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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* Counsel would like to thank Ashley Phillips, a UCLA School of Law student who worked on this brief.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the Brief for Amicus Curiae were served on October 29, 2015, by U.S. Mail, first class, postage prepaid, upon the following:

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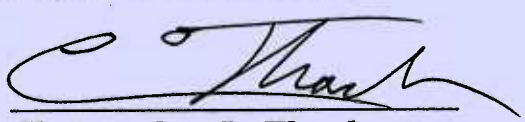
I further certify that the record on appeal has not been withdrawn from the office of the Fayette Circuit Clerk for purposes of this brief.



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STATEMENT OF POINTS AND AUTHORITIES

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