COMMONWEALTH OF KENTUCKY
SUPREME COURT
No. 2017-SC-000278-DG

LEXINGTON-FAYETTE URBAN COUNTY HUMAN RIGHTS COMMISSION, **Appellant,**

v.

HANDS ON ORIGINALS, INC., **Appellee.**

On Appeal From No. 2015-CA-000745

BRIEF OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ANTI-DEFAMATION LEAGUE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; CENTRAL CONFERENCE OF AMERICAN RABBIS; INTERFAITH ALLIANCE FOUNDATION; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; NATIONAL COUNCIL OF JEWISH WOMEN, INC.; PEOPLE FOR THE AMERICAN WAY FOUNDATION; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM IN SUPPORT OF APPELLANT

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Certificate of Service

I certify that on February 7, 2018, I served copies of the original *amicus* brief, using Federal Express overnight service, and on February 13, 2018, I served copies of this corrected *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.

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STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

Like many jurisdictions, Lexington-Fayette Urban County has enacted an ordinance to ensure that its citizens 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)). The County has recognized that, as with discrimination on the basis of race, national origin, or religion, withholding 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, Ch. II, art. II § 2(33)(1).

Hands On maintains that the First Amendment allows it to disregard this law and deny service to customers seeking T-shirts for an organization advocating for gay and lesbian rights 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). Yet the would-be customer, the Gay and Lesbian Services Organization, supplied the design. Hence, any speech at issue belongs to that organization, not to Hands On. The County's antidiscrimination ordinance (Lexington-Fayette Urban County Local Ordinance 201-99, Section 2-33) requires merely that businesses serve customers on nondiscriminatory terms; it neither compels speech nor burdens Hands On's expressive association.

Hands On also cannot claim a constitutional or statutory religious-freedom right to violate the ordinance because that would run afoul of the Establishment Clause of the First Amendment to the U.S. Constitution, which prohibits granting religious exemptions from generally applicable laws when

the exemptions would harm third parties. And Hands On's claim under Kentucky's Religious Freedom Restoration Act fails both because the printshop has not satisfied the statutory prerequisite that claimants must show a substantial burden on their religious exercise and because, even if it had met its burden, enforcement of the County's ordinance would survive strict scrutiny.

If Hands On's argument were sufficient to license violations of antidiscrimination laws by this for-profit business open to the public, a host of other businesses would likewise have the right to engage in invidious discrimination. Lesbians, gay men, bisexuals, and their children would not know which businesses will serve them; but they *would* know that the law does not protect their rights to equal access to places of public accommodation. And Hands On's argument would apply—or not—in just the same way to all the classes protected by the antidiscrimination law. Businesses could therefore refuse service on the basis of not just sexual orientation but also race, national origin, or religion. That result would undermine the entire civil-rights legal regime. Accordingly, if the Court concludes that Hands On violated the County's antidiscrimination ordinance,[1] it should uphold the decision of the Kentucky Human Rights Commission.

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[1] This brief does not address the application of the ordinance but instead focuses on whether applying the ordinance to Hands On would violate the business's rights under the federal First Amendment or the Kentucky Religious Freedom Restoration Act.

ARGUMENT

I. THE HUMAN RIGHTS COMMISSION'S ORDER COMPORTS WITH FREEDOM OF SPEECH.

A. Requiring businesses to serve customers on nondiscriminatory terms does not compel speech.

Because the County's antidiscrimination ordinance regulates commercial entities' conduct—nondiscriminatory service of customers—not their expression, it does not implicate the compelled-speech doctrine. To be sure, the Free Speech Clause safeguards the right to refrain from speaking. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943). But speech and conduct are different; and even "conduct [that] was in part initiated, evidenced, or carried out by means of language" (*Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)) may be regulated without running afoul of the First Amendment (*see Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 62 (2006)).

In *FAIR*, several law schools sought to exclude military recruiters from on-campus employment fairs, despite a federal statute requiring that recruiters be given the same campus access as other employers, because the schools disapproved of the military's policy barring service by openly gay individuals. *Id.* at 52. Because allowing military recruiting entailed "send[ing] e-mails or post[ing] notices on bulletin boards," the schools argued that the statutory equal-access requirement violated their First Amendment rights against compelled speech. *Id.* at 61–62. The U.S. Supreme Court rejected that argument, holding 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 can "require an employer to take down a sign reading 'White Applicants Only,'" the Court held, so too may schools be required to work with military recruiters on the same terms as other employers. *Id.* at 62. Likewise, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the U.S. Supreme Court rejected a compelled-speech challenge to a state law that required a private shopping mall to allow groups to disseminate political messages on mall property, emphasizing that the mall could "disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law." *Id.* at 87.

A business selling goods or services to the general public is even further removed from customers' speech. Here, Hands On is a printing company that places customers' messages on clothing and accessories. Being required to print the Gay and Lesbian Services Organization's design on the same terms as it prints the designs of other customers is no more violative of a business's rights than is, for example, a requirement that law-brief printers print and bind briefs for all customers on equal terms, notwithstanding that many briefs may take positions on controversial issues with which the printer disagrees. Just as no one would think that a legal brief is the printshop's speech, neither would anyone plausibly view the Gay and Lesbian Services Organization's T-shirts as Hands On's speech. Indeed, because all retail businesses are required to comply with the County's antidiscrimination ordinance, there is "little [or no] likelihood" (*FAIR*, 547 U.S. at 65) that the views of people wearing T-shirts expressing pride in their identities would be attributed to anyone other than the wearers of the shirts.

In simple terms, performing a service for a customer is regulable conduct, not protected speech. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 66 (N.M. 2013).[2] Were it otherwise, a host of other businesses would be equally free to discriminate at will: Every copy center—from Kinkos to Office Depot—could deny service to customers on the basis of race, sex, age, religion, or sexual orientation. Minority and interracial couples seeking to print wedding invitations could be turned away. So could churches wanting copies of fliers inviting people to Mass.

The First Amendment confers no such right on sellers to violate civil-rights laws simply because they wish to express disapproval of members of a protected class of customers because of who they are. Hence, courts have routinely rejected attempts to transform this type of garden-variety discrimination into protected speech or religious expression. *See, e.g.*, *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543, 556 (Wash. 2017) (flower shop); *Elane Photography*, 309 P.3d at 63 (commercial photographer); *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cty. Superior Court*, 189 P.3d 959, 967–68 (Cal. 2008) (physicians); *Klein v. Or. Bureau of Labor and Indus.*, No. A159899, 2017 WL 6613356, at *19 (Or. Ct. App. Dec. 28, 2017) (bakery).

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[2] Because Hands On was asked merely to reproduce the Gay and Lesbian Services Organization's message and therefore would not be engaging in any arguably creative effort at all (*see* Cir. Ct. Op. 5 (customer gave Hands On "a detailed description of the front of the t-shirt design")), its free-expression defense is even less plausible than the amply implausible free-expression defense asserted by the bakery in *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. Ct. App. 2015), *cert granted,* U.S. Sup. Ct., No. 16-111 (argued Dec. 6, 2017).

B. Requiring businesses to serve customers on equal terms does not burden expressive association.

Nor does requiring Hands On to comply with antidiscrimination laws burden any right to expressive association. 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). To have an expressive-association claim, a "group," as a group, "must engage in some form of expression." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

As detailed above, Hands On does not speak for First Amendment purposes by fulfilling customers' orders. Its customers, typically strangers to each other and to the shop's owners, are ordinary purchasers of goods and services who, collectively, "are not members of any organized association; they are patrons of the same business establishment." *Stanglin*, 490 U.S. at 24. The requirement that Hands On engage in ordinary, arms-length commercial transactions on a nondiscriminatory basis does not somehow convert the shop's customers into its partners in a communicative venture. And the transaction of selling a customer a batch of T-shirts bearing the customer's design does not make the printshop the speaker of the customer's message. For these sorts of reasons, the courts have repeatedly rejected both expressive-association and intimate-association challenges to laws that regulate such arms'-length business transactions. *See, e.g.*, *Fields v. City of Tulsa*, 753 F.3d 1000, 1012 (10th Cir. 2014) (police officer's freedom of intimate association not infringed by order to perform regular job duties at Islamic Society event because officer "was never required to be anything more than an outsider with respect to the

Islamic Society"); *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010) (requiring groups to coordinate with City officials to arrange for use of space inside City Hall does not significantly burden right of expressive association).

Indeed, the U.S. Supreme Court held that even affinity groups like the Rotary Club and Jaycees, which historically excluded women, have no First Amendment associational right to discriminate unless they can "demonstrate that admitting women . . . will affect in any significant way the existing members' ability to carry out their various purposes." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987); *accord Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). Nothing about being required to serve all customers equally adversely "affect[s] in any significant way" a printshop's ability to sell T-shirts. *Rotary Int'l*, 481 U.S. at 548. Quite the contrary.

II. THE COMMISSION'S ORDER DOES NOT VIOLATE HANDS ON'S RELIGIOUS-FREEDOM RIGHTS.

Nor does the Kentucky Religious Freedom Restoration Act, Ky. Rev. Stat. § 446.350, afford an exemption from general public-accommodations law. The proper application of section 446.350 necessarily turns on two considerations: the Establishment Clause of the First Amendment—which prohibits the state from granting religious exemptions that materially harm third parties—and RFRA's statutory prerequisite that only religious exercise that has been substantially burdened receives the protection of strict scrutiny under the Act. The asserted defense here fails in both respects; and

enforcement of the public-accommodations law would survive strict scrutiny in all events.[3]

A. The Establishment Cause forbids religious accommodations that harm third parties.

The Establishment Clause prohibits granting a religious exemption from a generally applicable law when the exemption would have a "detrimental effect on any third party." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); *see also Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring). Thus, when analyzing statutory protections for religious exercise like section 446.350, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). Because a religious exemption from public-accommodations law would have precisely that impermissible effect—

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[3] The lower courts did not address Hands On's constitutional free-exercise claim, presumably because that claim is meritless as a matter of law. "[S]tatutes . . . which provide for the public health, safety and welfare, *and* which are statutes of general applicability that only incidentally affect the practice of religion, are properly reviewed for a rational basis under the Kentucky Constitution, as they are under the federal constitution." *Gingerich v. Commonwealth*, 382 S.W.3d 835, 844 (Ky. 2012); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Emp't Div. v. Smith*, 494 U.S. 872, 878–79 (1990). Antidiscrimination laws that apply to all businesses on equal terms easily satisfy the Free Exercise Clause. *See 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) (public university's policy forbidding discrimination based on sexual orientation did not violate Free Exercise Clause because it was "of general application" and only "incidentally burden[ed] religious conduct"); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274, 287–88 (2010).

by making innocent third parties suffer otherwise unlawful discrimination—the Kentucky RFRA cannot be read to require what Hands On seeks.[4]

In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the U.S. Supreme Court invalidated a statute that guaranteed employees the day off on the Sabbath of their choosing. *Id.* at 709–10. Because the statute required "those who observe a Sabbath . . . as a matter of religious conviction [to] be relieved of the duty to work on that day, no matter what burden or inconvenience this impose[d] on the employer or fellow workers," it "impermissibly advance[d] a particular religious practice" and could not stand. *Id.* 708–10.

And in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the Court struck down a sales-tax exemption for religious periodicals that would have "burden[ed] nonbeneficiaries by increasing their tax bills by whatever amount [was] needed to offset the benefit bestowed on subscribers to religious publications." *Id.* at 18 n.8. In so doing, the Court explained that it had upheld religious exemptions from general laws only when they "did not, or would not,

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[4] Alternatively, the Court may wish to address the issue as a matter of constitutional avoidance: The Kentucky RFRA should be interpreted not to afford the exemption sought, for to read it as providing the exemption would raise and require adjudication of grave constitutional questions under both the federal Establishment Clause and Section 5 of the Kentucky Constitution, the latter of which forbids the "enlarge[ment]" of the civil rights of any person "on account of his belief or disbelief of any religious tenet, dogma, or teaching." KY. CONST. § 5; *see Baker v. Fletcher*, 204 S.W.3d 589, 597–98 (Ky. 2006) (courts should refrain from reaching constitutional issues when nonconstitutional grounds suffice to resolve case); *cf.* Daniel Reed, *All Citizens Of Kentucky Are Equal, Except Some Are More Equal Than Others: The Constitutional Deficiencies of the Kentucky RFRA*, 54 U. LOUISVILLE L. REV. 331, 354 (2016).

impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs." *Id.*[5]

As a matter of law, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. All for-profit businesses in Lexington-Fayette Urban County must abide by the County's public-accommodations law. The religious beliefs of Hands On's owners do not, and under the Establishment Clause cannot, supersede those requirements. Because granting Hands On an exemption from public-accommodations law would license (and hence result in) discrimination against historically marginalized groups—and could result in "exclusion [of those groups] from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society" (*Romer v. Evans*, 517 U.S. 620, 631 (1996))—the Establishment Clause prohibits the exemption.

B. Hands On failed to demonstrate a substantial burden on its religious exercise.

Even setting aside the constitutional prohibition against applying the Kentucky RFRA as Hands On wishes, the claim fails on its own terms. Hands On maintains that the Commission's Order is presumptively subject to strict

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[5] *See also Hobby Lobby*, 134 S. Ct. at 2781 n.37 (quoting *Cutter*, 544 U.S. at 720); *United States v. Lee*, 455 U.S. 252, 261 (1982) (rejecting request for religious exemption from social-security taxes because exemption would impermissibly "impose the employer's religious faith on the employees"); *Braunfeld v. Brown*, 366 U.S. 599, 608–09 (1961) (rejecting religious exemption that would have given Jewish business owners "an economic advantage over their competitors").

scrutiny under the Act. But strict scrutiny does not apply because Hands On has failed to meet the Act's prerequisite that the business demonstrate that the County has "substantially burden[ed] [its] freedom of religion." Ky. Rev. Stat. Ann. § 446.350. Only if that showing were made would the burden of persuasion shift to the County to show that it has used the least restrictive means to serve a compelling governmental interest. *Id*. And even if strict scrutiny were to apply—which it does not—it would be satisfied here.

1. Mere invocation of a religious belief should be insufficient to establish a substantial burden on religious exercise.

As a matter of statutory construction, the substantial-burden-on-religious-exercise prerequisite should be read to have meaningful and objective content. Hence, mere invocation of religious belief as a rationale for violating the law should not suffice to trigger section 446.350's burden-shifting and heightened scrutiny. To jump to strict-scrutiny analysis whenever a religious motivation is cited would violate the canon that a "'statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

Courts have identified only two ways that governmental action might constitute a substantial burden on the free exercise of religion: by "putting substantial pressure on an adherent . . . to violate his beliefs" (*Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981), or by forcing adherents to choose between practicing their faith and receiving a generally available public benefit (*see Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058,

1069–70 (9th Cir. 2008); *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007); *see also Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 384 (6th Cir. 2014), *vacated on other grounds*, 135 S. Ct. 1914 (2015)).

Thus, to assert a defense under a Religious Freedom Restoration Act, a party must "demonstrat[e] the honesty and accuracy of his contention that the religious practice at issue is important to the free exercise of his religion." *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004). There must be a sufficient nexus between the religious belief and the asserted religious practice to show that the state is "forc[ing the parties] to engage in conduct that their religion forbids or . . . prevent[ing] them from engaging in conduct [that] their religion requires." *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (quoting *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001)).

To require less of a showing by making mere religious motivation the lynchpin of the substantial-burden analysis would effectively nullify the statutory requirement. *See Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004) (considering and rejecting alternative statutory interpretations because "[i]f this Court were to make religious motivation the key for analysis of a claim, that would 'read out of [state RFRA] the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement.'" (quoting *Henderson*, 253 F.3d at 17)).[6] As Congress explained for the federal RFRA, on which the Kentucky RFRA is based, the statutory protection "does not require the Government to justify every action that has

[6] *See also Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007) (substantial-burden "hurdle is high and . . . determining its existence is fact intensive").

some effect on religious exercise." *See* 139 CONG. REC. S14,352 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch); *see also Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (substantial-burden requirement means "more than an inconvenience on religious exercise"). The Kentucky RFRA was enacted in response to this Court's holding in *Gingerich* that there was no constitutional exemption from a law that, as applied, straightforwardly required members of the Amish faith to violate their religion's commands. 382 S.W.3d at 837 (rejecting federal and state constitutional challenges to law requiring Amish to place symbols on horse-drawn buggies). The RFRA was meant to protect against that sort of imposition, not to make mere religious motivation the ground for a broad exemption from general law.

Were the substantial-burden requirement construed instead to turn solely on religious motivation, the courts would automatically have to apply strict scrutiny every time a party ventured to assert that an official act implicated religion, forcing government to satisfy the extraordinarily onerous compelling-interest test. That approach would not be workable for government or for the courts. Nor would it provide the protection for religious exercise that the Kentucky legislature intended. *Cf. Warner,* 887 So. 2d at 1033–34. For without the gatekeeping function of the substantial-burden prerequisite, genuine claims for religious accommodation would receive just the same treatment as mere rhetoric, with the result that the statutory protection of strict scrutiny would inevitably be watered down so as not to undermine the very possibility of general law—thus undercutting genuine claims along with

empty ones. And government would be deterred from accommodating religious exercise in the future for fear that any accommodation would be expansively invoked to the point that it derailed the state's entire regulatory program.

2. Hands On's invocation of its owner's religious belief did not establish a substantial burden on religious exercise.

Though Hands On's owners may disfavor same-sex couples on religious grounds, requiring the business to serve all customers regardless of sexual orientation is no more a burden on religious exercise than would be requiring a shop to serve all customers regardless of race despite the shopkeeper's belief on religious grounds that the races are unequal or that interracial marriage is sinful. *Cf. Thornton*, 472 U.S. at 710 ("'The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.'") (quoting *Otten v. Balt. & Ohio R.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)); *see also Loving v. Virginia*, 388 U.S. 1, 3 (1967).

The Circuit Court concluded that the Kentucky RFRA "is applicable" here solely "because HOO and its owners['] exercise of religion was motivated by the owners['] sincerely held religious beliefs." Cir. Ct. Op. 14; *see also* Cir. Ct. Op. 10 ("[T]he logo . . . communicate[d] . . . that people should be proud about sexual relationships other than marriages between a man and a woman," a "statement . . . directly contrary to the beliefs and values of HOO and its owners."). In doing so, the court incorrectly treated commercial activity in part affected by religious beliefs as equivalent to the exercise of religion. Though the Commission's Order had the effect of requiring Hands On to print

a customer's message with which Hands On's owner disagreed, the business did not argue that its (or its owner's) faith forbade it to fill the order. Absent that showing, no substantial burden on an exercise of religion was even asserted, much less established. Consequently, the compelling-interest test of section 446.350 was not triggered, and the Commission's order must be upheld as a rational application of the public-accommodations law.

3. Even if Hands On had established a substantial burden on religious exercise, the Commission's Order would satisfy strict scrutiny.

Even if Hands On had met the substantial-burden prerequisite, the Commission's Order would survive strict scrutiny because the County has compelling interests in barring invidious discrimination (*see, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983)) and avoiding the Establishment Clause violation that would occur if the RFRA were interpreted to afford the exemption (*cf. Widmar v. Vincent*, 454 U.S. 263, 271 (1981)). And the Order is narrowly tailored to those interests. For how else could the County stamp out discrimination, except by prohibiting it? And how else could the County avoid the constitutional violation of a religious exemption that unduly burdens third parties, except by not granting the exemption?

CONCLUSION

Assuming that Hands On's conduct violates the County's antidiscrimination ordinance, neither free-speech nor free-exercise protections bar enforcement of the Commission's Order, so the Order should be affirmed.

Respectfully submitted,

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