

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
No. 2015-CA-000745

LEXINGTON-FAYETTE URBAN
COUNTY HUMAN RIGHTS COMMISSION, ET AL.

APPELLANT

v.

HANDS ON ORIGINALS, INC.

APPELLEE

On Appeal from Fayette Circuit Court
Civil Action No. 14-CI-04474

**BRIEF OF AMICUS CURIAE AMERICANS UNITED FOR SEPARATION OF
CHURCH AND STATE IN SUPPORT OF APPELLANTS**

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Certificate of Service

I certify that on December 28, 2015, I served a copy of this amicus brief, using Federal Express overnight service, on: Hon. James D. Ishmael, Jr., Judge, Fayette Circuit Court, Robert F. Stephens Circuit Courthouse, 120 N. Limestone, Lexington, KY 40507; Edward E. Dove, 201 West Short Street, Suite 300, Lexington, KY 40507, Counsel for Appellants; Bryan H. Beauman, Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Suite 1500, Lexington, KY 40507, Counsel for Appellee; and James A. Campbell and Kenneth J. Connelly, Alliance Defending Freedom, 15100 N. 90th Street, Scottsdale, AZ 85260, Counsel for Appellee. The record on appeal was not withdrawn by amicus curiae.



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Introduction

Like many other jurisdictions, Lexington-Fayette Urban County has enacted an antidiscrimination law to ensure that gay and lesbian customers will not endure “the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.” *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964). As with discrimination on the basis of race, ethnicity, national origin, or religion, allowing businesses to withhold goods and services from customers on the basis of sexual orientation would undermine efforts to “safeguard all individuals within Fayette County from discrimination.” Lexington-Fayette Urban Cty. Code of Ordinances, Chapt. II, art. II § 2(33)(1).

Appellee Hands On Originals, Inc., a commercial printing company, maintains that the First Amendment allows it to disregard this law and to deny service to customers seeking T-shirts for a gay-pride event because, it says, its “work is expressive and artistic.” Complaint & Notice of Appeal ¶ 12, *Hands On Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rights Comm’n*, No. 14-CI-4474 (Fayette Cir. Ct. Dec. 8, 2014). If that argument were sufficient to allow Hands On Originals—a for-profit business that markets its services to the public at large—to violate the antidiscrimination laws, a host of other businesses would be able to engage in illegal discrimination as well.

Nearly “[a]nyone who makes goods might be thought to engage in an artistic endeavor.” Mark Strasser, *Speech, Association, Conscience, and the First Amendment’s Orientation*, 91 Denv. U. L. Rev. 495, 525 (2014). As a result, the arguments advanced by Hands On Originals “might be used to refuse to provide any services at all to a vast array of individuals for fear of promoting objectionable lifestyles or practices.” *Id.* at 530. These arguments, moreover, could apply equally to refusals to provide service on the

basis of race, national origin, or religion. Restaurants, hotels, hairdressers, clothiers, printers, copy centers, and other businesses whose proprietors object to same-sex couples' relationships (or to the relationships of, say, interfaith or interracial couples) would be entitled to violate antidiscrimination laws with impunity. *See id.* at 529–30. In some communities, members of protected classes “might be forced to pick their merchants carefully, like black families driving across the South half a century ago.” Robin Fretwell Wilson & Jana Singer, *Same-Sex Marriage and Conscience Exemptions*, Engage: J. Federalist Soc’y Prac. Groups, Sept. 2011, at 16–17, <http://tinyurl.com/WilsonandSinger>.

These concerns are more than hypothetical: other businesses have raised similar First Amendment defenses to liability for illegal discrimination on the basis of sexual orientation. For example, a commercial photographer in New Mexico invoked the First Amendment to justify her company’s refusal to photograph a same-sex couple’s commitment ceremony. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 63 (N.M. 2013) (upholding finding of liability for discrimination), *cert. denied*, 134 S. Ct. 1787 (2014). A Washington florist claims that she has a First Amendment right to deny flowers to same-sex couples for their wedding ceremonies. *See State v. Arlene’s Flowers*, No. 13-2-00871-5 (Wash. Super. Ct. Jan. 7, 2015) (holding florist liable), <http://tinyurl.com/WAflorist>, *appeal filed*, No. 91615-2 (Wash. May 1, 2015). Bakeries in Colorado and Oregon have argued that wedding cakes are expressive and therefore that they may withhold baked goods from same-sex couples. *See Craig v. Masterpiece Cakeshop, Inc.*, ___ P.3d ___, 2015 WL 4760453 ¶¶ 4, 44, 74 (Colo. App. Aug. 13, 2015) (describing bakery’s argument that “decorating cakes is a form of art”), *petition for cert. filed*, No.

2015SC000738 (Colo. Oct. 23, 2015); *In re Klein*, Nos. 44-14 & 45-14 at 85–86 (Or. Bureau of Labor & Indus. July 2, 2015) (final order) (holding baker liable), <http://tinyurl.com/ORbakery>, *appeal filed*, No. A159899 (Or. Ct. App. July 17, 2015). A New York farm claims that it has free-speech and free-exercise rights to exclude same-sex couples from its commercial wedding venue. Brief for Appellants at 24, 31, 35, *Gifford v. McCarthy*, No. 520410 (N.Y. App. Div. June 25, 2015), <http://tinyurl.com/NYweddingvenuebrief>. And an Iowa art gallery argued that the First Amendment permits it to deny a wedding venue and planning services to same-sex couples because the owners use the gallery “to consistently manifest both their artistic views and religious beliefs....” Verified Petition ¶ 49, *Odgaard v. Iowa Civil Rights Comm’n*, No. CVCV046451 (Iowa Dist. Ct. Oct. 7, 2013), <http://tinyurl.com/IAgallery>.

Courts, as well as state and local human-rights commissions, have rightly rejected these attempts to transform garden-variety discrimination into protected religious expression.¹ As these decisions reflect, commercial businesses that provide service to the public have no First Amendment free-speech or free-exercise rights to violate laws that prohibit discrimination in public accommodations, including laws that prohibit discrimination on the basis of sexual orientation.

¹ See *Elane Photography*, 309 P.3d at 63 (commercial photographers); *N. Coast Women’s Care Med. Grp. v. San Diego Cty. Super. Ct.*, 189 P.3d 959, 967–68 (Cal. 2008) (physicians); *Masterpiece Cakeshop*, 2015 WL 4760453, at *8 (bakery); *In re Klein*, Nos. 44-14 & 45-14, at 96, 105 (bakery); *Bernstein v. Ocean Grove Camp Meeting Ass’n*, No. CRT 6145-09 (N.J. Div. on Civil Rights Oct. 22, 2012) at 11, <http://tinyurl.com/NJweddingvenue> (wedding venue); *McCarthy v. Liberty Ridge Farm, LLC*, Nos. 10157952 & 10157963, at 21 (N.Y. Div. of Human Rights Aug. 8, 2014) (Notice and Final Order), <http://tinyurl.com/weddingvenueorder> (same); see also Grant Rodgers, *Grimes’ Gortz Haus to Stop All Weddings in Wake of Discrimination Complaint*, Des Moines Register (Jan. 28, 2015), <http://tinyurl.com/IAgallerysettles> (gallery owners settled discrimination complaint by agreeing to stop hosting weddings).

Accepting the arguments made by Hands On Originals in this case would not only put Kentucky courts at odds with First Amendment decisions from across the country, but also would allow nearly any business alleging that its provision of goods or services is expressive to discriminate as it pleased. Gay men, lesbians, and members of other protected classes (and their children) would not know which businesses they could patronize and could not expect the law to protect their rights of access to public accommodations. Nothing in the First Amendment—neither the right to free speech nor the right to free exercise—requires such retrogression.

Argument

I. Freedom of Speech Does Not Excuse Compliance with Lexington-Fayette County’s Antidiscrimination Law.

Lexington-Fayette County’s antidiscrimination law neither compels Hands On Originals to speak nor restricts the company’s symbolic speech or expressive association.

A. The antidiscrimination law does not compel speech.

The Free Speech Clause encompasses “both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). But there is a difference between speech and conduct—even “conduct [that] was in part initiated, evidenced, or carried out by means of [spoken, written, or printed] language,” *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)—and states may regulate the latter without violating the First Amendment, *see Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (“FAIR”). As an antidiscrimination measure that requires public accommodations to provide the same services to all patrons, whether or not they are members of a protected class, the Lexington-Fayette County law permissibly regulates Hands On Originals’s conduct.

The act of printing words on a T-shirt does not transform properly regulated conduct into unlawfully compelled speech. In *FAIR*, a group of law schools sought to exclude military recruiters from on-campus employment fairs in order to express their disapproval of a military policy barring service by openly gay individuals. *Id.* at 52. A federal statute, however, required the schools to give to military recruiters the same aid that they gave to other employers to help them reach students. *Id.* at 57. Because that aid could include “send[ing] e-mails or post[ing] notices on bulletin boards,” the law schools argued that this requirement compelled them to speak a message with which they disagreed. *Id.* at 61–62. The U.S. Supreme Court, however, rejected the argument that the equal-access requirement resulted in unconstitutional compelled speech. On the contrary, the Court held that “[t]he compelled speech to which the law schools point is plainly incidental to the [statute’s] regulation of conduct.” *Id.* at 62. Just as “Congress . . . can prohibit employers from discriminating in hiring on the basis of race”—and “require an employer to take down a sign reading ‘White Applicants Only’”—so too may Congress compel law schools to provide equal access to military recruiters. *Id.* at 62.

Lexington-Fayette County’s antidiscrimination law regulates the conduct of Hands On Originals in the same way. Hands On Originals is a screenprinting company that places customers’ messages on clothing and accessories. When it decided to hire itself out to stamp customers’ messages on T-shirts, Hands On Originals chose to perform a service, not to engage in protected expressive activity; that its service happens to involve reproducing customers’ words does not transform the public-accommodations law into a compulsion to speak. *See Elane Photography*, 309 P.3d at 66 (“[T]he fact that [Elane Photography’s] services require photography stems from the nature of Elane

Photography’s chosen line of business.”). Were it otherwise, a host of other businesses would be equally free to discriminate at will. Every copy center—from Kinkos to Staples to Office Depot—could deny service to customers on the basis of their race, sex, religious beliefs, or sexual orientation. Minority and interracial couples seeking to print wedding invitations could be turned away; so could churches wanting to duplicate fliers inviting people to Mass.

Nor may Hands On Originals obtain First Amendment protection by insisting that its graphic designers provide artistic and creative services, rather than just stenography of customers’ words. The graphic designers employed by Hands On Originals are not producing art that reflects their own creative expression; they are selling services to allow customers to express *their* messages. As the New Mexico Supreme Court explained, in rejecting the argument that the First Amendment allows a wedding photographer to deny service to same-sex couples, laws that unconstitutionally compel speech target “the speaker’s own message, as opposed to a message-for-hire.” *Id.* Here, it is the paying customers of Hands On Originals who generate and then disseminate the messages that the company is hired to print.

Hands On Originals also does not gain a right to discriminate under *Wooley v. Maynard*, 430 U.S. at 705, or *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). In *Wooley*, the U.S. Supreme Court held that a state could not require residents to display the message “Live Free or Die” on the license plates of their private vehicles. 430 U.S. at 707, 717. Because the law required drivers to place the state’s message on their personal vehicles, the state’s message would be “readily associated” with those drivers. *Id.* at 717 n.15. And in *Hurley*, the organizers of a

parade had been required to allow the participation of a group whose message the organizers disagreed with, 515 U.S. at 559; this requirement amounted to compelled speech because parades are “a form of expression, not just motion,” *id.* at 568, such that the inclusion of a particular group in the parade would “likely be perceived as having resulted from [the organizers’] determination ... that its message was worthy of presentation,” *id.* at 575. Each of those cases, then, involved laws requiring parties to engage in pure expression that would be attributed directly to them.

Here, on the other hand, the law merely requires Hands On Originals to provide a service to customers; the company need not adopt its customers’ messages.² Nobody from Hands On Originals is required to wear or display the T-shirts that the company prints; when customers wear those T-shirts, nobody will know who printed them. There is, in sum, no legal link between Hands On Originals and the messages of its customers.

B. The antidiscrimination law does not restrict symbolic speech or expressive association.

Nor does Lexington-Fayette County’s antidiscrimination law burden or compel business-owners’ symbolic speech or expressive association. Neither accepting or turning

² See *FAIR*, 547 U.S. at 65 (even “high school students can appreciate the difference between speech a school sponsors and speech the school permits ... pursuant to an equal access policy”); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (no compelled speech where business owner “could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law”); *Elane Photography*, 309 P.3d at 69 (“It is well known to the public that wedding photographers are hired by paying customers and ... may not share the happy couple’s views.”); *Nathanson v. Commonwealth of Mass. Comm’n Against Discrimination*, 16 Mass. L. Rptr. 761, at *6 (Mass. Super. Ct. 2003) (family-law attorney did not have free-speech right to refuse male clients because at issue was “the client’s access to legal rights and remedies, rather than use of [the attorney’s] speech and her law office as a vehicle for [the attorney’s] own expression”).

away customers nor fulfilling their orders for printed T-shirts constitutes expression or association protected by the First Amendment.

Whatever Hands On Originals's reason for refusing to print T-shirts for a gay-rights event, the *act* of serving or refusing to serve a customer is not symbolic speech. Although "[i]t is possible to find some kernel of expression in almost every activity a person undertakes ... such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). The U.S. Supreme Court has thus rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

The conduct of Hands On Originals does not become expressive merely because it involves the printing of T-shirts. Even the American flag, which has powerful symbolic meaning, is not so inherently expressive that a court would "automatically conclude[] that any action taken with respect to our flag is expressive." *Texas v. Johnson*, 491 U.S. 397, 405 (1989). Wearing a uniform bearing a patch of the American flag, for example, is not symbolic speech if there is "no evidence that observers would likely understand the patch or the wearer to be *telling* them anything about the wearer's beliefs." *Troster v. Pa. State Dep't of Corrections*, 65 F.3d 1086, 1092 (3d Cir. 1995); *see also, e.g., Cotto v. United Techs. Corp.*, 738 A.2d 623, 633 (Conn. 1999) ("Even though the flag is a symbol of government, [not] every work assignment involving the flag implicates an employee's constitutional rights of free speech."). However symbolic a particular T-shirt may be to the person wearing it, the act of mass-producing T-shirts for paying members of the general public does not communicate the printing company's beliefs; neither, hence, does

the act of refusing to serve customers based on their sexual orientation or membership in a gay-rights organization. *See Elane Photography*, 309 P.3d at 68 (“While photography may be expressive, the operation of a photography business is not.”).

The refusal of Hands On Originals to print T-shirts for a gay-rights event is no more expressive than the refusal of a university to welcome a recruiter to campus. The U.S. Supreme Court explained this principle in *FAIR*, where it rejected the law schools’ claim that exclusion of military recruiters from on-campus employment fairs was protected expression. 547 U.S. at 65–68. The act of “treating military recruiters differently from other recruiters” was “not inherently expressive.” *Id.* at 66. Instead, the “actions were expressive only because the law schools accompanied their conduct with [explanatory] speech”; without that accompaniment, “[a]n observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school’s interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.” *Id.*; *see also Nev. Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011) (legislator’s act of voting is not symbolic speech because, although the vote “discloses ... [whether] the legislator wishes” that a measure be adopted, the act of casting a vote itself “symbolizes nothing”).

Likewise, someone who observes that a screenprinter did not print T-shirts for a gay-rights organization would not know whether that was because of the company’s views about same-sex couples’ relationships, because the company did not have enough employees to fulfill another order, or because some potential customers chose to use a vendor with lower prices or faster service. And an observer who sees a business

complying with its legal obligation to provide services to that organization might conclude that the business wished to maximize its revenue by serving as many customers as possible, that it declined to inquire about its customers' sexual orientations because it did not consider that information pertinent to commercial transactions, or that it intended to comply with the antidiscrimination laws. Only the company's accompanying speech can communicate its actual motivations, and "[t]he fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection...." *FAIR*, 547 U.S. at 66.

Finally, the antidiscrimination law does not violate the company's right of expressive association. In order to have a First Amendment right to expressive association, "a group must engage in some form of expression." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Because Hands On Originals does not express itself when it serves or declines to serve customers, the company's obligation to serve members of protected classes does not implicate its ability to associate for expressive purposes.

In any event, the customers of Hands On Originals are not seeking to become part of the company or the right to wear the company's uniform, and they are certainly not demanding the right to speak on the company's behalf. *Cf. id.* at 661 (prohibiting state from "compel[ling] the organization to accept members where such acceptance would derogate from the organization's expressive message"). Hands On Originals need only print its customers' messages—not lend its name to or support for those messages.

II. The Free Exercise Clause Does Not Excuse Compliance with Lexington-Fayette County's Antidiscrimination Law.

Hands On Originals's argument is no stronger under the First Amendment's Free Exercise Clause. A commercial business may not engage in discriminatory conduct even when motivated by religion.

Although the rules are more relaxed today, the federal Free Exercise Clause used to require strict scrutiny of all laws substantially burdening religious exercise—even if the laws applied to religious and non-religious conduct alike. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 403–04, 406 (1963). Yet even under this earlier, rigorous inquiry, courts universally rejected arguments that the Free Exercise Clause justified the violation of antidiscrimination laws. For instance, in *Bob Jones University v. United States*, 461 U.S. 574 (1983), the U.S. Supreme Court rejected a free-exercise defense of a university's discriminatory admissions practices, even though “the challenged practices ... were based on a genuine belief that the Bible forbids interracial dating and marriage.” *Id.* at 602 n.28. Likewise, in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), the Court rejected the argument that requiring a restaurant to serve African-American patrons “constitutes an interference with the ‘free exercise of the Defendant’s religion.’” *Id.* at 402 n.5 (citation omitted). The Court went on to call the restaurant’s free-exercise argument “patently frivolous.” *Id.*

The same free-exercise arguments have been rejected when made by employers. In *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990), the Fourth Circuit enforced equal-pay laws against an employer who believed that “the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family.” *Id.* at 1392, 1397–99. And in *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d

610 (9th Cir. 1988), the Ninth Circuit enforced Title VII’s prohibition against religious discrimination despite the defendant employers’ argument that their practices were required by “the Bible and their covenant with God.” *Id.* at 620–21.

Modern cases make the company’s Free Exercise Clause defense even weaker. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the U.S. Supreme Court held that laws that are generally applicable and facially neutral with respect to religion do not implicate the Free Exercise Clause at all—even when they have the effect of imposing unique burdens on members of a particular faith. *Id.* at 878–79. In other words, a law that does not target religious exercise “need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Antidiscrimination laws like Lexington-Fayette County’s apply to all businesses on equal terms and do not single out religion or any particular faith for disfavor; as a result, they easily survive *Smith*’s relaxed standard.

A law lacks religious neutrality only if its “object . . . is to infringe upon or restrict practices because of their religious motivation.” *Id.* at 533. By contrast, the “object” of proscribing discrimination on the basis of sexual orientation—as with laws prohibiting discrimination on the basis of race, religion, or national origin—is the advancement of a value “embodied in our Bill of Rights—the respect for individual dignity in a diverse population.” *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 32 (D.C. 1987). Hands On Originals does not argue, and nothing else suggests, that the Lexington-Fayette Urban County Council acted with the goal of burdening religious exercise.

The requirement of religious neutrality is “interrelated” with *Smith*’s second requirement: that the law apply generally. *Lukumi*, 508 U.S. at 531. Lexington-Fayette County’s antidiscrimination law not only forbids all sexual-orientation discrimination, whether motivated by religion, tradition, or personal discomfort, but also applies generally to all public accommodations. Although the law includes an exception for any “religious institution,” Lexington-Fayette Urban Cty. Code of Ordinances, Chapt. II, art. II § 2(33)(7), that exception vindicates the First Amendment’s “special solicitude to the rights of religious organizations” and the autonomy of churches. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012). That the law contains an exception for religious organizations, and thus seeks to ameliorate any incidental burdens on religious exercise and intrusions into church governance, tends to demonstrate the law’s compliance with the First Amendment. *See Locke v. Davey*, 540 U.S. 712, 724–25 (2004) (availability of scholarships for many facets of religious education negates suggestion that prohibiting funding for pursuit of devotional-theology degree reflects unconstitutional animus toward religion). The law here comports with the Free Exercise Clause because it applies equally to all, and does not “selective[ly] ... impose burdens only on conduct motivated by religious belief.” *Lukumi*, 508 U.S. at 543.

Because antidiscrimination laws across the country share these features with Lexington-Fayette County’s law, courts have repeatedly concluded that they are neutral and generally applicable and thus are insulated from free-exercise challenges. *See, e.g., Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 697 n.27 (2010) (school policy forbidding discrimination based on sexual orientation was “of general application” and only “incidentally burden[ed]

religious conduct,” so Christian student group could not “moor its request for accommodation to the Free Exercise Clause”); *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 538–39 (W.D. Ky. 2001) (rejecting free-exercise challenge to ordinance banning employment discrimination based on sexual orientation), *vacated on other grounds*, 53 F. App’x 740 (6th Cir. 2002); *Elane Photography*, 309 P.3d at 75 (rejecting wedding photographer’s free-exercise challenge to application of antidiscrimination law); *N. Coast Women’s Care Med. Grp., Inc. v. San Diego Cty. Super. Ct.*, 189 P.3d 959, 967 (Cal. 2008) (rejecting free-exercise challenge to law requiring doctors to provide artificial-insemination treatments to patients regardless of their sexual orientation); *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909, 919 (Cal. 1996) (rejecting free-exercise challenge to law prohibiting landlords from discriminating on basis of marital status); *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 279 (Alaska 1994) (same). In sum, “protections for same-sex couples do not specifically target religious conduct or motives,” and so “the Free Exercise Clause offers no support for exemption claims.” Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 Nw. J. L. & Soc. Pol’y 274, 287–88 (2010).³

The Free Exercise Clause has authorized otherwise illegal discrimination only

³ Courts have rejected Free Exercise Clause defenses to antidiscrimination laws even outside the context of public accommodations. *See, e.g., King v. Governor of N.J.*, 767 F.3d 216, 241–43 (3d Cir. 2014) (rejecting challenge by religiously motivated counselors to ban on purportedly therapeutic efforts to change sexual orientation of gay minors), *cert. denied*, 135 S. Ct. 2048 (2015); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 879–80 (11th Cir. 2011) (upholding requirement that graduate counseling student with religious objection comply with professional ethics rules requiring treatment of lesbians and gay men); *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1188 (9th Cir. 2006) (upholding school policy forbidding student to wear shirt displaying antigay message, despite student’s religious motivation), *vacated on other grounds*, 549 U.S. 1262 (2007).

when necessary to preserve the associational interests unique to houses of worship. Thus, in *Hosanna-Tabor*, 132 S. Ct. 694, the U.S. Supreme Court held that the Free Exercise Clause prohibited governmental interference with the selection of a religious community's leadership, in order to protect "the internal governance of the church." *Id.* at 706. The Court added, however, that this protection is not available to all entities: a "labor union, or a social club," for example, does not get the same Free Exercise Clause protections as "the Lutheran Church." *Id.* As the Court explained, the law can and does treat a church differently than a business: while the former may hand-pick its members and clergy, the latter may not discriminate against members of a protected class when hiring or selling goods and services.

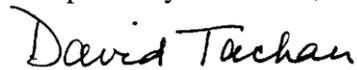
The various provisions of the First Amendment speak with one voice: businesses like Hands On Originals have a legal responsibility to treat their customers equally. They have no constitutional right to discriminate, whether in the name of religion or otherwise.

Conclusion

The judgment of the Circuit Court should be reversed.

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