — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 14-CI-04474

HANDS ON ORIGINALS, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND TAYLOR, JUDGES.

KRAMER, CHIEF JUDGE: The Lexington Fayette Urban County Human Rights Commission ("Commission") appeals an order of the Fayette Circuit Court reversing its determination that appellee, Hands On Originals ("HOO"), discriminated against the Gay and Lesbian Services Organization ("GLSO") in

violation of Lexington-Fayette Urban County Government's public accommodation ordinance, Local Ordinance 201-99, Section 2-33 (hereinafter referenced as "Section 2-33" or the "fairness ordinance"), discussed below. The circuit court also determined that if HOO violated the above-stated ordinance, the Commission's application of the ordinance to HOO's conduct, under the circumstances of this case, was unconstitutional. Having carefully reviewed the record and applicable law, we agree HOO did not violate the ordinance and AFFIRM on that basis. Therefore, any discussion of whether an alternative constitutional basis supported the circuit court's judgment is unwarranted.[1]

FACTUAL AND PROCEDURAL HISTORY

The GLSO is a Lexington-based organization that functions as a support network and advocate for gay, lesbian, bisexual, or transgendered individuals. Its membership also includes individuals in married, heterosexual relationships. One such individual, Aaron Baker, functioned as the GLSO's President at all relevant times during this dispute.

HOO is in the business of promoting messages; specifically, it prints customized t-shirts, mugs, pens, and other accessories. Blaine Adamson is one of HOO's owners and manages the business. According to HOO's policy and

[1] It is the long-standing practice of our Courts to refrain from reaching constitutional issues when other, non-constitutional grounds can be relied upon. *See Baker v. Fletcher*, 204 S.W.3d 589, 597–98 (Ky. 2006).

mission statement, which appears on its website, HOO's menu of services is limited by the moral compass of its owners:

> Hands On Originals both employs and conducts business with people of all genders, races, religions, sexual preferences, and national origins. However, due to the promotional nature of our products, it is the prerogative of Hands On Originals to refuse any order that would endorse positions that conflict with the convictions of the ownership.

In this vein, the record provides examples of subject matter HOO has refused to promote because its ownership has deemed it morally objectionable, such as adult entertainment products and establishments. The record also provides examples of images HOO has refused to promote, such as the word "bitches" and depictions of Jesus dressed as a pirate or selling fried chicken.

With that said, the Commission alleged HOO violated the fairness ordinance on March 8, 2012. On that date, Don Lowe, on behalf of the GLSO, telephoned HOO to place an order for t-shirts that would bear a screen-printed design with the words "Lexington Pride Festival 2012," the number "5," and a series of rainbow-colored circles around the "5." The GLSO intended to sell these t-shirts to promote the 2012 Lexington Pride Festival, an event it organized and encouraged everyone to attend. Blaine Adamson, on behalf of HOO, answered the telephone call. What happened next was described later in the following exchange between Adamson and an interviewer from the Commission:

INTERVIEWER: Ok, on or about March 8th when you spoke to Don Lowe of the GLSO, did you attempt to find out what kind of organization the GLSO was during that conversation?

ADAMSON: I do not recall asking that specifically. I recall asking what the process was about. I had somewhat of an idea but I wasn't sure.

INTERVIEWER: So at any point during this conversation did you ask what the GLSO was about?

ADAMSON: I do not recall asking specifically that. I remember, yeah I don't remember asking that.

INTERVIEWER: Ok, so would it be accurate to say that you just asked about the Pride Festival and what exactly did he say?

ADAMSON: I asked him, um, because he had called and left a message. He mentioned something about the Pride Festival and so when I called him, I first asked him was he sure that he had spoke with me because I traditionally don't do quotes or anything and he said he had. So, I just said ok well then I wanted to take care of him and I said what you need and he explained he needed shirts for the Pride Festival and I asked him what exactly is the Pride Festival and he explained to me what it was about.

INTERVIEWER: Did he explain it to you?

ADAMSON: Yes.

INTERVIEWER: What did he say?

ADAMSON: He basically said it was a Pride Festival downtown, um, that it was for the gay and lesbian community. And then he began to tell me because I had asked him what was on the shirt. That was my next

question. And he said Pride Festival and I honestly can't remember what he said after that.

INTERVIEWER: Ok. Once Mr. Lowe explained what the t-shirt was for, what was your response?

ADAMSON: Well I knew that, I knew immediately that he would be upset with me, with what I was about to say. So I said that, I said, "Don, I know that this will upset you, but because of my Christian beliefs, I can't promote that." Then, um, he was upset. And I can't remember what else he had said at that point because we were kind of talking a little bit, back and forth. I was trying to…

INTERVIEWER: Ok.

ADAMSON: And he mentioned something about [inaudible]. He hung the phone up.

INTERVIEWER: Ok, ok. Here is a copy of the t-shirt design. That look about accurate of what you recall?

ADAMSON: I never saw the design but from over the past, I never saw the design before we talked.

INTERVIEWER: Ok you didn't see the actual design before you talked. What about this design do you find offensive? Or what about this picture that you see here, would you find offensive enough not to print?

ADAMSON: Um, the Lexington Pride Festival, the wording.

INTERVIEWER: Ok.

ADAMSON: To me it's promoting a message, um an event that I can't agree with because of my conscience.

INTERVIEWER: Ok. So would you say it's not exactly the design of the shirt that's offensive but rather the

> message that it's portraying and what the GLSO stands for?
>
> ADAMSON: Um, specifically it's the Lexington Pride Festival, the name and that it's advocating pride in being gay and being homosexual and I can't promote that message. It's something that goes against my belief system.
>
> INTERVIEWER: So you feel that you use your own personal religious beliefs to make a decision not to print the t-shirts?
>
> ADAMSON: My own personal religious beliefs? Yes.
>
> INTERVIEWER: Ok.
>
> ADAMSON: Not to promote that message. Correct.

Shortly thereafter Aaron Baker, on behalf of the GLSO, filed a complaint with the Commission alleging HOO had discriminated on the basis of sexual orientation and gender identity in violation of Section 2-33. Based upon what Adamson related to its interviewer, the Commission ultimately agreed. In the relevant part of its order, the Commission explained:

> [HOO] argues that Mr. Adamson's objection to the printing of the t-shirt was not because of the sexual orientation of the members of the GLSO, but because of the Pride Festivals' advocacy of pride in being homosexual. Acceptance of [HOO's] argument would allow a public accommodation to refuse service to an individual or group of individuals who hold and/or express pride in their status. This would have the absurd result of including persons with disabilities who openly and proudly display their disabilities in the Special Olympics, persons of race or color, who are not only of differing race and color, but express pride in being so,

> and persons of differing religions who express pride in their religious beliefs.
>
> The Hearing Commissioner notes that human beings are either internally proud or not of their race, color, sexual orientation, disability, age, or religion. Those that are internally proud of their status may or may not outwardly express such pride. It is doubtful that [HOO] would deny that a substantial number of those of the Christian faith are internally proud of being Christian, but never express that pride to others. However, those members of protected classes who outwardly express pride in their own religion or sexual orientation do so because of their self-identification of being within that classification of persons.
>
> The purpose of the Lexington Pride Festival is to celebrate and exhibit pride in their status as persons of differing sexual orientation or identity. The Hearing Commissioner agrees with the Commission's contention that [HOO's] objection to the printing of the t-shirts was inextricably intertwined with the status of the sexual orientation of the members of the GLSO. Mr. Adamson's refusal on behalf of [HOO] was clearly because of the sexual orientation and identity of members of the GLSO.

In short, the Commission held HOO had violated the fairness ordinance because, by refusing to print the t-shirts requested by the GLSO, HOO had either discriminated on the basis of sexual orientation and gender identity; or had effectively discriminated on the basis of sexual orientation and gender identity by discriminating against conduct engaged in exclusively or predominantly by gay, lesbian, bisexual, or transgendered persons.

HOO subsequently appealed by filing an original action in Fayette Circuit Court. The circuit court reversed the Commission, finding that HOO did not violate the fairness ordinance; and, even if HOO had violated it, the ordinance was unconstitutional as applied under the circumstances of this case. This appeal followed.

STANDARD OF REVIEW

In reviewing an agency decision, this Court, as well as a circuit court, may only overturn that decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence on the record. *See Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 301 (Ky. 1972); *see also Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 642-43 (Ky. App. 1994). "Judicial review of an administrative agency's action is concerned with the question of arbitrariness." *Commonwealth, Transportation Cabinet v. Cornell*, 796 S.W.2d 591, 594 (Ky. App. 1990) (quoting *Am. Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964)). Arbitrariness means "clearly erroneous, and by 'clearly erroneous' we mean unsupported by substantial evidence." *Crouch v. Police Merit Board*, 773 S.W.2d 461, 464 (Ky. 1988). Substantial evidence is "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *Fuller*, 481 S.W.2d at 308.

If it is determined that the agency's findings are supported by substantial evidence, the next inquiry is whether the agency has correctly applied the law to the facts as found. *Kentucky Unemployment Ins. Comm'n v. Landmark Cmty. Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 578 (Ky. 2002) (quoting *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Comm'n*, 437 S.W.2d 775, 778 (Ky. 1969)). Questions of law arising out of administrative proceedings are fully reviewable *de novo* by the courts. *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. App. 1998). When an administrative agency's findings are supported by substantial evidence and when the agency has applied the correct rule of law, these findings must be accepted by a reviewing court. *Ward*, 890 S.W.2d at 642.

ANALYSIS

The resolution of this appeal involves the application of law to undisputed facts. We begin with a discussion of the law that the Commission argues HOO violated. The fairness ordinance adopts KRS 344.120, which provides in relevant part:

> [I]t is an unlawful practice for a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, resort, or amusement, as defined in KRS 344.130, on the ground of disability, race, color, religion, or national origin.

The fairness ordinance then adds to this language, providing that this practice is also unlawful if it is based upon grounds of "ages forty and over," "sexual orientation," or "gender identity."[2]

[2] At all relevant times, the fairness ordinance provided:

> (1) It is the policy of the Lexington-Fayette Urban County Government to safeguard all individuals within Fayette County from discrimination in employment, public accommodation, and housing on the basis of sexual orientation or gender identity, as well as from discrimination on the basis of race, color, religion, national origin, sex, disability, and ages forty and over.
>
> (2) For purposes of this section, the provisions of KRS 344.010(1), (5) through (13) and (16), 344.030(2) through (5), 344.040, 344.045, 344.050, 344.060, 344.070, 344.080, 344.100, 344.110, 344.120, 344.130, 344.140, 344.145, 344.360(1) through (8), 344.365(1) through (4), 344.367, 344.370(1), (2), and (4), 344.375, 344.380, 344.400 and 344.680, as they existed on July 15, 1998, are adopted and shall apply to prohibit discrimination on the basis of sexual orientation or gender identity within Fayette County.
>
> (3) The [Lexington-Fayette Urban County Human Rights Commission] shall have jurisdiction to receive, investigate, conciliate, hold hearings and issue orders relating to complaints filed alleging discrimination in employment, public accommodation or housing based on the sexual orientation or gender identity of the complaining party. The commission is authorized to use the powers and procedures listed in sections 2-31 and 2-32 to carry out the purposes of this section, except that KRS 344.385, 344.635 and 344.670 shall not apply to the enforcement of this section.
>
> (4) For purposes of this section, "sexual orientation" shall mean an individual's actual or imputed heterosexuality, homosexuality, or bisexuality.
>
> (5) For purposes of this section, "gender identity" shall mean:

Under the broad definition of "public accommodation" set forth in KRS 344.130[3] (which the fairness ordinance has likewise adopted), a wide array of entities qualify as public accommodations and are therefore subject to the fairness ordinance. Such entities include, but are not limited to: universities; abortion clinics; and any private business that supplies goods or services to the general

> (a) Having a gender identity as a result of a sex change surgery; or
> (b) Manifesting, for reasons other than dress, an identity not traditionally associated with one's biological maleness or femaleness.
>
> (6) Nothing in this section shall be construed to prevent an employer from:
>
> (a) Enforcing an employee dress policy which policy may include restricting employees from dress associated with the other gender; or
> (b) Designating appropriate gender specific restroom or shower facilities.
>
> (7) The provisions of this section shall not apply to a religious institution or to an organization operated for charitable or educational purposes, which is operated, supervised, or controlled by a religious corporation, association, association or society except that when such an institution or organization receives a majority of its annual funding from any federal, state, local or other government body or agency or any combination thereof, it shall not be entitled to this exemption.

[3] KRS 344.130, which defines the term, in relevant part, as follows:

> [. . .] any place, store or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds, except that:
>
> (1) A private club is not a "place of public accommodation, resort, or amusement" if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests;

public, or which solicits or accepts the patronage or trade of the general public—even private businesses with goods and services that carry a specific ethnic or religious theme (*e.g.*, Christian bookstores).

Because HOO is a store which supplies goods or services to the general public in the Lexington-Fayette area and because none of the exceptions specified in KRS 344.130 otherwise apply to it, HOO qualifies as a "public accommodation" and is therefore subject to the fairness ordinance. The overarching issue presented by this appeal is whether, by refusing to print the t-shirts requested by the GLSO, HOO "den[ied] an individual the full and equal

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(2) "Place of public accommodation, resort, or amusement" does not include a rooming or boarding house containing not more than one (1) room for rent or hire and which is within a building occupied by the proprietor as his residence; and

(3) "Place of public accommodation, resort, or amusement" does not include a religious organization and its activities and facilities if the application of KRS 344.120 would not be consistent with the religious tenents of the organization, subject to paragraphs (a), (b), and (c) of this subsection.

(a) Any organization that teaches or advocates hatred based on race, color, or national origin shall not be considered a religious organization for the purposes of this subsection.
(b) A religious organization that sponsors nonreligious activities that are operated and governed by the organization, and that are offered to the general public, shall not deny participation by an individual in those activities on the ground of disability, race, color, religion, or national origin.
(c) A religious organization shall not, under any circumstances, discriminate in its activities or use of its facilities on the ground of disability, race, color, or national origin.

enjoyment of [its] goods, services, facilities, privileges, advantages, and accommodations" and therefore violated the fairness ordinance.

As an aside, finding a violation of KRS 344.120 or the fairness ordinance is a straightforward proposition in situations where a person is ordered off the premises of a business establishment otherwise open to the public, or service is otherwise refused or limited, for no reason except the person's protected status. This is the quintessential example of conduct prohibited by public accommodation statutes. A university could not, for example, refuse to enroll a student because the student is Hispanic. An abortion clinic could not order a person off of its premises solely because that person is Christian. The owner of a Christian bookstore could not refuse to sell books to a person because that person is Muslim. A restaurant that offers a full menu could not serve only a limited menu of heart-smart options to persons over the age of forty.

However, in situations where *conduct* is cited as the basis for refusing service, applying public accommodation laws is less straightforward. "Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S.Ct. 753, 760, 122 L.Ed.2d 34 (1993).

For example, a shopkeeper's refusal to serve a Jewish man, not because the man is Jewish, but because the shopkeeper disapproves of the fact that the man is wearing a yarmulke, would be the legal equivalent of religious discrimination. *See id*. (explaining "A tax on wearing yarmulkes is a tax on Jews.") A shopkeeper's refusal to serve a homosexual, not because the person is homosexual, but because the shopkeeper disapproves of homosexual intercourse or same-sex marriage, would be the legal equivalent of sexual orientation discrimination. *See, e.g, Lawrence v. Texas*, 539 U.S. 558, 583, 123 S.Ct. 2472, 2487-88, 156 L.Ed.2d 508 (2003) (O'Connor, J., concurring) (explaining that a law criminalizing only homosexual sodomy "is targeted at more than conduct. It is instead directed toward gay persons as a class."); *see also Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 (Colo. Ct. App. 2015)[4] (holding that a cake-maker's refusal to sell a wedding cake to homosexual couple, because the cake-maker knew the cake would be used to celebrate a same-sex marriage and the cake-maker was opposed to such unions, is the equivalent of discrimination on the basis of sexual orientation).

By contrast, however, it is not the aim of public accommodation laws, nor the First Amendment, to treat *speech* as this type of activity or conduct. This is so for two reasons. First, speech cannot be considered an activity or conduct that is engaged in exclusively or predominantly by a particular class of people. Speech is

[4] With regard to *Craig*, a petition for discretionary review is currently pending before the United States Supreme Court. We cite *Craig* for purposes of illustration only.

an activity *anyone* engages in—regardless of religion, sexual orientation, race, gender, age, or even corporate status. Second, the right of free speech does not guarantee to any person the right to use someone else's property, even property owned by the government and dedicated to other purposes, as a stage to express ideas. *See O'Leary v. Commonwealth*, 441 S.W.2d 150, 157 (Ky. 1969).

As it held in its order, the Commission argues on appeal that "Acceptance of [HOO's] argument [for why it did not print the GLSO's t-shirts] would allow a public accommodation to refuse *service* to an individual or group of individuals who *hold and/or express pride* in *their* status." (Emphasis added.)

We disagree.

Nothing of record demonstrates HOO, through Adamson, refused any individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations it offered to everyone else *because* the individual in question had a specific sexual orientation or gender identity. Adamson testified he never learned of or asked about the sexual orientation or gender identity of Don Lowe, the only representative of GLSO with whom he spoke regarding the t-shirts. Don Lowe testified he never told Adamson anything regarding his sexual orientation or gender identity. The GLSO itself also has no sexual orientation or gender identity: it is a gender-neutral organization that functions as a *support*

network and *advocate* for individuals who identify as gay, lesbian, bisexual, or transgendered.[5]

Also, nothing of record demonstrates HOO, through Adamson, refused any individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations it offered to everyone else because the individual in question was *engaging in an activity or conduct exclusively or predominantly by a protected class of people*.

As reflected in its order, the Commission characterized the "activity or conduct" in question as (to paraphrase) the GLSO's holding and/or expressing pride in their status of being gay, lesbian, bisexual, or transgendered. As noted, however, the GLSO has no sexual orientation. Its membership and its Pride Festival welcome people of all sexual orientations. It functions as a support network and advocate for *others* (*i.e.*, gay, lesbian, bisexual, or transgendered individuals). And, the t-shirts the GLSO sought to order from HOO are an example of its support and advocacy of *others*. While the shirts merely bore a screen-printed design with the words "Lexington Pride Festival 2012," the number "5," and a series of rainbow-colored circles, the symbolism of this design, the festival the design promoted, and the GLSO's desire to sell these shirts to everyone clearly imparted a *message*: Some people are gay, lesbian, bisexual, and

[5] The Commission made no determination that HOO discriminated on the basis of "imputed" sexual orientation, per Section 2-33(4). However, as *dicta* we note for the same reasons discussed that such a determination would have been similarly untenable.

transgendered; and people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals.

The act of wearing a yarmulke is conduct engaged in exclusively or predominantly by persons who practice Judaism. The acts of homosexual intercourse and same-sex marriage are conduct engaged in exclusively or predominantly by persons who are homosexual. But anyone—regardless of religion, sexual orientation, race, gender, age, or corporate status—may espouse the belief that people of varying sexual orientations have as much claim to unqualified social acceptance as heterosexuals. Indeed, the posture of the case before us underscores that very point: this case was *initiated* and *promoted* by Aaron Baker, a non-transgendered man in a married, heterosexual relationship who nevertheless functioned at all relevant times as the *President* of the GLSO. For this reason, conveying a message in support of a cause or belief (by, for example, producing or wearing a t-shirt bearing a message supporting equality) cannot be deemed *conduct* that is so closely correlated with a protected status that it is engaged in exclusively or predominantly by persons who have that particular protected status. It is a *point of view* and form of *speech* that could belong to any person, regardless of classification.

In other words, the "service" HOO offers is the promotion of *messages*. The "conduct" HOO chose not to promote was pure speech. There is no contention that HOO is a public *forum* in addition to a public *accommodation*.

Nothing in the fairness ordinance prohibits HOO, a private business, from engaging in *viewpoint* or *message* censorship. Thus, although the menu of services HOO provides to the public is accordingly limited, and censors certain points of view, it is the same limited menu HOO offers to every customer and is not, therefore, prohibited by the fairness ordinance.

A contrary conclusion would result in absurdity under the facts of this case. The Commission's interpretation of the fairness ordinance would allow any individual to claim any variety of protected class discrimination under the guise of the fairness ordinance merely by requesting a t-shirt espousing *support* for a protected class and then receiving a value-based refusal. A Buddhist who requested t-shirts from HOO stating, "I support equal treatment for Muslims," could complain of religious discrimination under the fairness ordinance if HOO opposed equal treatment for Muslims and refused to print the t-shirts on that basis. A 25-year-old who requested t-shirts stating, "I support equal treatment for those over forty" could complain of age discrimination if HOO refused on the basis of its disagreement with that message. A man who requests t-shirts stating, "I support equal treatment for women," could complain of gender discrimination if HOO refused to print the t-shirts because it disagreed with that message. And so forth. Clearly, this is not the intent of the ordinance.

CONCLUSION

The Fayette Circuit Court correctly reversed the order of the Lexington Fayette Urban County Human Rights Commission because HOO did not, as the Commission held, violate Section 2-33 of the Lexington-Fayette Urban County Government's Code of Ordinances. We therefore AFFIRM.

D. LAMBERT, JUDGE, CONCURS IN RESULT ONLY AND FILES A SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTS AND WRITES SEPARATE OPINION.

D. LAMBERT, CONCURRING: I concur with the result reached by the majority opinion. I write separately, however, to state that I would affirm the trial court based on the reasoning of *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014). *Hobby Lobby* makes it clear that the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb et seq., allows closely held, for-profit entities, to freely advance their owners' sincerely held religious beliefs, as long as those beliefs do not offend existing federal laws that pass strict-scrutiny. I would echo the *Hobby Lobby* decision to hold that KRS 446.350,[6] Kentucky's Religious Freedom Restoration Statute, offers

[6] **Prohibition upon government substantially burdening freedom of religion—Showing of compelling governmental interest—Description of "burden."** Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

similar protection against Kentucky laws that substantially burden the free exercise of religion.

At the outset, it is important to clarify what is and what is not at issue. First, HOO is a privately-owned corporation. Second, as the majority points out, HOO did not refuse to print the shirts simply because the GLSO representative is a member of a protected class listed in the fairness ordinance. Rather, HOO refused to print the shirts because the HOO owners believe the lifestyle choices promoted by GSLO conflict with their Christian values. Third, no one questions the sincerity of HOO's owners' religious convictions; in fact, the parties agree that the fairness ordinance substantially burdens HOO's owners' religious beliefs. And fourth, there is little doubt LFUCG has a compelling interest in preventing local businesses from discriminating against individuals based on their sexual orientation. LFUCG must be able to market itself as a place where all people can acquire the goods and services they need. Accordingly, by the plain text of KRS 446.350, the central issue here is whether the fairness ordinance is the least-restrictive way for LFUCG to prevent local business from discriminating against members of the gay community without imposing a substantial burden on the exercise of religion. For the following reasons, I do not believe so.

Here, instead of providing an owner of a closely-held business, or the like, with an alternative means of accommodating a patron who wishes to promote

a cause contrary to the owner's faith,[7] the fairness ordinance forces the owner to either join in the requested violation of a sincerely held religious belief, or face a penalty, *i.e.*, support the furtherance of the offending cause or take a class on how to support it. Such coercion violates KRS 446.350. In the face of the protected religious freedoms afforded to HOO under both the Federal and State Religious Freedom Restoration Acts, and *Hobby Lobby,* the fairness ordinance is therefore invalid as applied in this case. Thus, I join the majority in affirming the Circuit Court.

TAYLOR, JUDGE, DISSENTING. Respectfully, I dissent. I would reverse the circuit court's opinion and order and reinstate the Lexington Fayette Urban County Human Rights Commission (Commission) order that Hands On Originals, Inc. (HOO) had engaged in unlawful discrimination in violation of Lexington-Fayette Urban County Government's (LFUCG) Ordinance 201-99, Section 2-33 of the Code of Ordinances (Fairness Ordinance).

Although the circuit court primarily relied upon a violation of HOO's constitutional rights to reverse the Commission's order, one member of the majority effectively concludes that the Fairness Ordinance is not applicable to this case on the premise that HOO was engaging in conduct equivalent to "message censorship," and thus said conduct was not in violation of the ordinance. This line of reasoning is misplaced and otherwise ignores the deliberate and intentional

[7] Here, the owners of HOO offered to find a printer who would do the work at the same price quoted initially to accommodate the needs of the customer.

discriminatory conduct of HOO in violation of the Fairness Ordinance, in my opinion.

The other majority member's view is that *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014) is controlling, effectively concluding that Kentucky Revised Statutes (KRS) 446.350 protects against enforcement of the Ordinance against HOO on religious freedom grounds. This position is also misplaced, in my opinion, as the holding in *Hobby Lobby* was limited solely to the issue of whether a closely held corporation could raise a religious liberty defense to the insurance contraceptive coverage mandate of the Affordable Care Act. *Id.* And, I do not believe KRS 446.350 is implicated in this case, as the statute does not prohibit a governmental entity from enforcing laws or ordinances that prohibit discrimination and protect a citizen's fundamental rights. Moreover, the United States Supreme Court has held that religious beliefs or conduct may be burdened or limited where the compelling government interest is to eradicate discrimination. *See Bob Jones Univ. v. U.S.,* 461 U.S. 574, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983) (holding that the government has an overriding interest in eradicating racial discrimination in education).

There is no dispute in this case that HOO is a "public accommodation" as defined in the Fairness Ordinance and to the extent applicable, the Kentucky Civil Rights Act as set out in KRS 344.010 *et seq*., as incorporated therein by the Ordinance. The Ordinance prohibits a public accommodation from discriminating

against individuals on the basis of sexual orientation and gender identity. And there is also no dispute that after HOO owner Blaine Adamson spoke with a representative of the Gay and Lesbian Services Organization (GLSO), HOO refused to print t-shirts for GLSO's Lexington Pride Festival (Festival). The primary reason given to GLSO for HOO's refusal to print the t-shirts is that it would have violated the HOO owners' religious beliefs that sexual activity should not occur outside of a marriage between a man and a woman. This refusal to print the t-shirts occurred after an employee of HOO had submitted a written quote to GLSO to print the t-shirts for the Festival.

The LFUCG's policy behind Section 2-33 of the Code of Ordinances is to safeguard all individuals within Fayette County from discrimination in public accommodations on the basis of sexual orientation or gender identity. The conduct of HOO and its owners clearly violates Section 2-33 of the Code of Ordinances in that HOO's conduct was discriminatory against GLSO and its members based upon sexual orientation or gender identity. Adamson testified that upon believing that the Festival advocated homosexuality, among other things, HOO immediately refused to print the t-shirts. Regardless of whether this guise was premised upon freedom of religion or speech, HOO blatantly violated the ordinance. One member of the majority upholds circumventing the public accommodation issue by holding that GLSO as an entity, has no sexual orientation and thus is not protected by the ordinance. This argument fails on its face. GLSO serves gays and lesbians and

promotes an "alternative lifestyle" that is contrary to some religious beliefs. That lifestyle is based upon sexual orientation and gender identity that the United States Supreme Court has recently recognized. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015), the Supreme Court held that the fundamental right to marry is guaranteed to same sex couples under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The circuit court sets forth several times in its Opinion and Order that HOO and Adamson refused to print GLSO's t-shirts because of their religious beliefs against same sex relationships. However, gay marriage and same sex relationships are now recognized under the United States Constitution as a fundamental right. *Id.* Regardless of personal or religious beliefs, this is the law that courts are duty bound to follow.

The majority takes the position that the conduct of HOO in censoring the publication of the desired speech sought by GLSO does not violate the Fairness Ordinance. Effectively, that would mean that the ordinance protects gays or lesbians only to the extent they do not publicly display their same gender sexual orientation. This result would be totally contrary to legislative intent and undermine the legislative policy of LFUCG since the ordinance logically must protect against discriminatory <u>conduct</u> that is inextricably tied to sexual orientation or gender identity. Otherwise, the ordinance would have limited or no force or effect. The facts in this case clearly establish that HOO's conduct, the refusal to

print the t-shirts, was based upon gays and lesbians promoting a gay pride festival in Lexington, which violated the Fairness Ordinance.

Finally, it is important to note that the speech that HOO sought to censor was not obscene or defamatory. There was nothing obnoxious, inflammatory, false, or even pornographic that GLSO wanted to place on their t-shirts which would justify restricting their speech under the First Amendment. The record in this case does not remotely establish that the depiction of rainbow colors with the number "5" somehow symbolizes illicit or even illegal sexual relationships. Likewise, there is nothing in the message that illustrates or establishes that HOO either promotes or endorses the Festival. For those of us who grew up in the 60s and 70s, a rainbow was a symbol of peace; others view rainbows as symbolic of love, life, hope, promise, or even transformation. Even the Bible provides that a rainbow is a sign from God. Genesis 9:13.

The Kentucky Supreme Court recently emphasized the importance of free speech in our democracy in *Doe v. Coleman*, 497 S.W.3d 740 (Ky. 2016). Therein, the Court stated:

> And it is certainly true that "free speech" is one of the most sacrosanct of freedoms, and one which is at the heart of defining what it means to be a free citizen. The First Amendment of the United States Constitution guarantees this freedom.

Id. at 749.

While free speech is not without its limitations, nothing in the promotion of the Festival by GLSO came close to being outside the protections of the First Amendment. The Fairness Ordinance in this case is simply an extension of civil rights protections afforded to all citizens under federal, state and local laws. These civil rights protections serve the societal purpose of eradicating barriers to the equal treatment of all citizens in the commercial marketplace. *See State of Washington v. Arlene's Flowers, Inc.,* ___ P.3d ___, 2017 WL 629181 (Wash. 2017).

Accordingly, I believe the conduct of HOO in this case violated the Fairness Ordinance. I would reverse the circuit court and reinstate the order of the Commission holding HOO in violation thereof.

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