

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2015-CA-745

AARON BAKER FOR GAY AND LESBIAN SERVICES
ORGANIZATION,
and
LEXINGTON-FAYETTE URBAN COUNTY HUMAN RIGHTS
COMMISSION,
Appellants,

v.

HANDS ON ORIGINALS, INC.,
Appellee.

Appeal from the Fayette Circuit Court
Civil Branch
Third Division
Hon. James D. Ishmael, Jr.
Civil Action No. 14-CI-04474

BRIEF FOR *AMICUS CURIAE*
THE CATO INSTITUTE
IN SUPPORT OF APPELLEE

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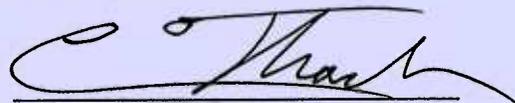
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INTEREST OF THE *AMICUS CURIAE*

The Cato Institute, founded in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts. Cato has published a vast range of commentary strongly supporting both the First Amendment and gay rights. See, e.g., Eugene Volokh & Ilya Shapiro, *Choosing What to Photograph Is a Form of Speech*, WALL ST. J., Mar. 17, 2014, available at <http://www.cato.org/publications/commentary/choosing-what-photograph-form-speech>; Robert A. Levy (Cato's chairman), *The Moral and Constitutional Case for a Right to Gay Marriage*, N.Y. DAILY NEWS, Aug. 15, 2011, available at <http://www.cato.org/publications/commentary/moral-constitutional-case-right-gay-marriage>.

STATEMENT OF THE CASE

Amicus incorporates by reference the Appellee's Statement of the Case in Hands on Originals' brief.

SUMMARY OF ARGUMENT

1. The government may not require Americans to help distribute speech of which they disapprove. The Supreme Court so held in *Wooley v. Maynard*,

430 U.S. 705 (1977), when it upheld drivers' First Amendment right not to display on their license plates a message with which they disagree. The logic of *Wooley* applies equally to printers' right not to print such messages.

2. The government's interest in preventing discrimination cannot justify restricting Hands On Originals' First Amendment rights. Hands On Originals is not discriminating based on the sexual orientation of any *customer*. Rather, its owners are choosing which *messages* they print. In this respect, the owners' actions are similar to the actions of the parade organizers in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), who also chose not to spread a particular message through their parade.

In *Hurley*, the Supreme Court noted that the state, in trying to force the organizers to include a gay pride group in a parade, was applying its antidiscrimination law "in a peculiar way": to mandate the inclusion of a message, not equal treatment for individuals. *Id.* at 572. And the Court held that this application of antidiscrimination law violated the First Amendment. The Commission's attempt to apply such law to Hands On Originals' choice about which materials to print likewise violates the First Amendment.

3. The Supreme Court has held that large organizations, such as cable operators or universities, might be required to convey messages on behalf of other organizations with which they disagree. But Hands On Originals is a small owner-operated company, in which the owners are necessarily closely

connected to the speech that Hands On Originals produces. In this respect, the owners of Hands On Originals are much closer to the Maynards in *Wooley v. Maynard*, whose “individual freedom of mind,” 430 U.S. at 714, secured the right not to help distribute speech of which they disapproved.

ARGUMENT

I. *Wooley* Shows That Hands On Originals May Not Be Forced to Print Expression With Which It Disagrees

Because the First Amendment protects the “individual freedom of mind,” people may not be required to display speech with which they disagree. *Wooley*, 430 U.S. at 714. Likewise, this individual freedom of mind means that people may not be required to print speech that they disagree with. Like artists, writers, or book publishers, printers—whether they print on paper or on T-shirts—have the constitutional right to choose which messages they print. *See Printing Indus. of Gulf Coast v. Hill*, 382 F. Supp. 801, 804 (S.D. Tex. 1974) (3-judge court) (concluding that printers have independent First Amendment rights “not derived from the author’s rights”), *vacated because of later change in state law*, 422 U.S. 937, 938 (1975). Speech on shirts, just like speech in a book or newspaper, is entitled to constitutional protection. *Cohen v. California*, 403 U.S. 15, 24 (1971). And speech created to be distributed for money is likewise as protected as other speech. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011).

Indeed, *Wooley* should dispose of this case. In *Wooley*, the U.S. Supreme Court held that drivers have a right not to display the state motto “Live Free or Die” on their license plates. Of course, this motto was created and printed by the government, and observers doubtless realized that the motto did not represent the drivers’ own views. Yet the Supreme Court nonetheless held that the law requiring drivers to display this motto “in effect require[d] that [drivers] use their private property as a ‘mobile billboard’ for the State’s ideological message.” 430 U.S. at 715. And such a requirement, the Court concluded, unconstitutionally “invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” *Id.* (citation omitted).

“A system which secures the right to proselytize religious, political, and ideological causes,” the Court held, “must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” *Id.* at 714 (citation omitted).

The same reasoning applies here. Just as the Maynards in *Wooley v. Maynard* had a “First Amendment right to avoid becoming the courier for [a] message,” *id.* at 717, the owners of Hands On Originals have a First Amendment right to avoid helping produce the message. Indeed, if the government could not compel even “the passive act of carrying the state motto on a license plate,” *id.* at 715, it likewise may not compel the more active act of printing

the message. And just as the Maynards prevailed even though passersby would not have thought that the license plate motto represented the Maynards' own views, Hands On Originals should prevail even though people would be unlikely to attribute the "Lexington Pride Festival" message to Hands On Originals.

The respect shown in *Wooley* for "individual freedom of mind," as a right not to take part in creating and distributing material one disagrees with, makes eminent sense. Democracy and liberty in large measure rely on citizens' ability to preserve their integrity as speakers and thinkers—their sense that their expression, and the expression that they "foster" and for which they act as "courier[s]," is consistent with what they actually believe.

This is why, in the dark days of Soviet repression, Alexander Solzhenitsyn admonished his fellow Russians to "live not by lies": to refuse to endorse speech that they believe to be false. Alexander Solzhenitsyn, *Live Not by Lies*, Wash. Post, Feb. 18, 1974, at A26, *reprinted at* <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/04/AR2008080401822.html>. Each person, he argued, must resolve to never "write, sign or print in any way a single phrase which in his opinion distorts the truth," to never "take into hand nor raise into the air a poster or slogan which he does not completely accept," to never "depict, foster or broadcast a single idea which he can see is false or a distortion of the truth." *Id.*

Such an uncompromising path is not for everyone. Some people may choose to make peace with speech compulsions, even when they disagree with the speech that is being compelled. But those whose consciences, whether religious or secular, require them to refuse to produce expression “which [they do] not completely accept,” *id.*, are constitutionally protected in that refusal.

II. Antidiscrimination Law Cannot Authorize Interference With Hands On Originals’ Right Not to Print Messages With Which It Disagrees

The government’s interest in preventing discrimination does not justify restricting Hands On Originals’ First Amendment rights. To be sure, the U.S. Supreme Court has held that antidiscrimination laws “do not, as a general matter, violate the First . . . Amendment[],” in part because, in their usual application, they do not “target speech” but rather target “the act of discriminating against individuals.” *Hurley*, 515 U.S. at 572. But the Court noted in *Hurley* that applying antidiscrimination laws to private organizations’ exclusion of speech based on its content is quite different from applying them to private organizations’ exclusion of people based on their identity.

In *Hurley*, a parade organizer excluded a group that wanted to carry an “Irish American Gay, Lesbian & Bisexual Group of Boston” banner in a parade. Massachusetts courts held that this exclusion violated antidiscrimination law, but the Supreme Court concluded that in this situation “the Massachusetts [antidiscrimination] law has been applied in a peculiar way.” *Id.* “Petitioners disclaim any intent to exclude homosexuals as such, and no indi-

vidual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march.” *Id.* “Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.” *Id.* And the parade organizers, the Supreme Court held, had a First Amendment right to exclude that banner.

Likewise, Hands On Originals did not seek to exclude gay, lesbian, or bisexual customers as such, but simply did not want to print a T-shirt carrying its own pro-gay-pride message. And just as the parade organizers had a right not to participate in the dissemination of GLIB’s message in *Hurley*, so here Hands On Originals has a right not to participate in the creation (and thus the dissemination) of the “Lexington Pride Festival” message.

This principle of course applies far beyond Hands On Originals’ decisions. A printer must be free to refuse to print materials promoting Satanism, or Scientology, or, if it chooses, conservative Christianity; the ban on discrimination against religious *customers* cannot justify requiring a printer to print religious *messages* with which it disagrees.

This freedom is protected regardless of whether the messages are “intertwined,” Lexington-Fayette Comm’n Br. 6, with the religion, sexual orientation, sex, race, national origin, or other protected status of the group seeking to place the order. An Israeli-American printer must be free to choose not to print messages that say “Support Palestine in the Israeli-Palestinian Conflict,” and a Palestinian-American printer must be free to choose not to print

“Support Israel in the Israeli-Palestinian Conflict.” Again, the ban on discrimination based on customers’ national origin cannot justify requiring a printer to print messages with which it disagrees, including when the disagreement stems from views related to the nationalities involved in a political dispute.

And, to offer one more example, some jurisdictions ban discrimination based on a customer’s political affiliation.¹ Yet even in those jurisdictions, printers must have the First Amendment right to refuse to print messages that support the Communist Party or the National Socialist Party or the Democratic Party or the Republican Party. Similarly, printers must be free not to print messages that express views they disagree with related to sexual orientation.

The Commission is correct that this means a printer would have a First Amendment right not to print a “Black Lives Matter” T-shirt. Lexington-Fayette Comm’n Br. 14. Printers should indeed be free to choose not to create advocacy for any political movement, whether or not related to race. Likewise, printers should be free not to print T-shirts saying “White Lives Mat-

¹ See Ann Arbor, Mich. Code of Ordinances §§ 9:151, :153; Broward County, Fla. Code of Ordinances §§ 16½-3, -34; D.C. Code § 2-1411.02; Champaign, Ill. Code of Ordinances §§ 17-3, -56; Decorah, Iowa Code of Ordinances §§ 2.50.020, 2.50.050.B; Harford County, Md. Code § 95.3, .6; Howard County, Md. Code of Ordinances § 12.210; Lansing, Mich. Code of Ordinances §§ 297.02, .04; Prince George’s County, Md. Code §§ 2-186, 2-220; Madison, Wisc. Code of Ordinances §§ 39.03(2)(cc), (5); Seattle, Wash. Mun. Code §§ 14.06.020(L), .030(B); Urbana, Ill. Code of Ordinances §§ 12-37, -39, -63; V.I. Code tit. 10, § 64(3) (2006).

ter,” “The Nation of Islam is Great,” “KKK,” “There Is No God But Allah,” “Jesus Is the Answer,” “Dianetics: The Modern Science of Mental Health” (the title of a major Scientology text), or any other message of which they disapprove.

This argument is consistent even with *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), where the New Mexico Supreme Court held that wedding photographers may not decline to photograph same-sex weddings. (That holding is not binding here, and *amicus* disagrees with it.) The New Mexico court stressed that, though New Mexico law bars, for example, discrimination by law firms, it “does not prohibit a law firm, even one that is a public accommodation, from turning away clients with whose views the firm disagrees.” *Id.* at 72. Likewise, Kentucky law may not prohibit a printer, even one that is a public accommodation, from refusing to print T-shirts that carry views with which the printer disagrees.

And the argument is also consistent with *Craig v. Masterpiece Cakeshop, Inc.*, 2015COA115 (Colo. Ct. App. Aug. 13, 2015), which held that a baker may not decline to bake a wedding cake with two men on top. (That holding is also not binding here.) The Colorado court expressly noted that “a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated.” *Id.* ¶ 71. But it concluded that it “need not reach

this issue” because the bakery “denied Craig’s . . . request without any discussion regarding . . . any possible written inscriptions.” *Id.*

The “Lexington Pride Festival” T-shirt, which clearly communicates a message celebrating gay pride, is expressive in a way that a cake with no inscription is not. Indeed, the Commission agrees that the logo on the T-shirt communicates an ideological message. “In depositions before the Commission, GLSO representatives conceded that the logo on the shirt communicates the message that people should be proud about sexual relationships other than marriages between a man and a woman.” Trial Ct. Op. 10; Brown Dep. at 27:6-28:8 (Ex. A). Lowe Dep. at 52:3-53:2 (Ex. B).

III. Forcing Hands On Originals to Print T-shirts Interferes More With Conscience and Individual Freedom of Mind Than Did the Laws in *Turner* or *Rumsfeld*

Hands On Originals is a small business owned by three people. It is not a vast publicly held corporation like Turner Broadcasting System, *see Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994), or a large nonprofit university, like the ones in *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006). Requiring Hands On Originals to print T-shirts with messages that its owners oppose interferes with the owners’ “freedom of mind” much more than would imposing similar requirements on Turner Broadcasting or on a university.

In *Rumsfeld*, the U.S. Supreme Court held that the government could demand that universities let military recruiters access university property and

send out e-mails and post signs mentioning the recruiters' presence. "Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter," the Court reasoned, "is simply not the same as . . . forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in . . . *Wooley* to suggest that it is." 547 U.S. at 62.

But even if universities are far removed from the Maynards in *Wooley*, the owners of Hands On Originals are quite similar to those drivers. Like the Maynards, the owners are individuals who have to be closely and personally involved in the distribution of messages with which they disagree—in *Wooley*, by displaying the message on their own car, and in this case, by having to print the message in their own small shop.

Turner is also different from this case because letting cable operators exclude certain channels interfered with those channels' ability to reach customers. As the U.S. Supreme Court noted in *Hurley*, "A cable is not only a conduit for speech produced by others and selected by cable operators for transmission, but a franchised channel giving monopolistic opportunity to shut out some speakers." 515 U.S. at 577. Because of this, the government had an interest in "limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed." *Id.* Likewise, in *Rumsfeld*, military recruiters would often find it much harder to reach students who study and often live on a secluded uni-

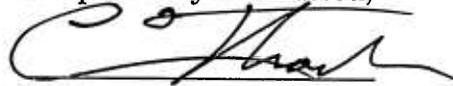
versity campus, if the recruiters could not do so through the normal on-campus interview process.

But Hands On Originals is no monopoly. Other competing printing companies would be happy to take Gay and Lesbian Services Organization's money, or even "print the t-shirts for GLSO for free or at a substantially reduced price." Trial Ct. Op. 6. There is no need to protect GLSO's message by interfering with Hands On Originals' First Amendment rights.

CONCLUSION

Printers, like other speakers and like the drivers in *Wooley*, have a First Amendment right to choose which speech they will help disseminate and which they will not. The district court's grant of summary judgment, which correctly recognizes and protects this right, should therefore be upheld.

Respectfully submitted,



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