

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION  
CASE NO: 3:19-CV-851-JRW

Electronically filed

CHELSEY NELSON PHOTOGRAPHY, LLC  
AND CHELSEY NELSON

PLAINTIFFS

v.

**MOTION TO DISMISS**

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT, ET AL.

DEFENDANTS

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The Defendants, Louisville/Jefferson County Metro Government (“Metro Government”) and Louisville Metro Human Relations Commission-Enforcement, Louisville Metro Human Relations Commission, Advocacy, Kendall Boyd in his official capacity as Executive Director of the Louisville Metro Human Relations Commission, Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Laila Ramey, William Sutter, Ibrahim Syed, and Leonard Thomas, in their official capacity as members for Louisville Metro Human Relations Commission-Enforcement, by counsel, (collectively “Defendants”) hereby move this Court pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) to dismiss Plaintiffs’ claims against them for lack of standing, lack of subject-matter jurisdiction and failure to state a claim. Defendants also move to dismiss on grounds of sovereign immunity and/or qualified immunity as further set forth in their tendered Memorandum in Support of Motion to Dismiss. Finally, Defendants also move to dismiss Plaintiffs’ claims for compensatory damages, nominal damages or attorneys’ fees for failure to state a claim.

In further support of this Motion, Defendants contemporaneously file their Memorandum in Support of the Motion setting forth the basis and reasons for the requested dismissal. The tendered Order of Dismissal should be entered.

TENDERED BY:

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Motion to Dismiss with tendered Order was electronically on this 16th day of January 2020, via the Court's electronic mail system which in turn will email this Motion to Dismiss to the following:

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION  
CASE NO. 3:19-CV-851-JRW

CHELSEY NELSON PHOTOGRAPHY LLC,  
AND CHELSEY NELSON

PLAINTIFFS

v. **DEFENDANTS’ MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS’ CLAIMS**

LOUISVILLE/JEFFERSON COUNTY  
METRO GOVERNMENT, *et al.*

DEFENDANTS

\* \* \* \* \*

**I. Introduction**

The Defendants Louisville/Jefferson County Metro Government (“Metro Government” or “Metro”), Louisville Metro Human Relations Commission – Enforcement (generally “HRC” or “HRC – Enforcement,” as specified), Louisville Metro Human Relations Commission – Advocacy (generally “HRC” or “HRC – Advocacy” or “HRC Board,” as specified), Kendall Boyd, in his official capacity as Executive Director of the HRC (“Director Boyd”), Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Laila Ramey, William Sutter, Ibrahim Syed, and Leonard Thomas (hereinafter collectively “Defendants”), by counsel, for their Memorandum in Support of Defendants’ Motion to Dismiss submit the following. This memorandum examines pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) why the Plaintiffs lack standing to bring this pre-enforcement suit and why certain claims against Defendants should be dismissed as a matter of law for failure to state a claim upon which relief may be granted.

## II. Facts

### A. CHELSEY NELSON AND CHELSEY NELSON PHOTOGRAPHY LLC AND THE ALLEGATIONS OF THE COMPLAINT.

Plaintiff Chelsey Nelson (“Nelson”) owns and is the sole member of Chelsey Nelson Photography LLC (“Chelsey Photography”), a Kentucky for profit limited liability company located in Louisville, Kentucky.<sup>1</sup> (Dkt. 1 Complaint at para. 7-9, 55). She alleges she is “a commissioned photographer, editor, and blogger who loves using photographs and words to tell stories that positively depict creation, truth, purity, beauty and excellence.” (Dkt. 1 Complaint at para. 26-27). Plaintiffs claim Chelsey Photography offers wedding celebration services and boutique editing services with an emphasis on wedding celebration services portraying engaged and married couples in a positive way. The business is run for profit as an LLC, not a sole proprietorship. (Dkt. 3-2 Declaration of Chelsey Nelson at para. 6, 11-15, 54). Nelson has placed all the content of her personal Instagram page on her business Instagram site. (*Id.* at para. 23-31). The Complaint alleges the business “does not currently accept requests from the general public to personally photograph any subject matter except weddings.” (Dkt. 1 Complaint at para. 57-59, *see also* para. 60-62). The business solicits and receives requests for its services from the general public through Plaintiffs professional contacts, website, and other social media sites (*Id.* at para. 46).

Even though Metro Government has taken no pre-enforcement action against Plaintiffs, Plaintiffs allege Metro “is using the threat of limitless damages . . . and court orders to force Chelsey to create photographs for, blog about, and participate in solemn ceremonies she disagrees with – same-sex wedding ceremonies. (Dkt. 1 Complaint at p. 2). She complains that “Louisville even makes it illegal for Chelsey to explain on her studio’s own website why she only believes in marriage between a man and a woman or why she only accepts requests consistent with this view.” (Dkt. 1 Complaint at p. 2). She claims her only option

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<sup>1</sup> In October 2019, Ms. Nelson formed Chelsey Nelson Photography LLC under Kentucky law and it is listed on the Kentucky Secretary of State’s online website as an LLC. (Dkt. 1 Complaint at para. 48-49; *see also* (Dkt. 3-2 Declaration of Chelsey Nelson at pp. 2-3, para. 11-15).

is to file this pre-enforcement lawsuit “to clarify and protect her freedoms under the First and Fourteenth Amendments and the Kentucky Religious Restoration Act—the freedoms to live out her faith, to speak her views, and to pursue her dream of running her photography studio” while seeking for others the same freedom. (Dkt. 1 Complaint at pp. 3-4, and para. 208-09). Nelson proclaims she “has ultimate editorial judgment and control over the photographs she takes, the photographs she edits, and the content of her blog, and she always retains discretion to reject any client suggestion if she deems it improper.” (Dkt. 1 Complaint at para. 149, 181; Dkt. 3-2 Declaration of Chelsey Nelson at para. 115-22, 163, 184-85). Above all, she claims “she cannot tell certain stories or participate in certain ceremonies” and she “only accepts requests for services which are consistent with her editorial, artistic, and religious judgment.” (Dkt. 1 Complaint at para. 182, 185). She believes “God created marriage to be an exclusive covenant between one man and one woman.” (Dkt. 1 Complaint at para. 190; Dkt. 3-2 Declaration of Chelsey Nelson at para. 58-59).

Nelson states as a result of her beliefs, she would decline any request for her services for a same-sex wedding because that would violate her religious beliefs. (Dkt. 1 Complaint at para. 191-92; Dkt. 3-2 Declaration of Chelsey Nelson at para. 218-221, 237, 251-52). She proclaims she “does not want to leave the wedding industry because she is motivated by her religious beliefs to provide wedding celebration and boutique editing services for weddings so she can positively depict marriage between one man and one woman . . . .” (Dkt. 1 Complaint at para. 232).

Chelsey Photography is a commercial, for profit, photography business operating in Jefferson County, Kentucky that offers its services for a fee to the public, thereby increasing its visibility to clients and potential clients. Nelson claims she wants to expand her business and advertise but “she is refraining from doing so because of the law” and she claims she has lost and is continuing to lose business because of her fear of violating the subject Metro Ordinance. (Dkt. 1 Complaint at para. 235-41). She claims she “faces a credible threat and substantial risk that she will receive requests to provide wedding celebrations and

boutique editing services for same-sex weddings, likely leading to prosecution” under Metro’s Ordinance. (Dkt. 1 Complaint at para. 242).

Plaintiffs claim unless Defendants are enjoined, they will suffer irreparable harm and economic injury. Plaintiffs claim their First Amendment rights of freedom of speech, association and press have been violated. Plaintiffs also claim their First Amendment right of free exercise of religion has been violated together with an alleged violation of the First Amendment Establishment Clause. In addition, Plaintiffs allege a violation of the Fourteenth Amendment Due Process Clause. Finally, Plaintiffs claim that Kentucky’s Religious Freedom Act has been violated. (Dkt. 1 Complaint at pp. 41-50). In Plaintiffs’ Preliminary Injunction Motion they seek an injunction precluding enforcement of the subject Ordinance for denying photography services with respect to same-sex marriages.

Plaintiffs do not allege in the Verified Complaint that they have been asked to photograph or edit a same-sex wedding. Plaintiffs do not allege that they have ever declined an offer to photograph, or edit the photographs of, same-sex weddings. Rather, Plaintiff Chelsey Nelson states that she “*would decline* any request for . . . a same-sex wedding.” *Id.* at para. 191 (emphasis added). Plaintiffs further state, “[a]nytime Chelsey receives a request that she cannot fulfill because of a conflict with her religious beliefs, she *would* do her best to refer that request to another artist . . . .” *Id.* at para. 199 (emphasis added). The phrases “would,” “would not,” and “cannot” speak to a potential act that has not yet occurred. For instance, the Plaintiff LLC does not say: “every time Chelsey received a request she could not fulfill, she did her best to refer that request to another artist.” This distinction is important because Plaintiffs do not articulate an injury. Plaintiffs claim that Louisville’s Ordinance violates their First Amendment rights by compelling, or restricting the Company’s artistic content and associations, and “by effectively requiring [Plaintiffs] to operate their expressive business in ways that violate their religious beliefs or to close their expressive business . . . .” (Dkt. 1 Plaintiffs’ Complaint at pp. 42-45). Nowhere in the Complaint do Plaintiffs allege that this harm has actually occurred. Plaintiffs do not allege that Metro has communicated any attempt to restrain them. Metro

has not threatened, initiated, or resolved a civil action against Plaintiffs under the complained of ordinance. See Affidavit of Director Kendall Boyd attached as Exhibit 1. Instead, under the section heading “Louisville actively enforces its law”, the Plaintiffs claim “[t]he fear of being investigated for an alleged violation . . . has also caused Chelsey to refrain from advertising . . . and growing her business . . . and has caused her to lose business opportunities . . .” *Id.* para. 282. This fear also allegedly prevents the Plaintiffs from posting public statements confirming its policy of only photographing and editing opposite-sex weddings. *Id.* para. 338. It is clear from the Complaint that the Plaintiffs’ fear of a hypothetical enforcement action forms the basis of all the allegations.

## **B. METRO GOVERNMENT IS A POLITICAL SUBDIVISION OF THE COMMONWEALTH OF KENTUCKY**

Metro Government is a consolidated local government established pursuant to KRS Chapter 67C. In 2004, the governments of Jefferson County and the City of Louisville merged pursuant to this statute. The Metro Government formed by this merger is a political subdivision of the Commonwealth of Kentucky. Before merger, Louisville enacted local legislation for the public safety and welfare of its citizens through, and in conformity with, the U.S. Constitution, the Kentucky Constitution and state law. In 1999, both Louisville and Jefferson County, before merger, amended their anti-discrimination ordinance to include the categories of sexual orientation and gender identity. The local ordinances largely reflect KRS § 344, the Kentucky Civil Rights Act. The Sixth Circuit has explained the history of the Ordinance and its effect in *Hyman v. City of Louisville*, 53 Fed. Appx.740, 742 (6<sup>th</sup>. Cir. 2002):

In 1999, after years of lobbying by a group called the Fairness Campaign, both the City of Louisville (the “City”) and Jefferson County (the “County”), which encompasses the City and several other localities, amended their anti-discrimination ordinances to include “sexual orientation” and “gender identity” amongst the traits upon which employers are not permitted to discriminate. The ordinances passed by the City and County are substantially the same: both not only proscribe discrimination in employment but also prohibit employers from publishing any advertisement related to employment that expresses a “preference, limitation, [or] specification” on, among other things, the basis of sexual orientation or gender identity. See Louisville Code Ord. § 98.17(D) (1999); Jefferson County Code Ord. § 92.06(E) (1999).

Metro Government has one of the largest minority and LGBT communities in the region. Chapter 32 of Metro Government's local ordinances authorize Metro to create the Human Relations Commission to advocate for practices and policies consistent with the ordinance and to enforce Louisville's civil rights provisions. The Mayor appoints members to the advocacy board by drawing from the city's diverse population. The members of this board meet once a month and advise the Mayor on Metro's relations with minority communities. The Mayor also appoints the Director of the HRC – Enforcement agency. The enforcement agency addresses violations of Metro's anti-discrimination laws, with a policy goal of educating the alleged offender about civil rights and seeking compliance first through conciliation efforts.

### **C. METRO GOVERNMENT'S PUBLIC ACCOMMODATION ORDINANCE**

Under Metro Ordinance § 92.02, "Place of Public Accommodation, Resort or Amusement" is defined in pertinent part as "[a]ny place, store or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds; except that a private club is not a place of public accommodation, resort or amusement if its policies are determined by its members and the facilities or services are available only to its members and the bona fide guests . . . ." (See Exhibit 2 copy of § 92.02).

Metro's Public Accommodations Ordinance in broad terms prohibits discrimination by forbidding and finding it is an unlawful practice "for a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, resort or amusement as defined in § 92.02 on the grounds of race, color, religion, national origin, disability, sexual orientation or gender identity." Metro Ordinance § 92.05 (A). (See Exhibit 2 copy of 92.05 (A)).

Additionally, the Ordinance makes "[i]t is an unlawful practice for a person, directly or indirectly, to publish, circulate, issue, display, or mail, or cause to be published, circulated, issued, displayed, or mailed,

a written, printed, oral or visual communication, notice, or advertisement, which indicates that the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, resort or amusement, will be refused, withheld, or denied an individual on account of his race, color, religion, national origin, disability, sexual orientation or gender identity, or that patronage of, or presence at, a place of public accommodation, resort or amusement, of an individual, on account of his race, color, religion, national origin, disability, sexual orientation or gender identity is objectionable, unwelcome, unacceptable, or undesirable.” Metro Ordinance § 92.05(B). See Ex. 2, 92.05 (B).

### **III. Argument**

#### **1. Plaintiffs Lack Standing**

Plaintiffs allege Louisville’s Ordinance violates their First Amendment rights, both facially and as-applied, by banning, chilling, or compelling Plaintiffs’ speech. Plaintiffs also allege the Ordinance impermissibly limits their Free Exercise of Religion, violates the Establishment Clause, their Due Process rights, and their Religious Freedom. Plaintiffs allege these violations have led to economic harm and economic harm to be incurred in the future. Plaintiffs seek declaratory and injunctive relief. Before reaching the merits of these claims, Plaintiffs must first demonstrate standing.

The power of the federal courts is limited to hearing actual cases and controversies. U.S. Const. Art. III, Sec. 2, cl. 2; see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130 (1992). Constitutional standing has three elements that serve as its irreducible minimum in all cases. *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. “First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual and imminent, not conjectural or hypothetical.” *Id.* (internal citations and quotations omitted) (citing *Allen v. Wright*, 468 U.S. 737, 756, 104 S.Ct. 3315 (1984)). Second, a plaintiff must demonstrate causation – i.e., that her injury is “fairly traceable to the challenged action of the defendant, and not the result of independent action of some third party not before the court.” *Id.* (internal citations and omitted) (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42,

96 S.Ct. 1917 (1976). Third and finally, a plaintiff must prove that it is likely, rather than merely speculative, that a favorable decision could redress the injury. *Id.* 504 U.S. at 561, 112 S.Ct. 2130.

“If a party does not have standing to bring an action, then the court has no authority to hear the matter and must dismiss the case.” *Binno v. Am. Bar Ass’n*, 826 F.3d 338, 344 (6<sup>th</sup> Cir. 2016) (internal citation omitted). “The party seeking to invoke federal jurisdiction bears the burden to demonstrate standing and she ‘must plead its components with specificity.’” *Daubenmire v. City of Columbus*, 507 F.3d 383, 388 (6<sup>th</sup> Cir. 2007) (quoting *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 494 (6<sup>th</sup> Cir. 1999) (internal citation omitted). Particularly where a plaintiff seeks prospective relief, such as declaratory relief or an injunction, the Supreme Court has strictly construed the nature of the injury in fact – looking for the plaintiff to articulate a concrete harm that would not occur but for the defendant’s action. *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S.Ct. 2318, (1972).

As the Supreme Court found in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 134 S.Ct. 2334, 2336 (2014) “[t]o establish Article III standing, a plaintiff must show, inter alia, an ‘injury in fact’ which must be ‘concrete and particularized’ and ‘actual or imminent,’ not ‘conjectural or hypothetical.’” Further, in *Miller v. City of Wickliffe*, 852 F.3d 497, 505-07 (6<sup>th</sup> Cir. 2017), the Sixth Circuit Court of Appeals affirmed the district court’s ruling that plaintiffs lacked standing to bring a pre-enforcement facial challenge to an ordinance because the threat of enforcement of the law was not sufficiently imminent. Here, Plaintiff Nelson has claimed in the Complaint that she is afraid to act in violation of the Metro Ordinance with respect to her business, not that she intends to engage in a course of conduct implicating the Constitution. Plaintiffs have failed to show that the threat of enforcement against the LLC was credible at the time of the filing of the Complaint in this case. Plaintiffs had not been asked to photograph or edit photographs for a same-sex marriage. No action had been threatened against the Plaintiffs. Plaintiffs also had not applied for an exemption from the ordinance. All that Plaintiffs can assert, like in *Wickliffe*, 852 F.3d at 507, is that Metro “might have taken some action against them.” *Id.*

As the Sixth Circuit in *Wickliffe* wrote, “[t]his is the exact sort of hypothetical and speculative dispute that Article III proscribes from federal court dockets.” *Id.* The Plaintiffs’ claims should be dismissed for lack of standing and ripeness.

“The ripeness doctrine prevents courts from ‘entangling themselves in abstract disagreements’ through premature adjudication.” *Miller v. City of Cincinnati*, 622 F.3d 524, 532 (6<sup>th</sup> Cir. 2010) (quoting *Grace v. Community Church v. Lenox Twp.*, 544 F.3d 609, 615 (6<sup>th</sup> Cir. 2008)). To evaluate ripeness courts have considered three factors: “(1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties respective claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings.” *Miller*, 622 F.3d at 532 (internal citations omitted.)

In *Grace Community Church*, 544 F.3d at 609-15, the Sixth Circuit considered a case where the church filed suit against the township challenging the revocation of a special land use permit for a residential facility for religious instruction and counseling as a violation of the church’s rights under the federal Religious Land Use and Institutional Persons Act. The church made no attempt to obtain reconsideration of the revocation decision and did not appeal to the appropriate board of appeals but filed suit almost a year later. The Sixth Circuit in discussing the issues involved on appeal noted that ripeness is a “matter of justiciability, implicating ‘prudential reasons for refusing to exercise jurisdiction.’” (internal citations omitted). Here the church had failed to resolve the dispute locally before filing the federal suit and for lack of finality reasons the Sixth Circuit held the decision to revoke permit was not ripe for appellate review. *Id.* at 615. *See also National Park Hospitality Ass’n v. Dept. of Interior*, 538 U.S. 803, 807-08, 123 S.Ct. 2026 (2003) (Court held the controversy was not ripe for review).

Plaintiffs attempt to create or manufacture a concrete harm. Plaintiffs state that Metro Ordinance § 92.05 “forces Chelsey to decide between continuing to offer wedding celebration [photography] services and boutique editing services exclusively for marriages between a man and a woman under the constant threat

of prosecution under the law or leaving the wedding industry altogether.” (Dkt. 1 Plaintiff’s Verified Complaint, para. 227). Plaintiffs present this choice as a concrete and particularized damage, an injury-in-fact. However, the plain language of Plaintiffs’ statement unequivocally demonstrates that no injury has occurred. Plaintiffs do not allege that Metro has closed down their business, nor that Metro is even contemplating such an action. The allegation before the Court is that the Ordinance forces Plaintiffs to make a such a drastic choice, not that a choice has been made, one with redressable consequences. Because of the lack of an enforcement history, either in fact or alleged, Plaintiffs cannot *know* the consequences of their choice without exercising the choice. There is nothing concrete and particularized about the allegation. (See Exhibit 1. Affidavit of Director Kendall Boyd.) Nowhere in Plaintiffs’ Complaint do allegations rise to an actual and imminent injury. Rather, throughout the Complaint Plaintiffs offer conjectural and hypothetical scenarios that might happen if the subject Ordinance were applied to them.

Typically, a statute must be enforced against the plaintiff before a challenge to its constitutionality, but pre-enforcement challenges are available where “threatened enforcement [is] sufficiently imminent” – that is, there is “a credible threat” that the provision will be enforced against the plaintiff. *Susan B. Anthony List*, 134 S.Ct. at 2342. Here, the threat of future enforcement was not substantial at the time the suit was brought as the Defendants were completely unaware of Plaintiffs, their business and their beliefs. (See Exhibit 1) As the Sixth Circuit recognized in *Hyman v. City of Louisville*, 53 Fed. Appx. 740, 743 (6<sup>th</sup> Cir. 2002), the Supreme Court “wrote in *Mollan v. Torrance*, 22 U.S. (9 Wheat) 537, 539 6 L.Ed. 154 (1824), ‘the jurisdiction of the Court depends upon the state of things at the time of the action brought . . . . [J]urisdiction is to be assessed under the facts existing when the complaint is filed’ even though affidavits or other evidence can be considered.” *Hyman*, 53 Fed. Appx. at 743 (citing *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830, 109 S.Ct. 2218 (1989)); *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 524 (6<sup>th</sup> Cir. 2001) (same). Where the plaintiff seeks declaratory and injunctive relief, “a pre-enforcement challenge may be made before the actual completion of an injury-in-fact.” *Glenn v. Holder*, 690 F.3d 417, 421 (6<sup>th</sup> Cir. 2012).

To satisfy the pre-enforcement injury-in-fact requirement, however, plaintiffs must show an intention to engage in the conduct proscribed by the ordinance and that there is a credible threat plaintiffs will be prosecuted for that conduct. *Susan B. Anthony List*, 134 S.Ct. at 2342. The Court in *Susan B. Anthony List* found standing existed under the very different facts of that case.

Plaintiffs claim an intention to violate the subject Ordinance. Plaintiffs assert they would like to publish statements against same-sex marriage on their social media accounts but she states she has not done so due to the Metro ordinance. Plaintiffs also have not shown, however, that Metro has a history of prosecuting these violations. It is believed Louisville last addressed a constitutional challenge to its Public Accommodations Ordinance 18 years ago, in 2002. See Affidavit of Director Kendall Boyd, attached as Exhibit 1 hereto. This was in the case of *Hyman v. City of Louisville*. In *Hyman*, 53 Fed.Appx. 740, the Sixth Circuit Court of Appeals found the plaintiff did not have standing because at the time the lawsuit was filed he had no present intention to violate the ordinance; but also because the plaintiff, a physician who did not want to hire gay and lesbian employees, had made his position on the issue so well known throughout Louisville that it was very unlikely he would receive an employment application from the protected community. The Plaintiffs in our present litigation may accomplish the same notoriety and arrive at the same result. In any event, this issue has not been litigated since *Hyman*, which distinguishes the present challenge from the result in *Susan B. Anthony List*. The Sixth Circuit Court in *Hyman*, 53 Fed. Appx. at 744 dismissed the case for lack of standing.

In *Susan B. Anthony List*, the United States Supreme Court found prosecution under Ohio's statute imminent because Ohio's Commission annually prosecuted 20 to 80 cases. Of additional concern for the Court in *Susan B. Anthony List*, Ohio had no process for weeding out frivolous complaints. Ohio's statute allowed anyone with knowledge of a violation to file a complaint which led to prosecution. While it is true that Metro's Ordinance also allows anyone with knowledge of a violation to file a complaint, every complaint does not lead to prosecution. Further distinguishing Plaintiffs' claims from the Court's analysis in *Susan B. Anthony*

*List*, Metro's Ordinance has no referral for criminal prosecution and civil fines are capped. Plaintiffs' claims of unlimited damages are purely speculative and incorrect. Complaints under Metro's Ordinance are reviewed for reasonable cause by the HRC Director, and frivolous allegations do not result in prosecution. See Exhibit 1 Affidavit of Director Kendall Boyd. Plaintiffs bear the burden to show they have proper standing. Because Plaintiffs do not demonstrate a sufficiently imminent threat of prosecution under the factors considered by the Supreme Court in *Susan B. Anthony List*, their complaint must be dismissed for lack of subject matter jurisdiction. In fact, neither Plaintiffs nor any third party filed charges of discrimination with the Louisville Metro Human Relations Commission much less received any finding which might support a civil action. See Exhibit 1, Affidavit of Kendall Boyd.

Plaintiffs' claims of an economic injury do not meet the necessary standing requirements because Plaintiffs fail to show an actual injury or imminent injury with proper causation under the Ordinance for their claimed loss of business. Plaintiffs allege the subject Ordinance acts to limit Plaintiffs' advertising and therefore Plaintiffs cannot expand its business.<sup>2</sup> However, no evidence is provided to support this claim. The Complaint states that casting a wide net will invariably bring same-sex customers to the business, which Plaintiffs must then deny and violate the statute. But Plaintiffs have not shown how the Ordinance directly causes Plaintiffs a business loss – such as demonstrating that heterosexual couples would be more likely to use their services if Plaintiffs could publicly discriminate against same-sex couples. Plaintiffs proactively limit their business, not only just to weddings, but weddings solely between one man and one woman. Such a limited business model just as likely results in the economic loss of which the Plaintiffs complain. For instance, Plaintiffs place “personal significance” and presumably revel in the joys of Christmas (Declaration of Chelsey Nelson in Support of Plaintiff's Preliminary Injunction Motion, para. 52) but offer no Christmas card photography services, a source of revenue that would seem to align with her religious beliefs.

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<sup>2</sup> This makes no sense. By publishing her intention to exclude certain members of the public from her business, it is the Plaintiff who is limiting the business.

Plaintiffs have not met their burden of proving standing to file suit. There is no actual injury and no imminent future injury. Rather, at best any future injury is hypothetical, conjectural and speculative. This is not an actual controversy and “not within the purview of disputes that the federal courts are permitted to adjudicate.” *Hyman*, 53 Fed. Appx. at 744. The case is also not ripe for review as the dispute is premature and Plaintiffs have not been cited and the record as pleaded does not substantiate an injury-in-fact. Rather, there has been no harm and there is no justiciable controversy. Further, as discussed below, Chelsey Nelson individually has no standing where her business is a limited liability company.

## **2. Nelson is the Sole Member of Limited Liability Company and She has No Individual Standing.**

Chelsey Nelson is the only owner and sole member of Chelsey Nelson Photography LLC, a Kentucky limited liability company established this past year. Plaintiffs’ Verified Complaint, para. 7. Plaintiffs’ Complaint alleges that Louisville’s ordinance continues to cause it a loss of business opportunities. *Id.* para. 227-41, Prayer for Relief, para. 8. The Supreme Court of Kentucky held in *Turner v. Andrew*, 413 S.W.3d 272, 275-76 (2013) that the real party in interest in a suit for lost business income is the Plaintiff’s LLC and not the sole member. The *Turner* Court reasoned that a sole owner may not elect to personally pursue lost revenue in his or her own name while also defending any potential liability by then standing behind the protections a LLC provides. The company and its solitary member are not legally interchangeable nor is this distinction trivial or supertechnical. *Id.*, 413 S.W.3d at 276 (citing *Miller v. Paducah Airport Corp.*, 551 S.W.2d 241 (Ky. 1977)); *See also In re Howland*, 579 B.R. 411, 415 (E.D. Ky. 2016) (recognizing under Kentucky law a limited liability company is a legal entity distinct from its members); *Lee v. JP Morgan Chase Bank, N.A.*, 2015 WL 5580910 \*2 (W.D. Ky. Nov. 2, 2015) (recognizing under Kentucky law a limited liability company is distinct from its members and citing *Turner* and *Pannell v. Shannon*, 425 S.W. 3d 58, 67 (Ky. 2014) for the position that a sole owner cannot be personally liable by reason of member status and as an individual lacks standing). “Moreover, an LLC is not a legal coat that one slips on to protect the owner from liability but then discards or ignores altogether when it is time to pursue a damage claim.” *Turner*, 413 S.W.3d

at 276. The *Turner* Court concluded that a solitary member and owner must bring a claim for business losses in the name of the company. Nelson individually therefore lacks proper standing to assert her company's business losses and her individual claims should be dismissed as a matter of law.

### **3. Sovereign Immunity and Claims for Compensatory Damages and Attorneys' Fees**

Plaintiffs in their prayer for relief allege they are entitled to compensatory damages, nominal damages and attorneys' fees from the Defendants for their constitutional law claims. These claims for damages fail to state a claim upon which relief may be granted and should be dismissed. (See Dkt.1 Complaint, Prayer for Relief.).

Plaintiffs' claims against Metro Government do not survive the application of sovereign immunity. "Immunity from suit is a sovereign right of the state." *Jewish Hosp. Healthcare Services, Inc. v. Louisville/Jefferson County Metro Government*, 270 S.W.3d 904, 907 (Ky. App. 2008) quoting *Foley Construction Company v. Ward*, 375 S.W.2d 392, 393 (Ky. 1963). Counties within the Commonwealth are also protected by sovereign immunity because those counties are the Commonwealth's political subdivisions. Metro is therefore "clothed with the same sovereign immunity." *Jewish Hosp. Healthcare Services, Inc.*, 270 S.W.3d at 907. Pursuant to KRS 67C.101(2)(e), Metro Government is "accorded the same sovereign immunity granted counties, their agencies, officers, and employees." Sovereign immunity is an absolute immunity which provides total protection from the costs and other burdens, of engaging in discovery, trials, and all other forms of judicial proceedings. *Lexington-Fayette Urban County Government v. Smolicic*, 142 S.W.3d 128, 135 (Ky. 2004). Pursuant to KRS 67C.101(2)(e), Metro Government is "accorded the same sovereign immunity granted counties, their agencies, officers, and employees." See also *Louisville/Jefferson County Metro Government v. Cowan*, 508 S.W.3d 107, 109 (Ky. App. 2016) (finding that Louisville/Jefferson County Metro Government was immune from suit and entitled to sovereign immunity).

Sovereign immunity confers on consolidated local governments the right to be free of the burden and expense of mounting and maintaining a defense to suits filed against them, as well as any of the other

consequences of litigation. *Lexington-Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128, 135 (Ky. 2004); *Cowan*, 508 S.W.3d at 109. Sovereign immunity exists for the benefit of the public, thereby permitting the government to concentrate its resources and energies for the benefit of its citizens, and to exercise fully independent judgment, free of any concerns of actual or potential litigation. *Id.*

Sovereign immunity is a defense that can only be waived by the General Assembly. *Department of Corrections v. Furr*, 23 S.W.3d 615 (Ky. 2000). Therefore, “absent an explicit statutory waiver, Metro Government is entitled to sovereign immunity.” *Jewish Hosp.*, 270 S.W.3d at 907. A waiver exists “only where stated ‘by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.’” *Jewish Hosp.*, 270 S.W.3d at 907 quoting *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997). As there has been no statutory waiver for the monetary or attorney fee damages claims asserted in this lawsuit, Plaintiffs’ claims for compensatory damages, nominal damages, or attorneys’ fees against Metro Government are barred by the doctrine of sovereign immunity.

Rule 12(b)(6) of the Federal Rules of Civil Procedure requires dismissal of a complaint where it fails “to state a claim upon which relief can be granted.” “[T]o survive a 12(b)(6) motion, a complaint must contain (1) enough facts to state a claim to relief that is plausible, (2) more than a formulaic recitation of a cause of action’s elements, and (3) allegations that suggest a right to relief above a speculative level.” *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 488 (6<sup>th</sup> Cir. 2009) (internal quotations omitted). A plaintiff must allege facts stating a claim to relief that is “plausible on its face.” *Id.*; accord *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

The Plaintiffs’ claims for compensatory damages or nominal damages or attorneys’ fees alleged in the prayer for relief must be dismissed because they fail to state a claim upon which relief may be granted. Only the claims for potential declaratory relief or injunctive relief against Metro Government can possibly remain. The claims for damages and attorneys fees should be dismissed.

Similarly, all of the claims against Director Kendall Boyd, Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Laila Ramey, William Sutter, Ibrahim Syed, and Leonard Thomas (hereinafter collectively “individual Defendants”) should be dismissed because these Defendants are entitled to sovereign immunity. When sued in their official capacities these individual Defendants are “cloaked with the same immunity as the government or agency he/she represents.” *Schwindel v. Meade County*, 113 S.W.3d 159, 169 (Ky. 2003) (citing *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001) and *Franklin County v. Malone*, 957 S.W.2d 195 201 (Ky. 1997)). This means that each of these individual Defendants, when sued in their official capacity, are entitled to the same immunity as Louisville Metro Government. The Complaint alleges claims against the individual Defendants and Commissioners only in their official capacities. (Dkt. 1 Complaint at para. 18). All the claims raised against these individual Defendants in their official capacities must be dismissed as there are no viable claims alleged in the Complaint against these individuals. These Defendants did not enact this legislation. The allegations of the Complaint fail to state a claim that is plausible against these Defendants and sufficient facts are not stated to justify any possible relief against these Defendants.

#### **4. The Louisville Metro Human Relations Commission – Enforcement and Louisville Metro Human Relations Commission – Advocacy Are Not *Sui Juris* and Cannot Be Sued.**

Plaintiffs have named Louisville Metro Human Relations Commission – Enforcement (“HRC Enforcement”) and Louisville Metro Human Relations Commission – Advocacy (“HRC Advocacy”) as Defendants in its Complaint. The Louisville Metro Human Relations Commission is an administrative agency whose mission is to promote unity, understanding and equal opportunity among all people of Louisville Metro and to eliminate all forms of bigotry, bias and hatred from this metropolitan community. The Louisville Metro Human Relations Commission seeks to unite the many ethnic, racial, gender, and religious groups in Louisville Metro through a combination of civil law enforcement and education outreach.

HRC Advocacy is a municipal administrative agency of Louisville Jefferson County Metro Government or a division or department or sub-agency of Louisville Metro Human Relations Commission.

HRC Advocacy is responsible for promoting and securing mutual understanding and respect among different religious, social, economic, gender, ethnic, and racial groups. HRC Enforcement, pursuant to Metro Ordinance § 92.08, has the responsibility of administration and enforcement of Chapter 92 of the Metro Ordinances with operating responsibility for carrying out the provisions of this chapter and this includes authority to “[r]eceive, initiate, investigate, seek to conciliate, hold hearings on, and pass on complaints alleging violations of this chapter.” Metro Ordinance § 92.08 (B)(4). HRC Enforcement is a municipal administrative agency of Metro Government or division or department or sub-agency of Louisville Metro Human Relations Commission.

As an administrative agency (Louisville Metro Human Relations Commission) and as departments or divisions or sub-agencies, Louisville Metro Human Relations Commission – Enforcement and Louisville Metro Human Relations Commission – Advocacy have no independent authority. As agencies or sub-agencies they are not separate legal entities capable of being sued and this is especially so with respect to Plaintiffs’ claims for compensatory and nominal damages and for attorney fees. The proper party if at all is Louisville/Jefferson County Metro Government.

Similarly, it has been found that the Louisville Metro Police Department is not an entity capable of being sued. *Matthews v. Jones*, 35 F.3d 1046, 1049 (6<sup>th</sup> Cir. 1994); *Carver v. Louisville/Jefferson County Metro Government*, 2014 WL 2805539 \*4. (W.D. Ky. June 20, 2014). In *Carver*, this Court stated, “[t]he Louisville Metro Police Department is not *sui juris* and does not have the capacity to be sued” as “[i]t is a department and division of the Louisville/Jefferson County Metro Government” and is “not a person within the meaning of 42 U.S.C. § 1983. *Higgenbottom v. McManus*, 840 F.Supp. 454, 456 (W.D. Ky. 1994)<sup>3</sup>; *Matthews v. Jones*, 35 F.3d 1046, 1049 (6<sup>th</sup> Cir. 1994); *Smallwood v. Jefferson County Government*, 743 F.Supp. 502, 503 (W.D. Ky. 1990).”

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<sup>3</sup> In *Higgenbottom*, this Court found for the same reasons that the Paducah Police Department could not be sued because it has no legal or corporate existence apart from the City of Paducah, Kentucky.

Likewise, it has been found that the Louisville Metro Department of Metro Corrections is not *sui juris* and does not have the capacity to be sued as it is a department and division of Metro Government and has no separate legal identity. *Mellencamp v. Louisville/Jefferson County Metro Government*, 2009 WL 1034216 \* 1 n. 1 (W.D. Ky. April 16, 2009).

Accordingly, Plaintiffs' claims against the Louisville Metro Human Relations Commission – Enforcement and Louisville Metro Human Relations Commission – Advocacy should be dismissed for failure to state a claim upon which relief can be granted as these parties are not *sui juris* and cannot be sued. Additionally, Plaintiffs have failed to allege a claim for monetary damages or attorneys' fees against HRC--Advocacy or HRC--Enforcement under federal law based upon the allegations of the Complaint. Therefore, these claims should be dismissed.

#### IV. Conclusion

Wherefore, for the reasons stated above, Plaintiffs' Complaint should be dismissed for lack of standing. Defendants should also be granted the other relief requested herein.

Respectfully submitted,

MIKE O'CONNELL,  
JEFFERSON COUNTY ATTORNEY

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JASON D. FOWLER  
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*Counsel for Defendants Louisville/Jefferson  
County Metro Government et al.*

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Defendants' Memorandum in Support of Motion to Dismiss Plaintiffs' Claims was electronically mailed on this 16th day of January, 2020, via the Court's electronic mail system which in turn will email this Response in Opposition to the following:

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/s/ John F. Carroll

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION  
CASE NO: 3:19-CV-851-JRW

*Electronically filed*

CHELSEY NELSON PHOTOGRAPHY, LLC  
AND CHELSEY NELSON

PLAINTIFFS

v.

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT, ET AL. DEFENDANTS

**AFFIDAVIT OF KENDALL BOYD**

Kendall Boyd, the Executive Director of The Louisville Metro Humans Relations Commission, after first being duly sworn, states as follows:

1. I am the Executive Director/Director of the Louisville Metro Human Relations Commission and have held this position since being appointed by Mayor Greg Fischer in 2017. Previously, I was the Assistant Director for the Human Resources for Louisville Metro and held this position from 2014 to the time I was appointed to my current position.

2. The central mission of the Louisville Metro Human Relations Commission is to promote unity, understanding and equal opportunity among all peoples of Louisville Metro which consists of Jefferson County, Kentucky and to eliminate all forms of bigotry, bias and hatred from the community. "The Human Relations Commission conducts investigations on allegations of discrimination in housing, employment and for alleged hate crimes, and conciliates claims of discrimination that may be filed with the agency." Under Sec. 92.09 (D) of the Ordinance, the Human Relations Commission must attempt to informally resolve or conciliate, every complaint it receives. The Human Relations Commission conciliates the large majority of

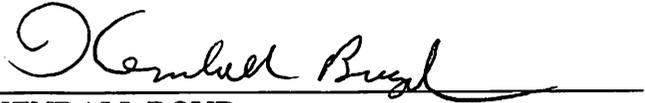
the discrimination complaints it receives. The Human Relations Commission seeks to bridge the many ethnic, racial and religious groups in Louisville Metro through a combination of education/outreach and civil law enforcement. The Commission works to try to ensure that residents of Louisville Metro are able to participate fully in civil activities and the Commission strives to bring awareness and appreciation of the community's diverse population. The Commission also monitors compliance for entities doing business and there is a component to enforce Louisville Jefferson County Metro Government ("Metro's") anti-discrimination laws. "The Human Relations Commission certifies minority, female, and handicapped business enterprises pursuant to ordinance."

3. Before the filing of the subject lawsuit, I had not heard of Chelsey Nelson or her photography business, Chelsey Nelson Photography, LLC. I have spoken to others with the Commission and others with Louisville Metro Human Relations ("HRCE") Commission-Enforcement and Louisville Metro Human Relations Commission-Advocacy ("HRCA") and can state I am unaware of anyone else at our office or with HRCA or HRCE who prior to this suit had any knowledge of or knew of Chelsey Nelson or Chelsey Nelson Photography, LLC. The Louisville Metro Human Relations Commission had not heard of Chelsey Nelson or the business known as Chelsey Nelson Photography, LLC. No charges of discrimination had ever been filed by any other citizens or third parties against Chelsey Nelson regarding any allegations of discrimination regarding same-sex marriages or any other type of discrimination charges or complaints. As the HRCA and HRCE had received no charges or complaints with respect to Chelsey Nelson and/or Chelsey Nelson Photography, before this suit, there was no awareness of Chelsey Nelson or her business, Chelsey Nelson Photography, LLC. Further, neither Chelsey Nelson nor Chelsey Nelson Photography, LLC had ever requested an exception from the

application of Metro's Public Accommodations Ordinance. As such there was no prior history by Louisville Metro Human Relations Commission/Advocacy or of dealing with Chelsey Nelson Photography, LLC or Chelsey Nelson.

4. Based upon information and belief and a reasonable inquiry, I believe the last time Metro Government or its predecessors the City of Louisville and/or Jefferson County last addressed a constitutional law challenge to the Public Accommodations Ordinance was in 2002.

Further the Affiant sayeth naught on this 10 day of January, 2020.

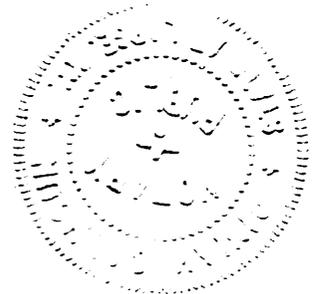
  
KENDALL BOYD

COMMONWEALTH OF KENTUCKY  
COUNTY OF JEFFERSON

The foregoing Affidavit was subscribed and sworn to before me by Kendall Boyd on this 10 day of January, 2020.

My commission expires: Notary Public, State at Large, KY  
My commission expires Mar. 18, 2022

  
NOTARY PUBLIC  
State at Large, Kentucky



THE COMMISSION EXITS FEB 18 2020  
STATE OF TEXAS



ORDINANCE NO. 193, SERIES 2004

AN ORDINANCE RE-ENACTING CHAPTER 92 AND SECTIONS 130.50, 130.51, AND 130.52 OF THE LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT CODE OF ORDINANCES RELATING TO DISCRIMINATORY PRACTICES AND BIAS-RELATED OFFENSES.

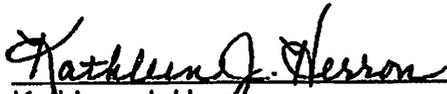
Sponsored By: Councilwoman Barbara Shanklin, 2<sup>nd</sup> District  
Councilwoman Mary Woolridge, 3<sup>rd</sup> District  
Councilwoman Cheri Bryant Hamilton, 5<sup>th</sup> District  
Councilman George Unseld, 6<sup>th</sup> District  
Councilman Tom Owen, 8<sup>th</sup> District  
Councilman Rick Blackwell, 12<sup>th</sup> District  
Councilman Dan Johnson, 21<sup>st</sup> District

NOW THEREFORE, BE IT ORDAINED BY THE LEGISLATIVE COUNCIL OF THE LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT [THE COUNCIL] AS FOLLOWS:

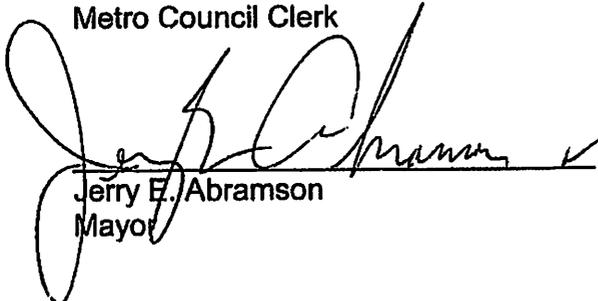
SECTION I. Pursuant to KRS 67C.115(2), the following sections of the Louisville/Jefferson County Metro Government Code of Ordinances are hereby reenacted:

Chapter 92, and Sections 92.01, 92.02, 92.03, 92.04, 92.05, 92.06, 92.07, 92.08, 92.09, 92.10, 92.11, 92.12, 92.13, 92.14, 92.15, 92.16, 92.17, 92.18, 92.19, 92.20, 92.21, 92.22, 92.23, 92.24, 92.25, 92.40, 92.41, 92.42, 92.43, 92.44, 92.45, 92.46, 92.47, 92.48, 92.98, and 92.99; and Sections 130.50, 130.51, and 130.52.

SECTION II. This Ordinance shall take effect upon its passage and approval.

  
Kathleen J. Herron  
Metro Council Clerk

  
Kelly Downard  
President of the Council

  
Jerry E. Abramson  
Mayor

Dec. 10, 2004  
Approval Date

**LOUISVILLE METRO COUNCIL**  
**READ AND PASSED**  
*December 9, 2004*

*WJ*

APPROVED AS TO FORM AND LEGALITY: 

Irv Maze  
Jefferson County Attorney

BY: 

Civil Rights Reenactment - Version 1 - 7 April 2004 - WTW  
Civil Rights Renactment - Version 1 - 7 April 2004 - WTWbkn110504

§ 92.02 DEFINITIONS.

For the purpose of this chapter, the following definitions shall apply unless the context clearly indicates or requires a different meaning.

**ADMINISTRATIVE CLOSURES.** Complaint closures other than on the merits, such as failure to locate, failure to cooperate and withdrawals.

**APPEAL PANEL.** A panel of not less than three Commissioners appointed by the Chair of the Human Relations Commission - Enforcement to hear appeals from decisions of the Hearing Officer.

**CANVASSING.** Includes door to door solicitation by the use of circular advertisements or any other means where the canvasser or his employer has not been requested by the owner to obtain a listing of any housing accommodation or to confer with the owner regarding a transaction involving a housing accommodation.

**COMMISSION.** The Louisville/Jefferson County Human Relations Commission as authorized by appointments, resolutions and ordinances of the Mayor and Metro Council.

**COMMISSIONER.** A member of the Louisville/Jefferson County Human Relations Commission.

**DISABILITY.** A physical or mental impairment which substantially limits one or more major life activities, a record of such impairment, or a condition which is regarded as causing such impairment. Current illegal use of drugs or chemicals shall not be considered a disability hereunder. Life activities shall be considered to include, but not necessarily limited to, communication, ambulation, socialization, self-care, education, vocational training, employment, transportation and adapting to housing.

**DISCRIMINATION.** Any direct or indirect act or practice of exclusion, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons, or the aiding, abetting, inciting, coercing, or compelling thereof made unlawful under this chapter.

**EMPLOYEE.** Any individual employed by an employer, but not including an individual employed by his or her parents, spouse or child, or an individual employed to render services as a nurse, domestic or personal companion in the home of the employer.

**EMPLOYER.** Any person who has two or more employees in each of four or more calendar weeks in the current or preceding calendar year, and any agent of such person.

**EMPLOYMENT AGENCY.** Any person regularly undertaking, either with or without compensation, to procure employees for an employer or to procure for employees opportunities to work for an employer and includes any agent of such a person.

**EXECUTIVE DIRECTOR.** The Executive Director of the Human Relations Commission - Enforcement.

**FAMILIAL STATUS.** One or more individuals who have not attained the age of 18 years and are being domiciled with a parent or another person having legal custody of such individual or individuals; or the designee of such parent or other person having such custody, with the written permission of such parent or other person. The protection afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

**FINANCIAL INSTITUTIONS.** Any person engaged in the business of lending money or guaranteeing losses.

**GENDER IDENTITY.** Manifesting an identity not traditionally associated with one's biological maleness or femaleness.

**HEARING OFFICER.** The Hearing Officer employed by the Human Relations Commission - Enforcement to hear complaints under applicable anti-discrimination laws.

**HOUSING ACCOMMODATION.**

(1) Any parcel or parcels of real property or lands, or any interest therein, whether contiguous or noncontiguous located in Jefferson County, used for the building of one or more housing or rooming units or for mobile homes or mobile home parks owned by or otherwise subject to the control of one or more persons; or

(2) Any real property, including vacant land intended for sale or lease, or any interest therein, located in Jefferson County; or

(3) Any single-family dwelling or multi-family dwelling, or any portion thereof, including a housing unit or a rooming unit, or any interest therein, located in Jefferson County, which is used or occupied, or intended, arranged, assigned, or designated to be used or occupied, as the home, homesite, residence, or sleeping place of one or more persons.

**HOUSING UNIT.** A single room, suite of rooms, or apartment, containing cooking and kitchen facilities, occupied or intended for occupancy as living quarters, by a person, a family, or a group of persons living together.

**LABOR ORGANIZATION.** Any labor organization and an agent of such an organization, including an organization of any kind, an agency or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and a conference, general committee, joint or system board, or joint council so engaged, which is subordinate to a national or international labor organization.

**OWNER.** Includes a lessee, sublessee, co-tenant, assignee, managing agent, or other person having the right of ownership or possession, or the right to sell, rent, or lease any housing accommodation.

**PERSON.** Includes an individual and any group of one or more natural persons, such as, but not limited to, labor unions, joint apprenticeship committees, partnerships, associations, corporations, unincorporated organizations, mutual companies, joint-stock companies, trusts, legal representatives, trustees in bankruptcy, receivers, or any individuals acting in a financial or representative capacity, either appointed by a court or otherwise, the Metro Government or any of its agencies, and any other legal, governmental or commercial entity as well as a natural person or persons. **PERSONS**, when applied to any of the foregoing, includes members, representatives, officers and directors.

**PLACE OF PUBLIC ACCOMMODATION, RESORT OR AMUSEMENT.** Any place, store or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds; except that a private club is not a place of public accommodation, resort or amusement if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests; and **PLACE OF PUBLIC ACCOMMODATION, RESORT OR AMUSEMENT** does not include a rooming or boarding house containing not more than one room for rent or hire and which is within a building occupied by the proprietor as his or her residence.

**PURCHASER.** Includes any occupant, prospective tenant, assignee, prospective assignee, buyer, or any other person seeking the right of ownership or possession, or any agent of any of these.

**REAL ESTATE BROKER or REAL ESTATE SALESPERSON.** An individual, whether licensed or not, who for a fee, commission, salary, or other valuable consideration or who with the intention or expectation of receiving or collecting consideration, lists, sells, purchases, exchanges, rents, or leases any housing accommodation, including options thereupon, or who negotiates rents or leases any housing accommodation, including options thereupon, or who negotiates or attempts to negotiate such activities; or who advertises or holds oneself out as engaged in such activities; or who negotiates or attempts to negotiate a loan secured by a mortgage or other encumbrance on transfer of any housing accommodation or who is engaged in the business of charging an advance fee or contracting for collection of a fee in connection with a contract whereby a person undertakes to promote the sale, purchase, exchange, rental, or lease of any housing accommodation through its listing in a publication issued primarily for such purpose; or an individual employed by or acting on behalf of any of these.

**REAL PROPERTY.** Includes buildings, structures, real estate, lands, tenements, leaseholds, cooperatives, condominiums, and hereditaments, corporeal and incorporeal.

**ROOMING UNIT.** Any room or group of rooms forming a single, habitable unit used for living or sleeping, but which does not contain cooking and kitchen facilities.

**SEXUAL ORIENTATION.** An individual's actual or imputed heterosexuality, homosexuality or bisexuality.

(1994 Jeff. Code, § 92.02) (Jeff. Ord. 36-1999, adopted and effective 10-12-1999) (1999 Lou. Code, § 98.02) (Lou. Ord. No. 0088-2001, 2, approved 8-16-2001; Lou. Metro Am. Ord. No. 129-2003, approved 7-18-2003; Lou. Metro Am. Ord. No. 193-2004, approved 12-10-2004)

**§ 92.05 UNLAWFUL PRACTICES IN CONNECTION WITH PUBLIC ACCOMMODATIONS.**

(A) Except as otherwise provided herein, it is an unlawful practice for a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, resort or amusement as defined in § 92.02, on the ground of race, color, religion, national origin, disability, sexual orientation or gender identity.

(B) It is an unlawful practice for a person, directly or indirectly, to publish, circulate, issue, display, or mail, or cause to be published, circulated, issued, displayed, or mailed, a written, printed, oral or visual communication, notice, or advertisement, which indicates that the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, resort or amusement, will be refused, withheld, or denied an individual on account of his race, color, religion, national origin, disability, sexual orientation or gender identity, or that patronage of, or presence at, a place of public accommodation, resort or amusement, of an individual, on account of his race, color, religion, national origin, disability, sexual orientation or gender identity is objectionable, unwelcome, unacceptable, or undesirable.

(C) It shall be an unlawful practice to deny an individual, because of sex, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a restaurant, hotel, motel, or any facility supported directly or indirectly by government funds.

(1) The provisions of this subsection shall not apply to:

(a) Restrooms, shower rooms, bath houses and similar facilities which are in their nature distinctly private;

(b) YMCA, YWCA and similar type dormitory lodging facilities;

(c) The exemptions contained in the definitions of "Place of Public Accommodations, Resort or Amusement" set forth in § 92.02;

(d) Hospitals, nursing homes, penal or similar facilities, to require that men and women be in the same room.

(1994 Jeff. Code, § 92.06) (Jeff. Ord. 36-1999, adopted and effective 10-12-1999) (1999 Lou. Code, § 98.05) (Lou. Ord. No. 0088-2001, 2, approved 8-16-2001; Lou. Metro Am. Ord. No. 193-2004, approved 12-10-2004)

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION  
CASE NO: 3:19-CV-851-JRW

Electronically filed

CHELSEY NELSON PHOTOGRAPHY, LLC  
AND CHELSEY NELSON

PLAINTIFFS

v.

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT, ET AL.

DEFENDANTS

**ORDER**

On Motion of the Defendants, Louisville/Jefferson County Metro Government (“Metro Government”) and Louisville Metro Human Relations Commission-Enforcement, Louisville Metro Human Relations Commission, Advocacy, Kendall Boyd in his official capacity as Executive Director of the Louisville Metro Human Relations Commission, Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Laila Ramey, William Sutter, Ibrahim Syed, and Leonard Thomas, in their official capacity as members for Louisville Metro Human Relations Commission-Enforcement, by counsel, (collectively “Defendants”) to Dismiss the Complaint and Plaintiffs’ claims against them pursuant to Fed. R. Civ. P. 12 (b)(1) and 12 (b)(6) for lack of subject matter jurisdiction, lack of standing and on other grounds, and the Court having considered the Defendants’ Motion to Dismiss, the Memorandum in Support, and the Plaintiffs’ Response and the Court being otherwise fully advised;

**IT IS HEREBY ORDERED** that Defendants’ Motion to Dismiss is hereby GRANTED, and all of named Plaintiffs’ claims against the Defendants are hereby dismissed as Plaintiffs’ pre-enforcement claims are not ripe and the Court hereby finds Plaintiffs lack standing as the Court finds Plaintiffs lack a current injury in fact, actual and imminent and the pre-enforcement claims are conjectural and not sufficiently imminent or actual. Further, the Court finds a threat of future enforcement has not been sufficiently shown. The Court finds it must consider jurisdiction on the state of things at the time of the filing of the suit and Plaintiffs have

not made a credible threat of prosecution for any conduct. The Court also finds Chelsey Nelson individually lacks standing as the business, Chelsey Nelson is the sole member of Chelsey Nelson Photography, LLC, a limited liability company distinct from its members. This is a final Order and Plaintiffs claims are dismissed with prejudice. It is so Ordered this \_\_\_\_ day of 2020.

TENDERED BY:

MICHAEL J. O'CONNELL  
JEFFERSON COUNTY ATTORNEY

/s/ John F. Carroll

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