COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2017-SC-000278

LEXINGTON-FAYETTE URBAN
COUNTY HUMAN RIGHTS COMMISSION — APPELLANT

v.

HANDS-ON ORIGINALS, INC. — APPELLEE

On Appeal from Civil Action No. 14-CI-04474,
No. 2015-CA-000745

AMICUS CURIAE BRIEF OF THE COMMONWEALTH OF KENTUCKY, *EX REL.* MATTHEW G. BEVIN, IN SUPPORT OF HANDS-ON ORIGINALS, INC.

M. Stephen Pitt
S. Chad Meredith
Matthew F. Kuhn
Office of the Governor
700 Capital Avenue, Suite 101
Frankfort, Kentucky 40601

Counsel for the Commonwealth of Kentucky, ex rel. Matthew G. Bevin

CERTIFICATE OF SERVICE

I certify that on February 7, 2018 I served this brief via first-class U.S. mail on Edward E. Dove, 201 West Short Street, Suite 300, Lexington, Kentucky 40507; Bryan H. Beauman, 333 West Vine Street, Suite 1500, Lexington, Kentucky 40507; Fayette Circuit Court, Clerk, 120 North Limestone, Lexington, Kentucky 40507; and Kentucky Court of Appeals, Clerk, 360 Democrat Drive, Frankfort, Kentucky 40601.

M. Stephen Pitt

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF POINTS AND AUTHORITIES i

PURPOSE AND INTEREST OF AMICUS CURIAE 1

ARGUMENT 1

Thomas D. Clark, *Kentucky: Land of Contrast* (1968) 2

I. The Kentucky Constitution zealously protects rights of conscience. 2

Ky. Const. Art. XII, § 3 (1792) 2

Ky. Const. § 5...2, 3

Ky. St. Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979)...2, 3

Ky. Const. § 1..3

1 Official Report of the Proceedings & Debates (1890)......................4, 5, 6

4 Official Report of the Proceedings & Debates (1891)..............................6

II. This Court has largely abandoned Kentucky's freedom-of-conscience protections....6

Gingerich v. Commonwealth, 382 S.W.3d 835 (Ky. 2012) 7

Commonwealth v. Howard, 969 S.W.2d 700 (Ky. 1998) 7

KRS 446.350 ....7, 8

III. *Gingerich* should be overruled...8

U.S. Const. amend. I 8

Ky. Const. § 5...8

Gingerich v. Commonwealth, 382 S.W.3d 835 (Ky. 2012) 9, 10, 11, 12

Employment Division v. Smith, 494 U.S. 872 (1990).................................9

Commonwealth v. Howard, 969 S.W.2d 700 (Ky. 1998) 10

Michael W. McConnell, *The Origins & Historical Understanding of the Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990) 12

IV. The Court should again give meaning to Kentuckians' constitutional right to freedom of conscience....................................13

Gingerich v. Commonwealth, 382 S.W.3d 835 (Ky. 2012) 13

CONCLUSION..14

James C. Klotter & Freda C. Klotter, *A Concise History of Kentucky* (2008)
....14

PURPOSE AND INTEREST OF AMICUS CURIAE

The Commonwealth, through Governor Bevin, has a substantial interest in this case, which asks whether the city of Lexington can override the deeply held religious beliefs of its citizens based upon a self-defined notion of "tolerance." The simple but compelling facts of this case—small business owners being forced to print t-shirts promoting homosexuality in violation of their sincerely held religious beliefs—give the Court a unique opportunity to reaffirm a cornerstone of Kentucky's Constitution: its absolute protection of rights of conscience. The Court should hold that, under the Kentucky Constitution, laws that override religious beliefs or freedom of conscience are unconstitutional unless they can overcome the most exacting scrutiny. Under this high standard, Lexington's fairness ordinance, if interpreted to require Hands-On Originals to print t-shirts promoting homosexuality, cannot stand.

ARGUMENT

Kentucky is, and always has been, a land of freedom of conscience, where citizens can live without fear that the government will prescribe what beliefs and speech are orthodox and require conformity therewith. From its earliest days, Kentucky has been a haven for those who wish to adhere to the dictates of their conscience without interference from the Commonwealth. Indeed, many early settlers came to Kentucky for that very reason. For example, the 18th century saw repeated clashes in Virginia between Baptists and the established church. In fact, Baptist ministers in Virginia *were jailed* for daring to contradict what the authorities had unilaterally determined to be

orthodox—*i.e.*, for challenging the established church. Thomas D. Clark, *Kentucky: Land of Contrast* 41–42 (1968). Thus, seeking freedom, many Baptists "decided to withdraw" from Virginia. *Id.* at 42. They went "west to free Kentucky, where a man could claim a piece of good land and worship God as he pleased." *Id.*

This is the philosophical heritage of this Commonwealth. It is who we are. From the very beginning, we have been a people who understand, celebrate, and protect diversity of thought.

I. The Kentucky Constitution zealously protects rights of conscience.

In light of the freedom-seeking motives of many of Kentucky's early settlers, the drafters of Kentucky's first Constitution ensured that it would stand as a bulwark against government interference with freedom of conscience. They specified: "[N]o human authority can, in any case whatever, control or interfere with the rights of conscience." Ky. Const. Art. XII, § 3 (1792). Although Kentucky's Constitution has been amended three times since 1792, most recently in 1890, its initial rights-of-conscience protections have remained intact, with almost no change. *See* Ky. Const. § 5; *see also Ky. St. Bd. for Elementary & Secondary Educ. v. Rudasill*, 589 S.W.2d 877, 880 n.4 (Ky. 1979) (quoting the rights-of-conscience protections in the 1792, 1799, and 1850 constitutions).

The current Kentucky Constitution, like those before it, demands that special solicitude be shown for rights of conscience. The Constitution speaks in

categorical terms on this issue: "No human authority shall, in any case whatever, control or interfere with the rights of conscience." *Id.*; *see also* Ky. Const. § 1 (guaranteeing the "inherent and inalienable right[] . . . of worshipping Almighty God according to the dictates of [one's] conscience[]"). Section 5's language, which admits of no exception, thus safeguards Kentuckians' rights of conscience to the fullest extent possible. That this expansive language has invariably been part of Kentucky's four constitutional charters confirms the centrality of freedom of conscience to the Commonwealth's constitutional design.

Tellingly, when Kentucky's current Constitution was debated in 1890, a serious attempt was made to water down Kentucky's freedom-of-conscience guarantees.[1] More specifically, the report of the Committee on Preamble and Bill of Rights proposed that Section 5 of the Constitution be materially limited as follows:

> [N]o human authority ought, in any case whatever, to control or interfere with the rights of conscience . . . . **But the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations; excuse acts of licentiousness, or justify practices inconsistent with the good order, peace or safety of the State; or opposed to the civil authority thereof.**

---

[1] This Court has long acknowledged that the 1890 debate about Section 5 of the Constitution informs its meaning. This debate, the Court has held, aids "in divining the intent of the constitutional draftsmen in settling upon the words they chose to limit the power of the state." *Rudasill*, 589 S.W.2d at 879. This is because "the convention of 1890 was comprised of competent and educated delegates who were sincerely concerned with individual liberties." *Id.* at 880.

1 Official Report of the Proceedings & Debates 300 (1890) (emphasis added). Thus, the proposed version of Section 5 allowed the Commonwealth to override its citizens' freedom of conscience if doing so was consistent with "the good order, peace or safety of the State" or "the civil authority thereof." *See id.*

This proposed limitation was controversial in 1890, just as it would be today. In discussing the issue, Delegate Straus proposed striking any limitation on rights of conscience, explaining that "[t]he Committee, it seems to me, ha[s] gone out and gotten new language for the purpose of qualifying the old declaration of the liberty of conscience. It is possible that these words may in the future be fruitful of much trouble in this State." *Id.* at 850. Delegate Straus continued, offering concrete examples to make his point:

> It seems to me that there is an abundance of room here for construction, and we leave it with the Legislature of this State to determine the question what . . . practices are inconsistent with good order, peace or safety of the State. I can imagine a Legislature so composed of religious fanatics that they will determine that the doctrine of a number of gentlemen in the city of Louisville, who teach the doctrine of the Agnostics is contrary to the peace and order of this State, and, therefore, that they should not be permitted to assemble. I can so construct a Legislature that they will determine that the old-fashioned Methodist meetings in the woods, where they shout, is contrary to the good order and peace of society. You leave a wide door open for construction. It seems to me that we should be content to have a complete and clear declaration in favor of liberty of conscience, without any attempt whatever to qualify or limit it, or to abridge the power of the Legislature to determine what practices are inconsistent with good order and the peace and safety of the State.

Id. In sum, Delegate Straus voiced concerns—which Hands-On's current situation proves were prescient—that the government would use limitations on rights of conscience to silence those with unpopular beliefs.

Delegate Bronston echoed those concerns, stating that "[n]o civilized people in these United States, or in the known world, who believe in freedom of conscience, have ever proposed to impose such restrictions [on freedom of conscience]." *Id.* at 852. Delegate Bronston was especially concerned with the proposed constitutional language that allowed Kentuckians' rights of conscience to be disregarded merely if they are "opposed to the civil authority thereof." *Id.* at 852–53. Responding to this proposed language, Delegate Bronston argued:

> It is those words that I say to the gentlemen of this Convention absolutely nullify the provision for freedom of conscience; because if the civil authority can do it, who can say that in this great cauldron of public excitement . . . Legislatures may not be found that will prescribe the manner in which a man shall worship God; and then where is your freedom of conscience, when they say, "You can not do it—opposed to the civil authority?" . . . . I beg, gentlemen of this Convention, do not publish it to the world that you say that a man may worship God according to the dictates of his own conscience, and yet, in order to gratify the fondness of gentlemen for a flourish of language, you add at the end, "But shall not do it if it is contrary to the civil authority of Kentucky."

Id. at 853.

The Committee on the Whole initially rejected Delegates Straus's and Bronston's concerns by a closely divided vote. *Id.* at 855. Their efforts opposing any limitation on Kentuckians' rights of conscience, however, ultimately were successful. *See, e.g.*, *id.* at 1024–25 (making a motion to remove any limitation

on rights of conscience because "there is serious objection on the part of some gentlemen"[2]), 1231–33 (further discussing amendments to what became Section 5). When the dust cleared after the convention debate, the adopted version of the Constitution contained *no limits* on freedom of conscience. 4 Official Report of the Proceedings & Debates 6024 (1891) (listing the final version of Section 5 as adopted by the convention).

This history is telling. The 1890 delegates seriously considered and debated placing meaningful limitations on Kentuckians' rights of conscience, but *they refused to do so* for fear that a future government would wield power to silence disagreement and compel orthodoxy. In specifically rejecting any qualification on freedom of conscience, the 1890 delegates unequivocally confirmed that rights of conscience cannot be subordinated to the nebulous interests of "good order, peace or safety of the State." Rights of conscience, the 1890 convention confirmed, are second to nothing. Unfortunately, 122 years later, this Court essentially rewrote the Constitution by adopting some of the very limitations that the 1890 convention rejected.

II. This Court has largely abandoned Kentucky's freedom-of-conscience protections.

Despite Kentucky's uninterrupted history of protecting freedom of conscience, this Court has essentially written the rights-of-conscience

---

[2] This motion was made by Delegate Rodes, who served as the Chairman of the Committee on Preamble and Bill of Rights, the committee that initially proposed to restrict Kentuckians' freedom of conscience.

protections out of the Kentucky Constitution. In *Gingerich v. Commonwealth*, 382 S.W.3d 835 (Ky. 2012), the Court upheld a law requiring members of the Amish community to put a triangular emblem on their horse-drawn buggies, in violation of their religious beliefs. *Id.* at 844. By a 4-3 vote, *Gingrich* broadly concluded that the Commonwealth can override its citizens' sincerely held religious beliefs through a generally applicable law on the topic of "health, safety and welfare" merely if there is a rational basis for infringing on religious beliefs. *Id.* This means that the Commonwealth can override its citizens' sincerely held religious beliefs through generally applicable laws for almost any reason. *See Commonwealth v. Howard*, 969 S.W.2d 700, 703 (Ky. 1998) (discussing how easy rational basis review is to satisfy). Stated differently, by allowing generally applicable laws to overrule freedom of conscience as a matter of course, *Gingerich* dilutes Section 5 of the Kentucky Constitution of any real meaning.

Perhaps unsurprisingly in light of Kentucky's history, the public's reaction to *Gingerich* was harsh and swift. Less than a year after *Gingerich* was decided, the General Assembly, over the veto of then-Governor Beshear, repudiated *Gingerich* through statute. *See generally* KRS 446.350 ("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."). Although the General Assembly has for now partially remedied *Gingerich*'s error,[3] this case gives the Court the opportunity to fully correct it and once again give meaning to the freedom-of-conscience protections in the Kentucky Constitution.

III. *Gingerich* should be overruled.

The crux of *Gingerich*'s error was this: Notwithstanding the Kentucky Constitution's unique and expansive protections of freedom of conscience, *Gingerich* rendered Section 5 superfluous by holding that it simply means whatever the First Amendment to the federal Constitution is interpreted to mean. This conclusion is insupportable.

The First Amendment states, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. Section 5 of the Kentucky Constitution, by contrast, broadly provides that "no human authority shall, in any case whatever, control or interfere with the rights of conscience." Ky. Const. § 5. In comparing these two differently worded provisions, *Gingerich*

---

[3] Although this statutory remedy is dispositive of this case, it is generally insufficient to protect Kentuckians' freedom of conscience for two reasons. First, the General Assembly can always repeal it. Second, there could be instances in which KRS 446.350 does not fully protect rights of conscience. As written, it only protects religious beliefs, whereas Section 5 applies to the broader category of rights of conscience. For example, if a person with no religious beliefs refuses to provide a service that would require him to advocate for something that he believes to be morally wrong, Section 5 would be implicated, but KRS 446.450 would not since the individual's conduct would not have been motivated by religious beliefs.

acknowledged that the Kentucky Constitution "[c]ertainly" is "more specific" about rights of conscience. *Gingerich* nevertheless reasoned that "it is linguistically impossible for language to be more inclusive than that in the First Amendment [of the federal Constitution]." *Gingerich*, 382 S.W.3d at 840. The only justification that *Gingerich* offered for this conclusion—contained in one brief sentence—was that the term "free exercise" in the federal Constitution "arguably requires a government to not place restrictions on the religious practice." *Id. Gingerich* cited no authority for this "arguabl[e]" reading of the Free Exercise Clause. Nor could it. The United States Supreme Court, of course, does not even interpret the term "free exercise" that way.[4]

With this reasoning and nothing more, *Gingerich* adopted as the constitutional law of Kentucky the United States Supreme Court's deeply controversial interpretation of the First Amendment's Free Exercise Clause from *Employment Division v. Smith*, 494 U.S. 872 (1990). Relying on *Smith*, *Gingerich* held that "governmental acts done for the health, safety and welfare of the public, which are applied generally to everyone, need only have a rational basis even when they incidentally affect religious practice." *Gingerich*, 382 S.W.3d at 841. This standard allows religious beliefs to be substantially

---

[4] One needs to look no further than *Employment Division v. Smith*, 494 U.S. 872, 879, 890 (1990), which upheld a neutral, generally applicable law that substantially burdened religious practice, even though it was not supported by a compelling government interest. *Smith* facially conflicts with *Gingerich*'s suggestion that the term "free exercise" "arguably requires a government to not place restrictions on the religious practice."

burdened in the sphere of "health, safety and welfare" for virtually no reason at all. Under rational basis review, the Commonwealth can override the religious beliefs of Kentuckians based merely upon "rational speculation unsupported by evidence or empirical data." *Howard*, 969 S.W.2d at 703 (citation omitted). Confirming how low this standard really is, *Gingerich* upheld the challenged statute, which substantially burdened the religious beliefs of members of Kentucky's Amish community, in *two brief paragraphs*. *Gingerich*, 382 S.W.3d at 844. The brevity of *Gingrich*'s actual analysis of the challenged statute is startling. *Gingerich*, by its own terms, therefore grants the Commonwealth close to *carte blanche* to set aside its citizens' religious beliefs through generally applicable laws.

This holding prompted two separate opinions. First, Justice Venters wrote separately to "register [his] disagreement with the proposition that the protection of liberty provided by the Kentucky Constitution simply mirrors the comparable protections afforded by the federal Constitution." *Id.* at 845 (Venters, J., concurring in result only). According to Justice Venters, decisions interpreting the federal Constitution "do not control the meaning of the Kentucky Constitution; nor do they define the protections of liberty contained therein." *Id.* Justice Venters thus concluded that the Court "should no longer tether the meaning of the Kentucky Constitution to the pendulum of the federal court interpretations of the federal Constitution." *Id.*

Justice Scott, joined by Justice Hughes, went one step further. Justice Scott concluded that "[t]he Kentucky Constitution unquestionably affords greater protection to the free exercise of religion than does the Federal Constitution." *Id.* at 845 (Scott, J., dissenting). Responding to the Court's conclusion that it is "linguistically impossible" to provide greater protection of religious liberty than the First Amendment's Free Exercise Clause, Justice Scott reasoned: "Not only is it linguistically *possible* to be more inclusive than the First Amendment, Section 5 of the Kentucky Constitution is linguistically *more inclusive*. Presumably, the framers of Kentucky's Constitution used more inclusive language with the intent it would offer *greater* protection than the Federal Constitution." *Id.* (emphasis in original). Justice Scott's textual analysis, which compared the Kentucky and federal Constitutions side by side, was a strong rebuttal to the Court's logic:

> [T]he First Amendment provides, in relevant part, that: (1) *Congress,* shall make (2) no *law* (3) *prohibiting* the free exercise of religion. In contrast, Kentucky's Constitution provides, in relevant part, that (1) *no human authority* shall (2) *in any case whatever* (3) *control or interfere with* the rights of conscience. Obviously, "no human authority" is broader than "Congress"; "any case whatever" is broader than "law"; and "control or interfere with" proscribes more activity than an outright "prohibit[ion]."

Id. at 845–46 (internal citations omitted) (emphasis in original).

Justice Scott also explained why Kentucky's uniquely worded freedom-of-conscience protections necessarily have meaning separate and apart from how the United States Supreme Court interprets the federal Constitution. Justice Scott explained:

> When Kentucky's current Constitution was adopted in 1891, the Federal Constitution had been in effect for nearly a century. If, as the majority suggests, the framers of Kentucky's Constitution intended its provisions to be co-extensive with the Federal Constitution, it *could have* (and, one would expect, *would have*) used the same language. Instead, [Kentucky's] framers went beyond the mandates of the Federal Constitution and proscribed *more* activity than does the First Amendment.

Id. at 845 (internal citation omitted) (citation omitted). Tellingly, the *Gingerich* Court made no attempt to rebut this straightforward analysis. Nor could it. In fact, Judge Michael McConnell, the leading scholar in this area, has urged that Kentucky's freedom-of-conscience protections, first adopted in 1792, "may suggest a movement toward broader protections, simultaneous with the ratification of the first amendment." Michael W. McConnell, *The Origins & Historical Understanding of the Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1461 (1990).

Nor did the *Gingerich* Court grapple with the above-described constitutional debate from 1890 about the scope of Section 5 and whether freedom of conscience should be limited. *See supra* Part I. *Gingerich*'s rule that the Commonwealth has almost unfettered authority to override religious beliefs through generally applicable laws in the area of "public health, safety and welfare" is essentially indistinguishable from the proposed version of Section 5 that the convention delegates rejected in 1890, which allowed freedom of conscience to be subordinated if it was deemed contrary to "the good order, peace or safety of the State." In sum, *Gingerich* accomplished in one fell swoop in 2012 precisely what the delegates in 1890 refused to do. From both a

textual and historical perspective, then, *Gingerich*'s reading of Section 5 of the Kentucky Constitution is indefensible.

IV. The Court should again give meaning to Kentuckians' constitutional right to freedom of conscience.

In the wake of *Gingerich*, Section 5 of the Kentucky Constitution provides little protection for Kentuckians' rights of conscience in the area of "public health, safety and welfare." This case, which cuts to the heart of the relationship between the government and Kentuckians' rights of conscience, gives the Court its best opportunity since *Gingerich* to correct, or at the very least minimize, *Gingerich*'s error.

In light of Kentucky's above-described history and the expansive text of Section 5, the Court should hold that "any law interfering with an individual's free exercise of religion must pass strict scrutiny or else be declared unconstitutional."[5] *Gingerich*, 382 S.W.3d at 845 (Scott, J., dissenting). As Justices Scott and Hughes poignantly observed in *Gingerich*, any lower standard "renders *inconsequential* Kentucky's free exercise guarantee in that virtually any asserted governmental interest could justify laws of general applicability that have the effect of substantially burdening individuals' religious liberty." *Id.* at 847 (emphasis added).

---

[5] Applying strict scrutiny to all laws that infringe on religious beliefs simply would return Section 5 to its meaning pre-*Gingerich*. The *Gingerich* Court acknowledged that two of the earliest cases interpreting Section 5 "are commonly viewed as using a strict scrutiny standard . . . ." *Gingerich*, 382 S.W.3d at 842.

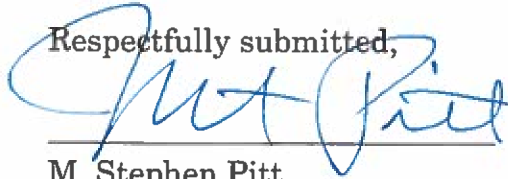
Even if the Court is not willing to overrule *Gingerich* altogether, the Court, at a minimum, should give it a short leash. *Gingerich* was a case about public safety, and, at the very least, it should be expressly limited to like matters. This case, in contrast, does not involve public safety. No one's safety is threatened by Hands-On's refusal to print t-shirts promoting homosexuality. If *Gingerich* is not limited to matters of public safety—*i.e.*, if rational basis review can be invoked based upon nebulous concerns of welfare or public benefit—then dizzying consequences will follow. For example, consistent with *Gingerich*'s interpretation of Section 5 of the Constitution, a publisher who supports same-sex marriage could be required to print materials for a group seeking to overturn *Obergefell v. Hodges*; the government could require a Christian advertising agency to publicly promote strip clubs; a homosexual photographer could be required to photograph a rally opposing homosexuality; and a pro-life speechwriter could be forced to write a speech for a pro-choice candidate voicing support for *Roe v. Wade*. This plainly is not a world in which we want to live, nor is it a world in which we should live. Thus, to avoid these scenarios, strict scrutiny should be applied to all laws—like Lexington's fairness ordinance—that infringe on Kentuckians' freedom of conscience for reasons other than public safety.

CONCLUSION

Kentucky "was a multicultural society from the start." James C. Klotter & Freda C. Klotter, *A Concise History of Kentucky* 11 (2008). However, directly

contrary to the Commonwealth's long history of protecting freedom of conscience, Lexington's fairness ordinance has been interpreted to silence disagreement, compel orthodoxy, and eliminate diversity of thought. This unprecedented incursion on Kentuckians' rights of conscience cannot stand under Section 5 of the Kentucky Constitution. Forcing Hands-On to print a message that its owners conscientiously disagree with is little different in principle than Virginia's jailing of Baptists in the 18th century.

Respectfully submitted,



M. Stephen Pitt
S. Chad Meredith
Matthew F. Kuhn
Office of the Governor
700 Capital Avenue, Suite 101
Frankfort, Kentucky 40601

Counsel for the Commonwealth of Kentucky, ex rel. Matthew G. Bevin