COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2017-SC-00278

LEXINGTON-FAYETTE URBAN
COUNTY HUMAN RIGHTS COMMISSION — APPELLANT

v.

On Review from the Kentucky Court of Appeals
Action No. 2015-CA-000745
Fayette Circuit Court Case No. 14-CI-04474

HANDS ON ORIGINALS, INC. — APPELLEE

BRIEF OF *AMICUS CURIAE* TYNDALE HOUSE PUBLISHERS, INC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of this brief have been served via First Class U.S. mail on this 7th day of February, 2017 to the following: Hon. Edward E. Dove, 201 W. Short Street, Suite 300, Lexington, Kentucky 40507; Hon. Bryan H. Beauman, Sturgill, Turner, Barker & Moloney, PLLC, 333 W. Vine Street, Suite 1500, Lexington, Kentucky 40507; Honorable James D. Ishmael, Jr., Judge, Fayette Circuit Court, Robert F. Stephens Circuit Courthouse, 120 N. Limestone, Lexington, Kentucky 40507; and Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601. The undersigned also certifies that the record on appeal was not withdrawn by Tyndale House Publishers, Inc.

COUNSEL FOR *AMICUS CURIAE*

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF INTEREST OF AMICI

Tyndale House Publishers was founded in 1962 by Dr. Kenneth N. Taylor as a means of publishing *The Living Bible.* Tyndale publishes Christian fiction, nonfiction, children's books, and other resources, including Bibles in the New Living Translation (NLT). Tyndale products include many *New York Times* best sellers, including the popular *Left Behind* fiction series by Tim LaHaye and Jerry B. Jenkins, novels by Francine Rivers, Karen Kingsbury and Joel C. Rosenberg, plus numerous nonfiction works. Tyndale House Publishers is substantially owned by Tyndale House Foundation. As a result, the company's profits help underwrite the foundation's mission, which is to spread the Good News of Christ around the world. Tyndale House's purpose is to minister to the spiritual needs of people, primarily through literature consistent with biblical principles.

Tyndale House is located in Carol Stream, Illinois. Its publications are sold in every state of the union, including approximately 100 commercial bookstores in Kentucky. In addition, Tyndale House has sold direct to nearly 300 individual consumers and 52 churches in Kentucky over the past two years. In the past year Tyndale House sold more than 10 million copies of its Christian books and Bibles through independent bookstores, chain bookstores (e.g., Barnes & Noble and Lifeway Christian Stores), and mass retailers (e.g., Amazon, Wal-Mart, and Target).

ARGUMENT

The issues raised by the Lexington-Fayette Urban County Human Rights Commission (HRC) concern an issue of crucial importance to any citizen – that of their individual freedom from government coercion to do or say things that violate their conscience. More specifically, as a practical matter, Appellant's arguments and the dissenting opinion by the Court of Appeals taken to their logical conclusion threaten the most basic

right of a publisher or other business involved in creating and disseminating various forms of speech – that of editorial discretion.

"The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster ... an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Appellant attempts to divert attention from the important issues surrounding freedom of speech by focusing on questions of whether a business refused to provide services to a particular group or for a particular purpose. Such a characterization of the issue, however, ignores the fundamental liberties that are at stake here. In this case a government entity penalized and punished a private business owner for refusing to print a message that violated his conscience. In fact, in its administrative action the local government sought to impose its own view of diversity training on Hands On Originals, Inc. (ALJ Order at 16.) This was not a matter of unlawful discrimination on the part of the business but of unlawful coercion on the part of the government. Forcing a person to speak, especially in a way that violates his or her conscience, is a *per se* violation of the First Amendment. *See Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) ("It is ... a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'") (quoting *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006)); *see also W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (finding local authorities' compelling students to salute to and pledge to the flag "transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control").

Under the protections of the First Amendment, the government may neither prohibit particular speech nor force particular speech. "[T]he right of freedom of thought

protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714 (forbidding state government from requiring citizens to display state motto on license plate). Fighting for and preserving this right has a long history in Western, and especially American, legal tradition. Interpreting a local fairness ordinance in a manner that contradicts these basic principles that are woven into the fabric of our legal history is repugnant to the very concept of free speech and would have far-reaching, devastating effects on all businesses involved in creating, promoting, or disseminating any message. The right to be free from compelled speech safeguards the "individual freedom of mind," *Wooley*, 430 U.S. at 714, and is required by "the premise of individual dignity and choice" that underlies the First Amendment. *Leathers v. Medlock*, 499 U.S. 439, 449 (1991) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)).

I. The right to exercise editorial discretion in determining the content of one's speech has a long and important history in the Anglo-American legal tradition.

American jurisprudence has long protected citizens from government coercion concerning the content of their speech. This Court also has reiterated its concern for protecting that freedom time and again, most recently last year. In *Champion v. Commonwealth*, 520 S.W.3d 331 (Ky. 2017), this Court unanimously struck down an attempt by the Lexington Fayette Urban County Government to undermine the free speech protections of the First Amendment. In striking down the Lexington Ordinance and its prohibition on speech in the form of panhandling, this Court wisely noted the following:

> The true beauty of the First Amendment is that it treats both Cicero and the vagabond as equals without prejudice to their message. Freedom of speech does not exist for us to talk about the weather; to accept this liberty is to welcome controversy and to embrace discomfort. Just as the government may not ban *Lolita* because it is *Lolita*, it likewise may not criminalize the beggar for begging – no matter how noble or altruistic its intentions may be.

Id. at 338. Likewise, here, the First Amendment treats both the Gay and Lesbian Services Organization (GLSO) and Hands On Originals "as equals without prejudice to their message."[1] *Id.* And the local Human Rights Commission may not compel Hands On Originals to speak the message propounded by the GLSO—whether or not one views the HRC's intentions as "noble or altruistic." *Id.*; *see also Knox* v. *Service Employees*, 567 U.S. 298, 309 (2012) ("The government may not . . . compel the endorsement of ideas that it approves.").

In *Champion*, this Court rightly recognized that the First Amendment's protection of speech reflects "the fundamental American principle that 'each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.'" 520 S.W.3d at 334 (citing *Agency for Int'l Development,* 133 S. Ct. at 2327 (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994)). And there is no distinction as to whether the speech infringement involves a restriction or a compulsion. *Agency for Int'l Development*, 133 S. Ct. at 2327. The right to be free from compelled speech has been recognized as including the right to exercise editorial discretion in fields that create and produce messages such as publishing, broadcasting, and cable programming.[2] *See Ark. Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 673-74 (1998) (explaining why entities that exercise editorial discretion in selecting and communicating certain messages engage in speech

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[1] To that point, the dissent below misses the mark in its claim that nothing justifies Hands on Originals to "censor" or "restrict[ ] [the GLSO's] speech under the First Amendment." (Opinion Affirming, Kentucky Court of Appeals (May 12, 2017), at *25.) In one sense, that statement is obviously wrong. Hands On Originals did not stop the GLSO from speaking its message, but in fact offered to refer the GLSO to another printer that would have created the requested shirts. But more to the point, neither the GLSO nor any private citizen has a *First Amendment* right to compel another citizen to speak. Nor are citizens compelled to speak because of the First Amendment right to speak for another. Nor does it matter if the Court – or local HRC officials - believes the requested material "was not obscene or defamatory... obnoxious, inflammatory, false, or even pornographic." *Id.*, at *25. The Court's opinion of speech is not relevant because "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess *by word or act* their faith therein." *Barnette*, 319 U.S. at 642 (emphasis added).

[2] Or even in re-producing speech – the Constitution makes no distinction. *See* Section II below.

activity protected by the First Amendment); *see also Turner Broad. Sys.*, 512 U.S. at 636 ("There can be no disagreement" that when cable programmers and cable operators "exercise[e] editorial discretion" over what content to include they "engage in and transmit speech" and "are entitled to the protection of the speech and press provisions of the First Amendment.").

The freedom of publishers and others engaged in similar activities to determine what speech to convey has not always been protected by governments in the past, but rather are freedoms that have been fought for, won, and preserved over time and at great cost. The history of that struggle can be traced through English history and colonial America, and was of particular significance even in Kentucky's own early history. American jurisprudence traditionally has had great respect for that history and has protected these rights as fundamental to a free society. *Doe v. Coleman*, 497 S.W.3d 740, 749 (Ky. 2016) ("And it is certainly true that 'free speech' is one of the most sacrosanct of freedoms, and one which is at the heart of defining what it means to be a free citizen.").

Within that long history, and of particular significance to amici, is the legacy of William Tyndale. Tyndale House Publishers is named in honor of William Tyndale, a name perhaps forgotten by many but nevertheless a figure important in any case implicating the freedom of speech for any publisher or printer. In the centuries following the invention of the movable-type printing press, governments had to grapple with the unprecedented ability of private citizens to disseminate literature, opinions, and political views in vastly greater volume and at a far greater speed than ever before in history – an ability which those in power often perceived as a threat to their authority and control. William Tyndale was one of several early publishers whose publications the government viewed as threatening to the status quo, and he paid the ultimate price for his choice of publication.

Tyndale lived in England from about 1494 to 1536 under the reign of Henry VIII and was a contemporary of Martin Luther and Sir Thomas More. Although highly controversial at the time because of his religious views, Tyndale was the first to translate the New Testament (as well as portions of the Old Testament) into English, and he used the relatively new printing press to publish it, along with many other works.[3] His publication of the Bible into English, as well as his published criticisms of the King's actions, infuriated Henry VIII along with other political and church leaders, and resulted in his exile from England. Because of the content of his publications, Tyndale was declared a heretic, was eventually captured in Antwerp, and on October 5, 1536, he was strangled and burned at the stake. Yet, Tyndale's legacy cannot be understated. Tyndale's writings, translations, and publications had a profound effect on the development and standardization of the English language.[4] While Tyndale may be less known than Shakespeare, in our modern English language we arguably use more of Tyndale's original words than Shakespeare's.[5]

Nearly two centuries later, even in Colonial America, freedom of speech for printers and publishers was still not entirely secure. One of the more notable early cases in American legal history concerning censorship of printers was the famous libel trial of a publisher named John Peter Zenger. In 1733, Zenger created the *New York Weekly Journal*, the first opposition newspaper in the Colonies. His publication attacked New York's British Governor, William Cosby. Zenger's publication used sarcasm, innuendo, and allegory to

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[3] Although John Wycliffe (ca. 1320-1384) is credited with completing the first English translation of the Bible, his translation was in "Middle English," which was significantly different from the "modern" English that Tyndale used, and was many decades before the invention of the movable-type printing press.

[4] The *Oxford English Dictionary* credits Tyndale with the first usage in English (as we know it) of multiple words including: network, atonement, Godspeed, Jehovah, Passover, intend, complainer, sorcerer, viper, castaway, fisherman, inexcusable, childishness, ourselves, scapegoat, uproar, wave, and many more. David Teems, *Tyndale: The Man Who Gave God An English Voice* 268-69 (2012); *see also Oxford English Dictionary* 2018. http://www.oed.com/(6 Feb. 2018).

[5] Teems, at xix.

ridicule the royal governor, and it was also the first American publication to include essays by leading English libertarian philosophers as well as the popular *Cato's Letters* which played a key role in the American Revolution.[6] Because of his criticisms of the governor, Zenger was charged criminally with seditious libel.

At trial, Zenger argued for acquittal, not by denying that he had published the materials at issue, but rather by arguing that the content of what he published was true. Upon his subsequent acquittal by the jury, Zenger was the last colonial printer to be prosecuted by royal authorities.[7] Zenger's case established in the Colonies that printers would be free to criticize the government, and became one of many factors helping shape the political culture that led to the Revolutionary War and the adoption of the First Amendment.[8]

While the adoption of the First Amendment to the Constitution of the United States made plain that Congress shall make no law abridging the freedom of speech, within a decade after its adoption, the effectiveness of its protection was called into question with the passage of the Sedition Act of 1798. The Sedition Act restricted the publication of any material critical of the new federal government, and also criminalized the assembly of persons with intent to oppose the legal measures of the government. Violation of the Act could result in a fine up to $5,000 or imprisonment for five years. At least ten editors and printers were convicted under the Sedition Act for printings critical of the Adams Administration.[9]

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[6] "Zenger Trial," *The Oxford Companion to United States History* (Paul S. Boyer ed., Oxford University Press 2001).
[7] *Id.* at 858.

[8] *Id.* at 858-59.

[9] Lowell H. Harrison and James C. Klotter, *A New History of Kentucky* 80-81 (1997).

The passage of the Sedition Act quickly generated significant controversy in the newly admitted Commonwealth of Kentucky. Kentucky's reaction to the Sedition Act and its companion Alien Friends Act and Naturalization Act, was "swift, negative, and almost unanimous."[10] Local meetings were conducted, the first generally recognized as being held in Clark County on July 24, 1798. Another meeting took place in Lexington on August 13, 1798, drawing a crowd larger than the population of the entire city, and featured speakers opposing the Act included George Nichols, an early publisher of the *Kentucky Gazette*, and Henry Clay.[11]

Because a state legislature could not violate the Sedition Act, citizens protested the violation of their cherished freedom of speech through the Kentucky General Assembly's passage of the Kentucky Resolutions of 1798. The Kentucky Resolutions called on other states to join Kentucky's member in Congress in pressing for repeal of the Alien and Sedition Acts. The legislation was principally, and secretively, authored by Thomas Jefferson, a close friend of John Breckenridge, who introduced the legislation into the Kentucky House of Representatives on November 9, 1798.[12] The Kentucky House approved the resolutions with one dissenting vote, the State Senate unanimously adopted them, and Governor Garrard signed the Resolutions on November 13, 1798.[13] While the Kentucky Resolutions raised other challenges that the Supreme Court of the United States would address in the first half of the nineteenth century, the historical significance in

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[10] *Id.* at 81.

[11] *Id.* The Clark County assembly characterized the Sedition Act as "the most abominable that was ever attempted to be imposed upon a nation of free men." *Id.*

[12] *Id.* at 81-82.

[13] "Kentucky Resolutions," *The Kentucky Encyclopedia* (John E. Kleber ed., University Press of Kentucky 1992). Ultimately, the terms of the Sedition Act expired in 1800, and with Thomas Jefferson's election, the controversy was quelled. *Id.* at 509.

Kentucky of the 1798 Resolutions exemplifies this Commonwealth's cherished protection of the freedom of speech.

II. First Amendment protections for a speaker's editorial discretion remain intact even when the speaker conveys speech on behalf of a third party.

Of primary importance for a publisher or printer is that speakers do not lose First Amendment protection because they convey speech on behalf of someone else. And it matters not whether they print or publish pamphlets, papers, photos, or promotional materials. Or Bibles. Or even T-shirts. The protection guaranteed by the First Amendment "does not end at the spoken or written word ... but extends to various forms of artistic expression." *Buehrle v. City of Key W.*, 813 F.3d 973, 976 (11th Cir. 2015) (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). Such protection is not a "mantle, worn by one party to the exclusion of another and passed between them depending on ... each party's degree of creative or expressive input." *Id.* at 977. Because the government cannot force citizens to speak "another speaker's message," both creators and editors of speech retain just as much interest in their speech as those who request or receive it. *Rumsfeld*, 547 U.S. 47 at 63 (collecting cases); *see also Simon & Schuster, Inc. v. N.Y. Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (acknowledging that both author and publisher have First Amendments rights).

A. Both creators and editors of speech use editorial judgment and therefore deserve First Amendment protection.

Hands On Originals' printing of promotional materials is like the work of other speech editors (e.g. newspapers, magazines, printers, search engines, etc.) who use their editorial judgment to publish speech created by others. Numerous cases illustrate the sweeping protections provided to all speakers along the chain of communication (a chain that squarely encompasses Hands On Originals). Perhaps newspapers are the most popular subject on this topic. The seminal United States Supreme Court case *Miami Herald Publishing*

Co. v. Tornillo, 418 U.S. 241 (1974) struck down a Florida statute requiring newspapers to print counter-opinion pieces if the paper had previously published articles critical of an elected official. In doing so, the Court rejected any argument that the newspaper was not protected by the First Amendment simply because it printed the speech of others. *Id.* at 258 ("A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.").[14] Any compulsion "to publish that which 'reason' tells them should not be published" is unconstitutional. *Id.* at 256.

Kentucky courts follow *Tornillo*. *See Flint v. Gannett Co., Inc.*, 2017 Ky. App. Unpub. LEXIS 234, *4 (Ky. App. Mar. 24, 2017) ("Under *Tornillo*, to allow [a customer] editorial control over a publication via judicial interference would violate the freedom of the press."); *Flint v. Jackson*, 2014 Ky. App. Unpub. LEXIS 998, *11 (Ky. App. Dec. 19, 2014) ("The Freedom of Press is one of our most sacred American institutions and is not encroached

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[14] *See also Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (Newspapers do not lose First Amendment rights just because they are "paid for printing" an advertisement.); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266-71 (1964) (overturning jury verdict for alleged slander because the newspaper did not forfeit its editorial rights under the First Amendment by publishing statements in the form of a paid advertisement, *id.* at 266, and because of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open...." *id.* at 270; and emphasizing that "[t]he constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered," *id.* at 271) (internal citations and quotation marks omitted); *Assoc. Press v. NLRB*, 301 U.S. 103 (1937) (recognizing that neutral laws must yield to the First Amendment if they interfere with the newspaper's editorial control over the content of its paper); *Passaic Daily News v. NLRB*, 237 F.2d 1543 (D.C. Cir. 1984) (holding that although the NLRB could require newspaper to re-hire the editor it had fired for his union activities, it could not force the paper to resume publication of the editor's weekly column because such compulsion would interfere with the editorial judgment protected by the First Amendment).

upon lightly.").[15] Multiple rulings from the Sixth Circuit apply the same principle. *See, e.g., Groswirt v Columbus Dispatch,* 238 F.3d 421, 2000 U.S. App. LEXIS 33466, *5 (6th Cir. 2000) (Table) ("A private publication has a First Amendment free press right to refuse to print material submitted to it for publication."); *Cousino v. Nowicki,* 165 F.3d 26, 1998 U.S. App. LEXIS 24926, *5 (6th Cir. 1998) (Table) ("[T]he First Amendment does not require a private publication or newspaper to publish any information [including a paid advertisement] submitted to it."); *Johari v. Ohio State Lantern,* 76 F.3d 379, 1996 U.S. App. LEXIS 3461, *3 (6th Cir. 1996) (Table) (rejecting discrimination claim brought under 42 U.S.C. § 1981, finding that "the First Amendment does not require a private publication to publish any information by an outsider").[16]

But the First Amendment's protection applies well beyond newspapers. Television stations have similar security in declining to produce others' speech. *See, e.g., Marshall v. Duncan,* 2010 U.S. Dist. LEXIS 33858, *4-5 (W.D. Ky. Apr. 6, 2010) (citing *Tornillo* and ruling that "a news station has a First Amendment free press right to refuse to cover material submitted to it. . . . For this reason, a federal court cannot compel a news provider to cover a

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[15] Pursuant to CR 76.28(4)(c), these opinions are attached as Exhibits 1 and 2 respectively to the motion for leave to file an *amicus curiae* brief.

[16] Other federal circuit courts follow suit. *See, e.g., Homefinders of America, Inc. v. Providence Journal Co.,* 621 F.2d 441, 444 (1st Cir. 1980) (The First Amendment prohibits the government from ordering a newspaper "to publish advertising against its will."); *Kania v. Fordham,* 702 F.2d 475, 477 n.5 (4th Cir. 1983) ("The University could not compel *The Daily Tar Heel* to provide equal access to those disagreeing with its editorial positions without running afoul of the constitutional guarantee of freedom of the press.") (citations omitted); *Chicago Joint Bd., Amalgamated Clothing Workers of Am., AFL-CIO v. Chicago Tribune Co.,* 435 F.2d 470, 478 (7th Cir. 1970) (finding that newspaper may not be required to open its "printing press and distribution systems without [its] consent" to accommodate someone else's speech that it opposes); *Novotny v. Tripp County, S.D.,* 664 F.3d 1173, 1177 (8th Cir. 2011) ("[A]n individual does not possess a constitutional right to require that a privately owned newspaper publish his letter to the editor. Indeed, a contrary rule would infringe upon the right of the newspaper itself to decide what content it includes on its own editorial page."); *McDermott v. Ampersand Pub., LLC,* 593 F.3d 950, 959 (9th Cir. 2010) ("It is clear that the First Amendment erects a barrier against government interference with a newspaper's exercise of editorial control over its content."); *Assocs. & Aldrich Co. v. Times Mirror Co.,* 440 F.2d 133, 136 (9th Cir. 1971) ("We can find nothing in the United States Constitution, any federal statute, or any controlling precedent that allows us to compel a private newspaper to publish advertisements without editorial control of their content....").

story submitted to it by a citizen."). In *Buehrle*, the Eleventh Circuit held that the First Amendment's free speech protection covered the tattoo technician who inks the citizen not just the person who displays the tattoo on the skin. *Buehrle*, 813 F.3d at 977 ("Protected artistic expression frequently encompasses a sequence of acts by different parties, often in relation to the same piece of work. The First Amendment protects the artist who paints a piece just as surely as it protects the gallery owner who displays it, the buyer who purchases it, and the people who view it.") (citation omitted).[17]

Certainly, photographers – not just the subjects of the photos or those who hire them – find similar protection under the First Amendment,[18] as do internet search engine websites[19] and even Facebook.[20] Likewise, painters, not merely their models or those who commission their work, enjoy the full breadth and scope of First Amendment protection.[21] How then can a printer and publisher of t-shirts, hats, aprons, bags, blankets, inkpens, flashlights, keychains and lanyards be treated differently? It certainly should not be. *See Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 740 (1996) ("The history of this Court's First Amendment jurisprudence, however, is one of continual

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[17] *See also Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) (holding tattooing was protected speech and reasoning that "[t]he principal difference between a tattoo and, for example, a pen-and-ink drawing, is that a tattoo is engrafted onto a person's skin rather than drawn on paper.... [A] form of speech does not lose First Amendment protection based on the kind of surface it is applied to").

[18] *See, e.g., Baker v. Peddlers Task Force*, 1996 U.S. Dist. LEXIS 19140, *3 (S.D.N.Y. Dec. 30, 1996) ("The City cites no authority for the proposition that commissioned works are excluded from the protection of the First Amendment, and common sense and even a casual acquaintance with the history of the visual arts strongly suggest that a commissioned work is expression.").

[19] *See, e.g., Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014) (affirming that search engines exercise protected editorial control over the information in their search list); *Langdon v. Google*, Inc., 474 F. Supp. 2d 622 (D. Del. 2007) (same); *e-ventures Worldwide, LLC v. Google Inc.*, 2017 U.S. Dist. LEXIS 88650 (M.D. Florida Feb. 8, 2017) (same).

[20] *See, e.g., La'Tiejira v. Facebook, Inc.*, 2017 U.S. Dist. LEXIS 125246 (Aug. 7, 2017) (recognizing the First Amendment protects Facebook's editorial control over what it chooses to censor from users of its platform).

[21] *See, e.g., ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 925 (6th Cir. 2003) (holding that distributing limited edition prints of original painting was protected speech because "[p]ublishers disseminating the work of others who create expressive materials also come wholly within the protective shield of the First Amendment.").

development, as the Constitution's general command that 'Congress shall make no law ... abridging the freedom of speech, or of the press,' has been applied to new circumstances requiring different adaptations of prior principles and precedents."). Of utmost concern to amicus, should the governmental compulsion of speech prevail in this case, is that if Hands On Originals can be compelled to print messages with which it disagrees, why not also a company that publishes books?

B. First Amendment protections are no different in the face of an alleged violation of an anti-discrimination law.

The fact that this case involves a First Amendment defense to a non-discrimination law changes nothing. Time and again courts have recognized the supremacy of the First Amendment to different non-discrimination statutes including the 1866 Civil Rights Act,[22] the Americans with Disabilities Act,[23] Title VII/harassment,[24] age discrimination complaints,[25] and public accommodation laws.[26] Accordingly, the primacy of the First

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[22] *See, e.g., Groswirt*, 238 F.3d at 421 (affirming dismissal of suit against a newspaper for refusing to publish letters because of the author's race because a private publication has a First Amendment free press right to refuse to print material submitted to it for publication); *Johari*, 76 F. 3d at 379 (affirming dismissal of suit for racial discrimination and upholding newspapers' right to exercise editorial judgment over what it publishes, even when it solicits letters from its readers); *Claybrooks v Am. Broad. Co.*, 898 F. Supp. 2d 986, 1000 (M.D. Tenn. 2012) (dismissing suit for racial discrimination under 42 U.S.C. § 1981 brought by African-American men who auditioned for, but were rejected by, ABC's television show *The Bachelor* because "the First Amendment protects the producers' right unilaterally to control their own creative content" and base their casting decisions "on whatever considerations the producers wish to take into account.").

[23] *See, e.g, Treanor v. Washington Post Co.*, 826 F. Supp. 568, 569 (D.D.C. 1993) (dismissing suit for alleged discrimination brought by a disabled individual against a newspaper for refusing to publish the person's book review and finding that "requiring newspaper editors to publish certain articles or reviews would likely be inconsistent with the First Amendment").

[24] *See, e.g., Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (court enjoined school harassment policy as applied to regulate speech, recognizing that "[w]hen laws against harassment attempt to regulate oral or written expression on such topics, however detestable the view expressed may be, we cannot turn a blind eye to the First Amendment implications."); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995) (court overturned jury verdict against police association based on a sexist column by an anonymous columnist in its newsletter, recognizing that "[w]here pure expression is involved, Title VII steers into the territory of the First Amendment.").

[25] *See, e.g., Ingels v. Westwood One Broad. Serv., Inc.*, 129 Cal. App. 4th 1050, 1974 (2005) (affirming dismissal of age discrimination suit, and upholding First Amendment rights of radio show to choose the content of its programming, stating "[h]ere, the broadcaster's choice of which callers to allow on the air is part of the content of speech") (citing *Riley v. Nat. Red. of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988)).

Amendment must prevail in cases such as this one — where the government seeks to force a printer to publish content he objects to by application of a public accommodation law. Such a compulsion destroys editorial judgment and contradicts well-settled case law. The courts have long protected the editorial judgment of those who print, publish, or transmit others' speech.

CONCLUSION

The American legal tradition fiercely protects the autonomy of the speaker in exercising his or her editorial judgment. Interpreting public accommodation ordinances in a manner that permits local governments to coerce particular expressions is not only unconstitutional, but also will have far-reaching effects on any publisher, printer, or other business that historically has exercised editorial discretion in the message it produces or promotes.

Just as with the government action concerning William Tyndale, Zenger, or the Sedition Laws, or even the law in *Champion*, laws that have the effect of either "stifl[ing] speech on account of its message, or that require[ ]the utterance of a particular message ... pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion." *Turner*, 512 U.S. at 641. It is no mere coincidence the government here sought

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[26] *See, e.g., Dale v. Boy Scouts of Am.*, 530 U.S. 640 (2000) (upholding Boy Scouts' free association rights in face of challenge that they had violated public accommodation law by removing a gay scout leader); *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (upholding parade organizers' First Amendment right to exclude LGBT advocacy group from marching under a banner in a St. Patrick's Day parade); *S. Bos. Allied War Veterans Council v. City of Boston*, 297 F. Supp. 2d 388, 392-93 (D. Mass 2003) (relying on *Hurley*, 515 U.S. at 579, for the proposition that private speakers have the right "not [to] have the message of an opposing group forced on them by the state," and thereby finding that state officials violated the First Amendment rights of parade organizers by forcing them under the public accommodations law to allow an anti-war group to march at the end of their parade); *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56, 59 (N.D. Ohio 1995) (holding that Cleveland's use of a state public accommodations law that prohibited sex discrimination to prevent Nation of Islam ministers from delivering "separate speeches to men and women" at a conference and forcing the ministers to speak to a mixed gender audience would necessarily change "the content and character of the speech" which would be a violation of the First Amendment).

not only to compel Hands On Originals' speech but also to conduct training as to the wrongfulness of the company's decision not to advance the GLSO's message. That very risk "that the Government may effectively drive certain ideas or viewpoints from the marketplace" is one of the reasons that freedom of speech must be guarded and protected. *Id.* (quoting *Simon & Shuster, Inc.*, 502 U.S. at 116). To continue to protect this cherished freedom this Court should affirm the decision of the Court of Appeals on the basis of upholding the First Amendment rights of publishers, printers and others who create and disseminate speech, as well as all other Kentucky citizens.

Respectfully submitted,

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