IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Chelsey Nelson Photography LLC, and **Chelsey Nelson,**

Plaintiffs,

v.

Louisville/Jefferson County Metro Government; Louisville Metro Human Relations Commission-Enforcement; Louisville Metro Human Relations Commission-Advocacy; Verná Goatley, in her official capacity as Executive Director of the Louisville Metro Human Relations Commission-Enforcement; and **Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Leslie Faust, William Sutter, Ibrahim Syed,** and **Leonard Thomas,** in their official capacities as members of the Louisville Metro Human Relations Commission-Enforcement,

Defendants.

Case No. 3:19-cv-00851-BJB-CHL

Plaintiffs' Combined Response to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Their Summary Judgment Motion

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Introduction

Plaintiff Chelsey Nelson wants to live out her faith in her photography, editing, and blogging. To that end, Chelsey started her own photography studio to promote messages she believes in. But Chelsey ran into a problem. Louisville's public-accommodations law compels her to speak contrary to her faith, censors speech inspired by her faith, and selectively targets her religious views on marriage. After Chelsey learned about this law, she asked this Court for protection.

She did so for good reason. As Louisville now concedes, its law does *exactly* what Chelsey feared: bans her from photographing and blogging consistent with her faith, forbids her from binding her company to act consistent with her faith, and outlaws her proposed statement explaining this policy. As Louisville also concedes, it has and will aggressively enforce its law—calling its need to regulate Chelsey "compelling" and defending its right to do so in this litigation *for the past two years*. Meanwhile, any individual, commission member, organization, or tester can file complaints against Chelsey (*infra* § I.A) while many other creative professionals like Chelsey have been prosecuted in Kentucky and elsewhere.[1] Chelsey Nelson's Decl. in Supp. of Pls.' Mot. for Summ. J. (Decl.) ¶¶ 411–15, ECF No. 92–2. This Court already found that Chelsey has standing to challenge Louisville's law and that Louisville's law violates Chelsey's First Amendment rights. Order 2, ECF No. 47. The undisputed facts only bolster that ruling.

In arguing otherwise, Louisville ignores Chelsey's facts, its own admissions, and this Court's prior ruling. In their place, Louisville creates an upside-down world where Chelsey's sworn and *undisputed* facts are "manufactured," her speech is

[1] Pet. for Reh'g at 11, *Arlene's Flowers, Inc. v. Washington*, No. 19-333 (U.S. July 27, 2021), https://bit.ly/3BY9Uss (potential personal bankruptcy); *Scardina v. Masterpiece Cakeshop Inc.*, No. 19CV32214 (Colo. Dist. Ct. June 15, 2021), https://bit.ly/3vaQ3UH (judgment); Richard Wolf, *Same-sex marriage foes stick together despite long odds*, USA Today (Nov. 15, 2017), https://bit.ly/3m2czwk.

conduct, her editorial discretion is discrimination, her religious beliefs are bigotry, and her decision to employ legal counsel to protect her rights is detestable.

Throughout this litigation, Louisville has consistently tried to re-label constitutional rights—free speech, religious freedom, consultation with counsel, public-advocacy litigation—as both illegal and immoral. But Louisville "cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). And "[s]peech is not conduct just because the government says it is." *Telescope Media Grp. v. Lucero* (*TMG*), 936 F.3d 740, 752 (8th Cir. 2019). In reality, citizens have standing to challenge laws that restrict their rights. Individuals can access counsel and courts to protect their rights. And laws cannot permissibly compel speech, censor viewpoints, or infringe religious liberty, no matter what labels officials use. This Court should therefore look past Louisville's labels and stop Louisville from violating Chelsey's rights under the First Amendment and Kentucky's Religious Freedom Restoration Act (KRFRA).

Argument

Summary judgment for Chelsey is appropriate because Louisville doesn't dispute any of her facts. Nor does Louisville dispute her entitlement to injunctive or declaratory relief if she wins on the merits. *See* Pls.' Br. in Supp. of Their Summ. J. Mot. (MSJ) 5–6, ECF No. 92–1 (outlining factors for this relief). And Chelsey wins on the merits for seven reasons: she (I) has standing to challenge Louisville's law which (II) compels and restricts her speech based on content and viewpoint, (III) is not neutral or generally applicable, (IV) forces her to participate in religious ceremonies she objects to, (V) substantially burdens her religious exercise, (VI) triggers and fails strict scrutiny, and (VII) is vague, overbroad, and gives officials

unbridled discretion. So this Court should grant Chelsey's summary-judgment motion, deny Louisville's, and provide all the relief requested in Chelsey's motion.[2]

I. Chelsey has standing to challenge Louisville's law.

For standing, Chelsey must show injury, causation, and redressability. *Susan B. Anthony List v. Driehaus* (*SBA List*), 573 U.S. 149, 157–58 (2014). Chelsey must also show ripeness. *Id.* at 157 n.5. Louisville only contests Chelsey's injury-in-fact for standing and ripeness. Defs.' Cross-Mot. for Summ. J. (Defs.' MSJ) 8–14, ECF No. 97. And Chelsey can show this because (A) she faces a credible threat from Louisville's law; (B) the law's provisions are intertwined; and (C) Louisville's law gives her competitors an unfair advantage. Chelsey's claims are also (D) ripe because the line between "standing and ripeness … has evaporated." *Winter v. Wolnitzek*, 834 F.3d 681, 687 (6th Cir. 2016).

A. Chelsey has standing because Louisville's law credibly threatens and chills her religiously motivated speech.

This Court found that Chelsey has standing. Order 8–9. Louisville completely ignores this. For injury-in-fact, Chelsey need only prove a "substantial risk" of Louisville's law harming her. *SBA List*, 573 U.S. at 158. Chelsey makes this showing because (1) she intends to "to engage in a course of conduct arguably affected with a constitutional interest;" (2) her conduct is arguably "proscribed by" Louisville's law; (3) there is a "credible threat" of being "prosecut[ed];" and (4) many factors prove the credible threat Chelsey faces. *Id.* at 159.

1. Chelsey intends to engage in activities protected by the First Amendment.

Chelsey "easily" shows that she wants to engage in conduct affected with a constitutional interest because she wants to offer and create photographs and blogs

[2] Chelsey reserves the right to supplement this record. *See* MSJ 5 n.2.

celebrating only opposite-sex weddings, explain this choice publicly, and bind her company to this policy. Order 7; *SBA List*, 573 U.S. at 159; MSJ 6–20 (proving this).

Chelsey does more than "intend" to do these activities—she *actually* does them. Chelsey "focus[es] on telling positive stories … about weddings between a man and a woman." Decl. ¶76. She regularly creates photographs and blogs to promote opposite-sex marriages "in a positive and uplifting way" and participates in those weddings. *Id.* at ¶¶ 151, 169–73; *id.* at ¶¶ 208–327 (prior photographs and blogs); App. to Pls.' Br. in Supp. of Summ. J. Mot. (App.) 401–10 (same). Chelsey follows her editorial policy of only promoting messages consistent with her belief, and now binds her company to that policy. Decl. ¶¶ 51–54; App. 2–3. And Chelsey posted statements with a "comprehensive expression of [her] religious beliefs about God designing marriage" after this Court enjoined Louisville. Decl. ¶¶ 452, 475.

Louisville never addresses (nor disputes) Chelsey's *intent* and actual practice. Instead, Louisville questions (without evidence) Chelsey's *motives* for filing this suit. Defs.' MSJ 4–7. But her motives are pure, and she acted reasonably.

For years, Chelsey watched other speakers risk their business because of their beliefs and worried about her own fate. Decl. ¶¶ 411–14. But like most non-lawyers, Chelsey was unaware of how she could protect herself. *Id.* at ¶ 414. When she learned about Louisville's law and its penalties, she reasonably decided to take steps to safeguard herself and her business. *Id.* at ¶¶ 455–57. She also decided to protect her right to post statements explaining her religious beliefs about marriage and what she can and cannot create, something she had previously refrained from doing to avoid prosecution. *Id.* at ¶¶ 450–54. These steps were reasonable. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 703 (2014) (plaintiffs wanted to "run the businesses in accordance with the family's religious beliefs").

Louisville questions Chelsey's motives by claiming she "was scaling back" her business just before this case. Defs.' MSJ 6 (citing Chelsey's deposition). But the

cited testimony just explains that Chelsey stopped accepting photography requests for anything *other* than wedding photography. Decl. ¶¶ 118–24 (explaining personal reasons for this choice). Focusing on wedding photography—Chelsey's goal "[f]rom the outset" of her business—is not the same as "scaling back" her business. *Id.* at ¶ 76. In fact, Chelsey was actively trying to grow her business just before learning about Louisville's law. *Id.* at ¶¶ 416–22. And Chelsey has been trying to grow her business after the injunction issued. *Id.* at ¶¶ 478–88. Louisville—not Chelsey—is trying to "downsiz[e]" her business. *Contra* Defs.' MSJ at 6.

Louisville also faults Chelsey for "not immediately post[ing]" her statements on her website and then for seeking "legal advice" about these statements. *Id.* at 5–6. But it would have been foolish for Chelsey to do otherwise. She reasonably feared being prosecuted under Louisville's law. Decl. ¶¶ 450–54; Order 10. And it is undisputed that Chelsey drafted her statement to express her sincerely held beliefs. Defs.' MSJ Ex. 7 PageID #3990, ECF No. 97–7 (Chelsey wrote statements); Decl. ¶ 448 (Chelsey wrote statements according to her beliefs).

Louisville next cries foul that this case is "manufactured." Defs.' MSJ at 1, 4, 7–8, 11, 14. But there is nothing manufactured about Chelsey's business or her intent. She testified under oath to intending to engage in her desired activities and did them after her injunction win. Meanwhile, Louisville cannot dispute that Chelsey operates her business in line with her faith. Decl. ¶¶ 51–54, 75–99, 208–327, 452, 475. Indeed, she's pursued this litigation despite harms to business and reputation and horrible name-calling by people she's never met. *Id.* at ¶¶ 459–74. No one would endure this if they weren't sincere or didn't want to follow through.

Beyond all this, Louisville's attacks are completely irrelevant. Courts allow civil-rights litigants to challenge unjust laws no matter their motives. *Pierson v. Ray*, 386 U.S. 547, 558 (1967) (ministers could enter "bus terminal for the sole purpose of testing their rights to unsegregated public accommodations"); *Evers v.*

Dwyer, 358 U.S. 202, 204 (1958) (per curiam) (black citizen could board segregated bus he had never ridden "for the purpose of instituting" a lawsuit).[3] Intent matters, not motives. And no one questions Chelsey's intent.

As a last-ditch effort, Louisville moves from attacking Chelsey to her counsel for a "national strategy" of preserving "religious exemptions." Defs.' MSJ 11. But Louisville is no historian. Advocacy groups have often used litigation to pursue their goals—from stopping segregation, to ensuring gun access, to ending affirmative action, to protecting the environment.[4] These activities aren't just permissible; they're constitutionally protected. *NAACP*, 371 U.S. at 429–45. Louisville just doesn't like the *particular* rights Chelsey and her counsel seek to protect. But Louisville's disdain for these rights does not undercut Chelsey or her counsel's right to exercise them. In the end, Louisville provides no reason to doubt Chelsey's sincerity or motives, much less her intent. And the latter is all standing requires.

2. Louisville's law arguably covers Chelsey's desired activities.

Louisville's law also prohibits Chelsey's desired activities. Order 7. *See SBA List*, 573 U.S. at 158. Louisville does not dispute this. Again and again, Louisville repeats that its law applies to Chelsey, forbids her desired actions, and converts her religious beliefs into illegal "discrimination."

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[3] *See Ted Cruz for Senate v. Fed. Election Comm'n*, 2019 WL 8272774, at *6 (D.D.C. Dec. 24, 2019) (standing for injury caused by "transparent tailor[ing]" injury to violate law); *Smith v. YMCA of Montgomery, Inc.*, 462 F.2d 634, 645 (5th Cir. 1972) (black plaintiffs could apply to camp "for the sole purpose of integrating" it). Louisville's "manufactured" defense is also ironic. Louisville uses testers—people with no sincere desire for services—to make fake requests to businesses for Louisville to prosecute. *Infra* § I.A.4 (detailing testers). Yet Louisville faults Chelsey for *earnestly* engaging in constitutionally protected activities.

[4] Ironically, Louisville cites nationwide advocacy organizations that oppose Chelsey's relief. Defs.' MSJ 15 (citing Br. of Amici Curiae Am. Civil Liberties Union of Ky. & Am. Civil Liberties Union Supporting Defs. (ACLU Br.) ECF No. 35).

Louisville's law requires Chelsey to participate in and offer and create photographs and blogs "on the exact same terms and conditions for" same-sex and opposite-sex weddings. App 383. According to Louisville, Chelsey violates the law's "exact same service" requirement because she only participates in, and offers and creates photographs and writes blogs celebrating, opposite-sex weddings. App. 352–54; *id.* at 760–65 (explaining exact same service rule as to Chelsey); Defs.' MSJ 7 ("Chelsey's intent … violate[s] the Accommodations Provision.").

Louisville also prohibits Chelsey from having her current policy and practice of only photographing, editing, blogging about, and participating in opposite-sex weddings. *See, e.g.*, App. 356–62. Louisville even calls Chelsey's "business model … discriminatory." Defs.' Br. in Resp. to Prelim. Inj. (Defs.' MPI Resp.) 8, ECF No. 15–1. To Louisville, Chelsey's policy is "plainly discriminatory" and violates the law. *Id.* at 10. *See id.* at 11 ("[o]n its face … [Chelsey's] policy discriminates based on sexual orientation"); Order 7 (explaining Louisville bans Chelsey's policy); App. 762–63 (Chelsey policy is "discrimination"); *id.* at 356–59 (same).

And Louisville bans Chelsey's statements explaining why she can only promote certain messages about marriage. Order 21; App. 360–62, 428–29; Defs.' MPI Resp. 5 (Chelsey's desired statements "discriminat[e] against same-sex couples"); Defs.' Mot. for Protective Order 2, ECF No. 64 (admitting "Plaintiffs' … statement violates the Fairness Ordinance"); *id.* at 5 (same); Defs.' Resp. to Pls.' Mot. to Compel Discovery 6, ECF No. 66 (same). Louisville's law also arguably bans Chelsey from explaining her religious beliefs on marriage because some might view those beliefs as "unwelcom[ing]." Metro Ord. ¶ 92.05(B).

With these clear pronouncements, Louisville's law at least arguably forbids Chelsey's desired activities, as this Court already held. Order 7.

3. Chelsey faces a credible threat of enforcement.

Chelsey also faces a credible threat because Louisville's law prohibits her constitutional activities and Louisville actively enforces the law.

When non-moribund laws arguably prohibit plaintiffs' desired activities, the Supreme Court and the Sixth Circuit presume a credible threat of enforcement. *See, e.g.*, *SBA List*, 573 U.S. at 162; *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (seeing "no reason to assume" a "newly enacted law will not be enforced"); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979); *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 769 F.3d 447, 451 (6th Cir. 2014) ("[C]ourts do not closely scrutinize the plaintiff's complaint for standing" in First Amendment pre-enforcement cases.); *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1396 (6th Cir. 1987) (standing where "statutory language of the Ordinance" applied to plaintiff).

This presumption applies here. Louisville admits it "actively enforces" its law. Defs.' MSJ 9. Indeed, Louisville has for two years defended its right to enforce its law against Chelsey in this litigation, and Louisville claims a compelling need to regulate Chelsey and an inability to grant even one religious exemption. Defs.' MSJ 24–28; App. 822 (agreeing "a single instance of discrimination … needs to be corrected"). It is "more than a little ironic that [Louisville] would suggest [Chelsey] lack[s] standing and then, later in the same brief, label [Chelsey] as a prime example of ... the very problem [its law] was intended to address." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 518 (D.C. Cir. 2009). Louisville's words match its deeds. Louisville has investigated more than 100 public accommodations since 2010. Statement of Stip. Fact (Stip.) 1.

Faced with this credible threat, Chelsey operates under a reasonable threat of prosecution and reasonably chilled her constitutional activities. See Decl. ¶¶ 425–54 (limiting her advertising, exiling herself from a referral group, and declining to

explain "a more comprehensive expression of [her] religious beliefs"). And "[i]t is well-settled that a chilling effect on one's constitutional rights constitutes a present injury in fact." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994); Order 8 (same).[5]

In fact, this Court and many others agree that speakers like Chelsey have standing to challenge laws like Louisville's. Order 6–10; *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1171–75 (10th Cir. 2021); *TMG*, 936 F.3d at 749–50; *Brush & Nib Studio, LC v. City of Phoenix* (*B&N*), 448 P.3d 890, 900–02 (Ariz. 2019). Unable to distinguish these, Louisville relies on an outlier—one unpublished, out-of-circuit case involving a law that had allegedly "never been enforced" and did not allow "testers." *Updegrove v. Herring*, 2021 WL 1206805, at *3 (E.D. Va. Mar. 30, 2021). That case was wrongly decided.[6] It's also different. Louisville actively uses testers and enforces its law. *See infra* § I.A.4.

Louisville also denies any enforcement threat, saying "the text of the Ordinance is at odds with any suggestion that it is targeted at individuals like Chelsey." Defs.' MSJ 9. But Louisville admits that Chelsey's business is a public accommodation under its law. *See* App. 899; *supra* § I.A.2. And Louisville concedes that its law's "clear terms" cover Chelsey's business because the law applies to "a commercial photography business that provides services to the public and advertises on the Internet." Defs.' MPI Resp. at 9. These admissions distinguish this case from *Plunderbund Media, L.L.C. v. DeWine* where the prosecuting officials

[5] Both the Denial and Unwelcome Clauses of the Publication Provision chill Chelsey from posting her statement. Order 21–23 (making this point); Decl. ¶¶ 445–54.

[6] *Updegrove* contradicts *SBA List* and other cases and was decided on admittedly wrong facts. After the court dismissed the case, and pending an appeal, defendants filed an affidavit admitting that "certain statements" of non-enforcement in a declaration "were not accurate" when made and defendants had actually "received eight complaints" of sexual orientation discrimination. Decl. of R. Thomas Payne, II, *Updegrove v. Herring*, Civ. No. 20-cv-01141-CMH-JFA, ECF No. 66.

"expressly affirmed that the law" did not cover the plaintiffs. 753 F. App'x 362, 372 (6th Cir. 2018). Defs.' MSJ 9 (citing same). *See Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 70 (2d Cir. 2019) (when party is "an object of" statute, there is "ordinarily little question" that statute causes injury) (cleaned-up).

Louisville turns a blind eye to its admissions, the undisputed facts, and precedent to impose unnecessary standing requirements on Chelsey. For example, Louisville denies standing because "[n]o discrimination complaints have been filed" against Chelsey. Defs.' MSJ 8. But Chelsey need not "first expose" herself "to actual … prosecution" to challenge Louisville's law. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). *See New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 9–11 (1988) (standing "before any enforcement proceedings were initiated"). Louisville's "active[] enforce[ment]" of its law bolsters Chelsey's standing. Defs.' MSJ 9; App. 894–96 (admitting complaint paragraphs 303 and 304); Stip. 1. Courts find standing even before a law is enforced against anyone. *See Am. Booksellers Ass'n, Inc.*, 484 U.S. at 392 (standing "before the statute became effective"); *Babbitt*, 442 U.S. at 302 (standing where penalty "has not yet been applied and may never be applied"); *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 696 (6th Cir. 2015) (similar).

Next, Louisville claims that standing hinges on Chelsey being "asked to provide services for a same-sex wedding." Defs.' MSJ 9. Not so. Courts have found standing in similar cases without relying on this. *See 303 Creative LLC*, 6 F.4th at 1171–75; *TMG*, 936 F.3d at 749–50; *B&N*, 448 P.3d at 900–02. And Chelsey alone controls whether she violates the law: whether to post her statements, how to operate her business, whether to offer only opposite-sex wedding photographs, and whether to decline requests for same-sex wedding photographs. Louisville also initiates complaints without service denials—through testers and from activity on social media and advertisements. *Infra* § I.A.4; App. 758 (investigating Scooter Triple B's for sign without knowledge of actual denial of service); *id.* at 482–84

(listing "discriminatory advertising" settlements). To be sure, private third parties can file complaints as well. But they can do so merely after seeing objectionable signs. App. 811, 813. And Louisville must investigate those complaints. Metro Ord. § 92.09(C)–(D); Defs.' MSJ Ex. 9 PageID #4012, ECF No. 97–9 (confirming mandatory investigation and conciliation attempts). That supports standing. Order 9–10; *SBA List*, 573 U.S. at 164 (standing for similar administrative system).

These enforcement mechanisms distinguish this case from *Hyman v. City of Louisville*, 53 F. App'x 740 (6th Cir. 2002). Defs.' MSJ 10 (citing same). There, the physician's prosecution risk depended on receiving an employee application from a homosexual where the physician did not have "an immediate or projected need to hire a new employee." *Hyman*, 53 F. App'x at 744. Here, Chelsey already adopted her policy and posted her statement. So absent the injunction, Louisville or any person seeing Chelsey's statement could investigate and prosecute Chelsey now.

Chelsey's risks have even increased after her position became "well known." *Contra* Defs.' MSJ 10. She continues to receive requests.[7] Decl. ¶¶ 480–81. And Louisville has investigated a public accommodations after looking through "social media and seeing some of the hubbub" and sent testers to public accommodations based on "information was received from news media." App. 742, 757. Louisville also accepts complaints from citizens and public interest non-profits acting as testers. App. 743, 868–71. Around the country, activists target well-known religious businesses. *Supra* n.1. Likewise, it is irrelevant that Louisville "had never even heard of Chelsey before she filed this lawsuit." *Contra* Defs.' MSJ 8. Louisville investigates and prosecutes previously unknown entities regularly. App. 824 (admitting no prior knowledge of Scooter Triple B's); *id.* at 836 (admitting testers "are randomly calling places … they've never heard of before").

[7] And Chelsey continues to book clients. Chelsey Nelson's Decl. in Supp. of Pls.' Combined Mot. for Summ. J. Resp. and Reply ¶ 4. *Contra* Defs. MSJ 6–7.

Despite these risks to Chelsey, Louisville insists she lacks standing because of the law's "modest civil fines" and lack of criminal penalties. Defs.' MSJ 11. But Louisville has expensive tastes—for Louisville, a "$10,000" fine counts as "modest."[8] *Id.* at 10. That's crippling for a small-business owner like Chelsey. *Mobil Oil Corp. v. Att'y Gen. of Va.*, 940 F.2d 73, 75 (4th Cir. 1991) (standing to challenge law with $2,500 penalty). Louisville's financial focus overlooks other harmful penalties—forcing Chelsey to create photographs and blogs that violate her faith or banning her business altogether. K.R.S. § 344.230(2)–(3) (remedies include "cease and desist" orders and "[a]dmission" to service); Metro Ord. § 92.08(B)(8) (incorporating same). And finally, Chelsey's "threat … need not stem from a criminal action." *Kiser v. Reitz*, 765 F.3d 601, 609 (6th Cir. 2014). *Accord SBA List*, 573 U.S. at 165–66 ("administrative action … may give rise to harm").

Louisville's theory also ignores that investigations alone harm Chelsey. Decl. ¶¶ 423–435, 450, 452. *SBA List*, 573 U.S. at 165–66 (threat of investigation created harm). That's because Louisville's investigative process is onerous, requiring Chelsey to respond to complaints under oath, produce documents, and testify as a witness. Metro Ord. § 92.08(B)(5); *id.* at § 92.09(D). And Chelsey must cooperate in the investigation or risk a default judgment with penalties like "a fine" or an "order[] basically to be stopped." App. 748.

In the end, Louisville demands too much for standing. Chelsey need only show a "substantial risk" of harm, *SBA List*, 573 U.S. at 158. Chelsey's risk of harm is at least substantial. So she has standing.

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[8] Louisville tries to rewrite its law to include a "limit[] [on] the amount of any fines." Defs.' MSJ 10. But damages for "humiliation and embarrassment" and "costs actually incurred" have no inherent limit. *Id.* These terms set the floor, not the ceiling. That's why settlement payments often exceed $10,000. *See* App. 457 ($11,750); *id.* at 463 ($23,000); *id.* at 467 ($21,000).

4. Many other factors confirm the credible threat.

Four more factors confirm Chelsey's standing. *See* Order 8–9 (identifying four factors); *McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016) (same).

First, Louisville has a history of enforcing its law and does so "actively." Order 8–9; Defs.' MSJ 9; App. 894–96 (admitting complaint paragraphs 303 and 304). Since 2010, Louisville has investigated over 100 public accommodations.[9] Stip. 1. That history is more than enough. *See Holder v. Humanitarian Law Project* (*HLP*), 561 U.S. 1, 16 (2010) (standing with "several" past prosecutions); *Online Merchants Guild v. Cameron*, 995 F.3d 540, 550–51 (6th Cir. 2021) (standing with two past prosecutions).

Second, Louisville never disavows prosecuting Chelsey. *See* Order 9; *Kiser*, 765 F.3d at 609; *Platt*, 769 F.3d at 452. To the contrary, Louisville actively defends its authority to do so. Defs.' MSJ 24–29; App. 424 & 430 (publicizing Louisville's intent to defend law despite injunction); *Harrell v. Fla. Bar*, 608 F.3d 1241, 1257 (11th Cir. 2010) ("an intent to enforce the rule may be inferred" from law's defense).

Third, Louisville's law is easy to enforce against Chelsey. Order 9. Louisville posts its complaint form online "[t]o make it convenient for a person wanting to file a complaint to do so at their leisure." App. 830. *See also id.* at 835, 854–55, 891–92; *Platt*, 769 F.3d at 452 (online complaint form bolstered standing). Louisville also accepts complaints over the phone. App. 830. Most of the complaints come from complainants who "walk in off the street or who [have] made an inquiry over the phone and ha[ve] been encouraged to come file a complaint." App. 744; *id.* at 831 ("Most of the complaints we receive come from phone calls.").

This easy complaint-process swells "the universe of potential complainants." *SBA List*, 573 U.S. at 164. For example, any person claiming to be aggrieved may

[9] Louisville also received about 180 public accommodation complaints from 2006–2019. App. 446–47, 450, 455, 462, 468, 471, 477, 485, 488, 879, 883. Louisville does not dispute the accuracy of these publicly available numbers. App. 896.

file a complaint. Metro Ord. § 92.09(A). "Person" includes individuals, Louisville officials, and associations, corporations, "any other legal … entity," and their "members." *Id.* at § 92.02 (defining persons). Persons living outside of Louisville can submit complaints. App. 733. So can a person "associat[ed] with someone from a protected class" even if the person was not denied because of their own characteristics. *Id.* at 806. And a person need not be denied a service to file a complaint—seeing an objectionable sign is enough. *Id.* at 811, 813.

Any member of Louisville's enforcement commission can also file complaints based on discriminatory actions they witness or hear about, reports in the news, or "discriminatory advertising" they see. Metro Ord. § 92.09(A); App. 352, 475, 740–41. In fact, Louisville officials filed a complaint against a public accommodation after "scrolling through social media" and seeing "controversial things … on Facebook." *Id.* at 757, 784, 819.

And Louisville uses and permits many kinds of testers to initiate complaints. *TMG*, 936 F.3d at 750 (testers support standing). For example, Louisville can file complaints through information developed by their "testers"—employees posing as customers to bait discriminatory acts by public accommodations. App. 740–43; *id.* at 742 (testers test public accommodations); *id.* at 858. Louisville officials can pose as testers on their own initiative. *Id.* at 740. Testers from non-profit organizations located outside Louisville can file complaints. *Id.* at 868–71 (noting testers from Lexington Fair Housing Council supported complaint). And Louisville has no policy preventing "a private citizen, from going around and engaging in testing activity, and then filing a complaint[.]" *Id.* at 743.

Overlooking these many pathways for complaints, Louisville counters that only someone "'aggrieved by an unlawful practice'" can file complaint. Defs.' MSJ 9. But that's not a real limitation. *SBA List* found that the public could easily file complaints even though they only could do so with "knowledge of the purported

violation." 573 U.S. at 164. *See 303 Creative*, 6 F.4th at 1169, 1174 (standing to challenge similar law when enforceable by those "alleging discrimination"). In any event, almost anyone qualifies as "aggrieved" because individuals, organizations, Louisville officials, and all sorts of testers can complain. And Louisville must investigate and attempt to resolve every filed complaint no matter who files it or its merits. Metro Ord. § 92.09(C)–(D); Defs.' MSJ Ex. 9 PageID #4012.

Finally, Louisville stresses that Chelsey's desired activities violate its law and intends to enforce the law. *Supra* § I.A.2–3. True, Chelsey "has not received any warning letters." Defs.' MSJ 9. But a formal letter isn't necessary here. Louisville clearly states its intent to enforce its law against Chelsey, which gives her standing. *See Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 529 (6th Cir. 1998) (standing because the "City clearly states in its answer that it fully intends to prosecute anyone who violates the provisions of the ordinance"); *Mich. State Chamber of Commerce v. Austin*, 788 F.2d 1178, 1184 (6th Cir. 1986) (similar).

Chelsey could challenge the law if she met only one of the above factors. *Online Merchants Guild*, 995 F.3d at 550 (each factor need not "be established"); *Hargett*, 791 F.3d 684 at 695 (standing based only on no disavowal). But she meets all four. That seals her standing.

B. Chelsey has standing to challenge the Accommodations and Publication Provisions because they are intertwined.

In addition to meeting the requirements to independently challenge the Accommodations and Publication Provisions, Chelsey can challenge the former provision because the merits of both provisions are intertwined.

Whether the Publication Provision can constitutionally ban Chelsey's desired statements depends on whether the Accommodations Provision can constitutionally ban Chelsey's policy and compel her to celebrate same-sex marriage. *See Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (invalidating abortion advertisement restriction

because it "pertained to constitutional interests"). This Court and Louisville acknowledge this intertwinement. Order 21 ("[T]he constitutionality of the Publication Provision … depends on the constitutionality of the Accommodations Provision …."); Defs.' MSJ 20 ("Just as there is no constitutional right to discriminate, there is no concomitant right to advertise an illegal policy of discrimination"). When issues are intertwined like this, courts address the merits of those issues. *Accord TMG*, 936 F.3d at 757 n.5; *B&N*, 448 P.3d at 926.[10]

Gratz v. Bollinger proves the point. 539 U.S. 244 (2003). There, the Court held an aspiring transfer student had standing to challenge a freshman admissions policy for which he was no longer eligible. *Id.* at 261–67. The criteria for freshman admissions and transfer students considered race to enhance diversity, which was exactly what the plaintiff argued was never justified. *Id.* at 267. So the two policies implicated "the same set of concerns," which created standing to challenge both. *Id.*

As this Court and Louisville recognize, Chelsey's claims are even more intertwined. Chelsey necessarily has standing to challenge the Accommodations Provision because she has standing to challenge the Publication Provision.

C. Chelsey has competitor standing because Louisville's law burdens her compared to her competitors.

In addition to standing based on enforcement and chill, Chelsey has standing because Louisville's laws give her competitors an unfair competitive advantage. *See, e.g.*, *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 281 (6th Cir. 1997) (standing when regulation burdened firearm manufacturers and dealers but not their

[10] *Cf. Schultz v. United States*, 529 F.3d 343, 350 (6th Cir. 2008) (evaluating merits of two separate but intertwined statutes because plaintiff had standing to challenge one of the statutes); *Brennan v. Twp. of Northville*, 78 F.3d 1152, 1158 (6th Cir. 1996) (explaining claim intertwinement in pendent jurisdiction case and noting the "finding on the first issue necessarily and unavoidably decides the second").

competitors); *XY Plan. Network, LLC v. United States Sec. & Exch. Comm'n*, 963 F.3d 244, 251 (2d Cir. 2020) (summarizing competitor-standing doctrine).

Specifically, Louisville's law burdens Chelsey but not her direct competitors—other wedding photographers in Louisville's wedding market and other boutique editing companies. Decl. ¶¶ 105, 109–16, 503; App. 606, 657. Without an injunction, Chelsey cannot operate her business efficiently because she must limit her advertising to avoid attracting requests to promote same-sex weddings and engagements, cannot participate in referral groups, and would de-publish her Facebook page. Decl. ¶¶ 432, 435–36, 492. Chelsey also cannot promote her business to the public or advocate for her religious beliefs as she desires because she cannot post a statement explaining her religious reasons for celebrating only opposite-sex weddings or explain these beliefs to persons who ask her to promote same-sex weddings. Decl. ¶¶ 440–54.

In contrast, other Louisville wedding photographers and boutique editors who compete with Chelsey do not face these burdens because they photograph and edit opposite-sex and same-sex weddings. App. 365, 538–39, 613, 661. *See Magaw*, 132 F.3d at 281 (competitor standing where regulation "restricted the operation" of firearm "businesses in various ways" but not their competitors); *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (competitor standing when law forces business to "lose sales to rivals" or to "expend more resources to achieve the same sales"). This gives Chelsey another basis for standing to challenge Louisville's law.

D. Chelsey brings ripe challenges against the Accommodations and Publication Provisions because they forbid her activities according to Louisville.

Chelsey's claims are also ripe because Louisville's law injures her. Ripeness and standing come to the same question in this case: whether Chelsey has suffered

an injury. *See Winter*, 834 F.3d at 687 (evaluating standing and ripeness together); *Platt*, 769 F.3d at 451 (same); Order 6 (same). She has. *See supra* § I.A.

There are also no relevant disputed or missing facts here. The law bars Chelsey from only participating in weddings, photographing, and blogging consistent with her faith, from adopting that policy, and from posting a statement explaining her beliefs or that policy. *Supra* § I.A.1–2. Chelsey provided her policy, her statement, and examples of what she can and cannot do. Decl. ¶¶ 50, 208–409, 446–47. And Louisville has conceded that its law forbids them. *Supra* § I.A.2.

This is far from an "abstract and hypothetical dispute." Defs.' MSJ 12–14. This Court already found Louisville's law violated Chelsey's rights on a less-developed record. Order 11–22. Courts have rejected Louisville's missing-facts argument in similar cases. *303 Creative LLC*, 6 F.4th at 1172, 1176 (ripe record with "clear examples" of website designs). And Louisville admitted that "there are no complicated or nuanced questions of interpretation at issue" here. Defs.' Mot. for Protective Order 5. That's why— without more facts—Louisville calls Chelsey's violations "undisputed" (Defs.' MSJ 7), and amici agree, ACLU Br. 2 (saying Chelsey's "intent … violates" the law). This litigation has gone on for two years and everyone in it—this Court, the parties, amici, and experts—has had enough facts to determine that Louisville's law forbids Chelsey's activities. Nothing has changed.

Still, Louisville poses irrelevant or already answered questions to conjure up ripeness concerns. Defs.' MSJ 13–14. For example, it is undisputed that Chelsey believes all weddings are religious events. Decl. ¶ 379. It is therefore irrelevant whether she is forced to participate in a same-sex wedding with "no religious component"—even that would violate her beliefs.[11] Defs.' MSJ 14. Likewise, it is

[11] Alternatively, for her participation claim only, this Court could enjoin Louisville from forcing Chelsey to participate in any same-sex wedding with prayer. *See* Decl. ¶ 171 (describing Chelsey's participation in past weddings); *B&N*, 448 P.3d at 900–01 (tailoring relief based on record).

undisputed that Chelsey creates everything "custom for each client," only creates "positive and uplifting" photographs and blogs, and declines to create certain wedding photographs because of their messages. Decl. ¶¶ 117, 151, 345–376, 395. Yet Louisville still insists Chelsey violates the law. *Supra* § I.A.2. So Chelsey breaks the law if she declines to "document" a same-sex wedding or declines because she "insists on making the wedding photos conform to her own vision." Defs.' MSJ 14.

In the same way, it is irrelevant whether a "same-sex couple" found another photographer or experienced any "degree" of "harms." *Id*. Those questions go to damages, not liability. According to Louisville, Chelsey violates the law regardless of whether the same-sex couple found another photographer or had any non-monetary harm. And damages are just one of the penalties Louisville can impose. *See* Metro Ord. § 92.08(B)(8).

In the end, no matter how Louisville tries to confuse things, it has admitted that Chelsey violates its law if she engages in her desired activities and has litigated for two years to restrict her activities. No more facts are needed. This Court should address the merits.

II. Louisville's law violates the First Amendment by compelling and restricting Chelsey's speech based on content and viewpoint.

Louisville's law violates the First Amendment by compelling and restricting Chelsey's speech based on content and viewpoint as this Court held. In arguing otherwise, Louisville never mentions this Court's prior opinion. *See* Defs.' MSJ 14–20. But this decision was correct. Louisville's law (A) compels Chelsey's speech, (B) compels and restricts Chelsey's speech based on content and viewpoint, and (C) endangers all speakers in Louisville.

A. The Accommodations Provision compels Chelsey's speech.

Louisville's law compels Chelsey to speak messages she disagrees with. This Court concluded that Chelsey's photographs and blogs are speech, that Louisville "can't compel speech when it violates the speaker's religious … principles," but the Accommodation Provision compels Chelsey to promote messages she disagrees with. Order 4, 13–18. Louisville does not dispute the three-part test for identifying compelled speech or any of Chelsey's facts. MSJ 6–15.

Instead, Louisville argues that its law "does not regulate the content of Chelsey's speech," does not tell Chelsey "how to frame her shots or edit photographs," and "regulates conduct." Defs.' MSJ 15, 18. This Court already rejected these arguments. Order 4; *id.* at 18 nn.121–122.

Other courts have too. For example, the public-accommodations law in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* did not dictate the color of parade floats or words on any banner. 515 U.S. 557, 561–63 (1995). But the law still applied "in a peculiar way" to "speech itself" when it forced parade organizers to admit an LGBT group into the organizer's parade. *Id.* at 572–73. Louisville's argument overlooks that facially speech-neutral laws trigger strict scrutiny when applied to "speech itself." *Id. HLP*, 561 U.S. at 28 (law "directed at conduct" triggered scrutiny as applied because "the conduct triggering coverage … consists of communicating a message").[12] Same goes for anti-discrimination laws. *See Groswirt v. Columbus Dispatch*, 238 F.3d 421, *2 (6th Cir. 2000) (unpublished); *Johari v. Ohio State Lantern*, 76 F.3d 379, *1 (6th Cir. 1996) (unpublished); *TMG*, 936 F.3d at 752; *B&N*, 448 P.3d at 914; *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 441–42 (S.D.N.Y. 2014); MSJ 9 (citing cases from the Eleventh Circuit and this district).

[12] *See also Cohen v. California*, 403 U.S. 15, 18 (1971) (breach of peace law applied to words on jacket); *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (disorderly conduct law applied to spoken words); *Cantwell v. Connecticut*, 310 U.S. 296, 303–07 (1940) (breach of peace law applied to playing record).

Here, the undisputed facts prove that Louisville's law applies to Chelsey's "speech itself," *Hurley*, 515 U.S. at 573—her photographs, editing, and blogs, MSJ 10 n.4 (collecting evidence on this topic). Louisville's "same-service rule" forces her to photograph, edit, and blog about same-sex weddings in a positive and uplifting way because she always photographs, edits, and blogs about opposite-sex weddings in "a positive and uplifting way." Decl. ¶ 151. *See also* App. 383; MSJ 8 n.3. And because there's no question that Chelsey's photographs, edits, and blogs are speech, Louisville's law applies to compel Chelsey's speech.

These cases and undisputed facts nullify *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013). Like Louisville, *Elane* confuses a law's text with how it applies to speech. *Id*. at 68 (law could compel photographs because it "applies not to Elane Photography's photographs but to its business operation"). As such, *Elane* contradicts *Hurley* and the cases cited above. This Court and others refuse to follow *Elane* for that reason. Order 18; *TMG*, 963 F.3d at 752; *B&N*, 448 P.3d at 916–17.

To avoid this outcome, Louisville says "a same-sex couple's wedding is not Chelsey's parade." Defs.' MSJ 17–18. Chelsey pre-empted this argument. MSJ 10 (citing cases). And *Hurley* disposes of the argument. The speech in *Hurley* was the parade organizer's speech even though "the parade's overall message is distilled from the individual presentations along the way." 515 U.S. at 577. In the same way, Chelsey's photographs and blogs are her speech—they "tell[] a story"—even though she photographs others. Order 17. She custom makes everything, retains "ultimate editorial control," and follows a unique artistic process for each photograph and blog she creates. Decl. ¶¶ 117, 208–327; App. 113, 121, 401–10. Under Louisville's theory, a biographer does not speak when writing about someone else's life. That's not the law. *See* Order 18; *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 794 n.8 (1988) (protecting professional fundraiser's speech on charity's behalf because he had "independent First Amendment interest in [his] speech").

Louisville tries to wiggle out from *Hurley* by claiming that extending it beyond "a private association … on a parade route" would "create a standard that could not withstand long term application" by requiring courts to decide "which businesses are sufficiently artistic." Defs.' MSJ 18 (quotation marks omitted). Not so. "While drawing the line between speech and conduct can be difficult," the Supreme Court's "precedents have long drawn it, and the line is long familiar to the bar." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (cleaned-up). And here "the line [Chelsey] asks this Court to draw isn't a difficult one" because "among those expressive art forms, long-protected by the First Amendment, is photography." Order 15–16; *id.* at 7 nn. 44–45 (collecting cases). Not even Louisville disputes that Chelsey's photographs and blogs are speech.

Returning to the well, Louisville attempts to distinguish *Hurley* again by arguing that "any compulsion to speak is incidental," citing *Rumfseld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006). That case dealt with compelled access to rooms, but "an empty hotel room" is not "speech." Order 26–27. And the law "neither limit[ed] what law schools may say nor require[d] them to say anything." *FAIR*, 547 U.S. at 60. *FAIR* is inapplicable here because Louisville's law regulates Chelsey's speech—her photographs and blogs. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 n.10 (2008) (distinguishing *FAIR* from situation when law forces someone "to reproduce another's speech against their will" or "co-opt[s] [their] own conduits for speech"); *Netchoice, LLC v. Moody*, 2021 WL 2690876, at *9 (N.D. Fla. June 30, 2021) (same).

That Louisville's law directly regulates Chelsey's speech separates this case from the other cases Louisville cites. Some cases (like those involving antitrust law or hiring decisions) did not involve speech at all. *Contra* Defs.' MSJ 15. Other examples (like newspaper publishers, video-game companies, and tattoo parlors) do not involve compelled speech. *Id.* 15–16. In the end, Chelsey's theory is limited.

Anti-discrimination laws and other generally applicable laws can still regulate business's *conduct* (i.e., labor laws and health codes) and non-expressive services (i.e., renting hotel rooms and selling hamburgers). Order 26 nn. 167–68. But such laws cannot compel businesses to create and convey speech. As applied to Chelsey, that's exactly what Louisville's law does and why it violates the First Amendment.

B. The Accommodations and Publication Provisions compel and restrict Chelsey's speech based on content and viewpoint.

The Accommodations and Publication Provisions apply here based on content and viewpoint because they compel and restrict Chelsey's speech based on what she says (or wants to say), alter Chelsey's photography and blog content, and require access only to certain viewpoints. MSJ 13–15.

Rather than engage this logic though, Louisville repeats that its Accommodations Provision does not facially "draw[] distinctions based on content." Defs.' MSJ 16. Then, moving to the Publication Provision, Louisville claims "there is no concomitant right to advertise an illegal policy of discrimination." *Id.* at 20.

Louisville makes two mistakes. First, Louisville again overlooks that its law regulates based on content and viewpoint *when applied* to Chelsey's photographs and blogs. *See HLP*, 561 U.S. at 26–27 (law facially regulating conduct still content-based as-applied); *Hurley*, 515 U.S. at 578 (same when anti-discrimination law applied to "content of … expression"); *supra* n.12. And as applied to Chelsey, Louisville's law does exactly that. *See, e.g.*, App. 360–61, 365, 428–29, 762; MSJ 13–14 (citing other record examples).

Second, Louisville prematurely (and incorrectly) calls Chelsey's desired statements discriminatory. Defs.' MSJ 19–20. Chelsey's right to post her statements depends on her right to control the content of her photography and blogs. *Supra* § I.B (explaining intertwinement). Because she can do the latter, she can post the

former. *TMG*, 936 F.3d at 757 n.5 (state could not ban film studio's statement); *B&N*, 448 P.3d at 926 (same as to art studio's statement).

With the focus properly on how Louisville's law applies to Chelsey, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) and *Pacific Gas & Electric Co. v. Public Utilities Commission of California* (*PG&E*), 475 U.S. 1 (1986) control. Louisville's law alters the content of Chelsey's speech, applies because she speaks only some messages, favors some views of marriage over Chelsey's, awards access to people to speak opposing views, and restricts Chelsey's speech based on content and viewpoint. MSJ 12–15. Louisville cannot distinguish *Tornillo* and *PG&E* because its law *applies* to Chelsey based on the content and viewpoint of her speech. *Cf. Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 655 (1994) (distinguishing the "access rules" in *Tornillo* and *PG&E* from the "must-carry rules" which "are content neutral *in application*" (emphasis added)). That triggers strict scrutiny.

C. Louisville does not dispute its law endangers all speakers.

Chelsey's claims are limited and well-accepted: anti-discrimination laws cannot compel speech based on content and viewpoint. While Chelsey's theory is limited, Louisville's arguments have no limiting principle and threaten all speakers.

Under Chelsey's theory, laws can still target and be triggered by discriminatory *conduct* or force people to engage in *conduct*, e.g., congregating outside certain buildings. Order 26 nn. 167–68. *Contra* Defs.' MSJ 17. And her theory does not upend "longstanding bans on discriminatory advertisements in employment, housing, and public accommodations." Defs.' MSJ 20. Louisville already applies Chelsey's theory to housing by prohibiting investigations into First Amendment activity. App. 948. Indeed, Louisville can still restrict speech that threatens to engage in illegal, *constitutionally unprotected* conduct, just not legal, constitutionally protected speech. *United States v. Williams*, 553 U.S. 285, 298

(2008) (explaining this). So Chelsey's theory is neither "unworkable" nor "expansive," especially as applied to photographs and blogs. *Contra* Defs.' MSJ 1.

Meanwhile, Louisville concedes it can compel businesses to "provide goods or services involving speech to customers."[13] Defs.' MSJ 15. *See* MSJ 12–13 (explaining danger of Louisville's logic). Worse still, Louisville now argues that its interest in compelling speech is "most necessary" when creative businesses—like website designers—offer "unique goods and services." Defs.' MSJ 26 (quotations omitted). Put differently, Louisville's inverted rule is the more unique the speech, the greater the government's power to compel. That rule is dangerous and unprecedented.

III. The Accommodations and Publication Provisions violate the First Amendment because they are not neutral nor generally applicable.

Louisville's law violates Chelsey's free-exercise rights because it is not neutral or generally applicable as applied. Louisville counters that its law does not evince "animosity" to Chelsey, treats religious and secular activities the same, and "applies uniformly." Defs.' MSJ 21–22. But this ignores the stated interests in Louisville's law and how the law's text and application undermine that interest.

For free-exercise claims, courts identify a law's general interest, compare regulated religious conduct to exempted conduct, then ask whether the latter undermines the law's interest. MSJ 15–16 (citing collecting cases). A law that treats religious conduct worse than comparable secular conduct must pass strict scrutiny. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).

Apply that analysis here. Louisville claims an equal interest in "rooting out all forms of discrimination," including sexual orientation, age, sex, and familial-status discrimination. App. 390; MSJ 16 n.10; Defs.' MSJ 26 ("every single instance

[13] This includes the argument about political speech and affiliation. *See* MSJ 12 n.6; Eugene Volokh, *Bans on Political Discrimination in Places of Public Accommodation and Housing*, Reason (Oct. 18, 2021), https://bit.ly/3AXf2vL.

of discrimination" is problematic). But the Accommodations and Publication Provisions undermine that interest by allowing all age or familial-status discrimination, most sex discrimination, and many exemptions. MSJ 16–18. Louisville permits these secular exemptions but bans "even one religious" objection for Chelsey.[14] Defs.' MSJ 28–29. But Chelsey doesn't endanger Louisville's anti-discrimination interests because she doesn't discriminate. Decl. ¶¶ 395, 409. So Louisville triggers strict scrutiny by treating Chelsey's religious conduct worse than comparable secular conduct that undermine Louisville's interests.

Louisville admits its law does not cover age, familial-status, or most sex discrimination by public accommodations. Defs.' MSJ 21. That's decisive because Louisville relies on its interest in ending "all forms" of discrimination to justify regulating Chelsey. App. 390. Even so, Louisville claims "the lack of coverage … is not the same as an exemption." Defs.' MSJ 21. That's wrong. A law is not neutral or generally applicable when its "lack of coverage" for certain activities undermines the government's interests, like it does here. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 544 (1993) (ordinance banned religious practice but did not regulate hunters' disposal of animals or improper garbage disposal by restaurants which undermined sanitation interests); *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 479–82 (6th Cir. 2020) (regulation closed schools but kept "gyms, tanning salons, office buildings" and casinos open which undermined COVID-19 prevention interests).

And here, the "differences in protected characteristics across different categories of an antidiscrimination law" matter because of Louisville's asserted interests. *Contra* Defs.' MSJ 21. Louisville admits that its anti-discrimination interest applies to "all forms" of discrimination, including age, familial-status, and

[14] For this reason, it is irrelevant (and futile) that Chelsey never exposed herself to prosecution by asking for a "religious exemption" before filing suit. Defs.' MSJ 5.

sex discrimination. App. 390; MSJ 16 n.10. By failing to protect these types of discrimination, Louisville's law is neither neutral nor generally applicable.

Louisville responds that "the difference in protected characteristics" is "reasonably related" to its interests because "community members file" employment age-discrimination complaints and housing familial-status discrimination complaints. Defs.' MSJ 21 (citing App. 883). But persons cannot file age or familial-status discrimination complaints against public accommodations—those aren't protected classes. Metro Ord. § 92.05(A). That Louisville receives more complaints for age, sex, and familial-status discrimination than for sexual-orientation discrimination just shows how much Louisville undermines its anti-discrimination interests by not regulating age, sex, and familial status in public accommodations.

And Chelsey need not produce "evidence" that Louisville "grants discretionary exemptions." *Contra* Defs.' MSJ 21. She only needs to show "a formal mechanism for granting exceptions" exists, not that "any exceptions have been given." *Fulton*, 141 S. Ct. at 1179. She has done so. MSJ 16–17. Louisville applies its laws to allow businesses to deny requests for secular reasons—business-related reasons or because the businesses does not create the requested product. *Id.*

Louisville tries to distinguish these exemptions by arguing they "were never violations in the first place." Defs.' MSJ 22. But that's the point. Louisville treats religion unfairly by allowing secular (but not religious) justifications for denials. For example, Louisville allows tattoo parlors and t-shirt designers to decline requests for goods they have never made in the past. MSJ 16–17. But Louisville condemns Chelsey for declining photographs celebrating same-sex weddings even though she has never created such photographs before and would decline such requests no matter who asks her.[15] Decl. ¶ 408. In this way, Louisville has "sole discretion" to

[15] Louisville also criticizes Chelsey for supposedly being inconsistent by not asking clients about "premarital sex." Defs. MSJ 5. There's no inconsistency. *See, e.g.*,

grant exemptions, treats Chelsey worse than others, and violates Chelsey's free exercise. *Fulton*, 141 S. Ct. at 1878. *See Sherbert v. Verner*, 374 U.S. 398, 401 (1963) (free exercise violation for "good cause" exception). *Contra* Defs.' MSJ 21.

This conclusion is consistent with *Kissinger v. Board of Trustees of Ohio State University*, 5 F.3d 177 (6th Cir. 1993). Defs.' MSJ 21 (citing same). There, the school protected its educational interests in "the use of live animals" by requiring all graduates to take a live animal course and giving no "particularized exemptions." *Kissinger*, 5 F.3d at 178–180. The school's interest and its policy aligned. Here, Louisville's interests and its law don't match because the law—as written and as applied—has many exemptions (or "lacks coverage"). "This ad hoc application of the anti-discrimination policy stands in marked contrast to *Kissinger*." *Ward v. Polite*, 667 F.3d 727, 739 (6th Cir. 2012).

IV. The Accommodations Provision violates the First Amendment because it compels Chelsey' to participate in and celebrate religious ceremonies she objects to.

Louisville's law also compels Chelsey to participate in and attend ceremonies she objects to. MSJ 18–19.

Louisville counters that its law just requires Chelsey "to be physically present" at same-sex weddings and that Chelsey does not sell "[p]articipation in religious services" as a service. Defs.' MSJ 23. But Louisville ignores the facts: Chelsey considers all weddings to be religious and Louisville's same-service rule forces Chelsey to serve as a witness to the union, stand to recognize the marriage, obey the officiant, and bow her head in prayer because she does so at opposite-sex weddings. Decl. ¶ 379; MSJ 19. Chelsey's compelled participation exists even if she

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Expert Decl. of Professor Dennis Burk ¶ 22, *Arlene's Flowers, Inc. v. Ferguson*, No. 13-cv-05094-RMP, https://bit.ly/3jgOL5I (explaining theological position that creative professionals need not question opposite-sex couples when "it is not immediately apparent whether the marriage would be biblically permissible").

is "hired." *Contra* Defs.' MSJ 23. On-duty officers and paid officiants cannot be forced to attend religious ceremonies. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018) (cannot force clergy to officiate wedding ceremonies); *Marrero-Méndez v. Calixto-Rodríguez*, 830 F.3d 38, 45 (1st Cir. 2016) (cannot require officer to "merely" attend events with prayer).

Louisville's cases don't prove otherwise. They involved no coercion. *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 589 (6th Cir. 2015) (no evidence of coerced "partake[ing] in religious activity of any kind"). Or *voluntary* attendance. *Town of Greece v. Galloway*, 572 U.S. 565, 589 (2014); *Fields v. City of Tulsa*, 753 F.3d 1000, 1010–12 (10th Cir. 2014). By contrast, Louisville's law coerces Chelsey's participation and demands attendance because she cannot "photograph any moments of the wedding ceremony … during [her] absence." Decl. ¶¶ 386–94.

Nor does protecting Chelsey violate the Establishment Clause, as Louisville suggests. Defs.' MSJ 23–24. Louisville's cases are irrelevant or distinguishable. *See Braunfeld v. Brown*, 366 U.S. 599 (1961) (finding no Establishment Clause violation); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144–45 & n.11 (1987) ("accommodat[ing] religious practices" can be done "without violating the Establishment Clause" and distinguishing *Caldor*); Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 Ky. L.J. 603, 612–21, 623 n.123 (2018) (distinguishing *Texas Monthly*, *Lee*, and *Caldor* and explaining *Cutter*'s exemption). The Supreme Court also rejects Louisville's "nonbeneficiary" harm argument. *Hobby Lobby Stores, Inc.*, 573 U.S.at 729 n.37; *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 195–96 (2012). And Louisville's logic would eviscerate the Free Exercise Clause, invalidate KRFRA, and tank Louisville's own religious exemptions. *See* Metro Ord. § 92.04(A) (allowing religious housing exemptions); *id.* at § 92.07(A) (same for employment). Louisville just misstates the Establishment Clause.

V. Chelsey can challenge Louisville's law under KRFRA because it substantially burdens her religious beliefs.

Chelsey also meets the three elements to prove a KRFRA violation. MSJ 19 (detailing elements); Defs.' MSJ 29–30 (not disputing test).

Louisville's law substantially burdens Chelsey's faith because it bars her from creating photographs, writing blogs, or posting statements consistent with her faith. *Supra* § I.A.2 (explaining this point); MSJ 19–20 (same). These burdens exist though Chelsey has not faced "enforcement action" or "been asked by a customer." *Contra* Defs.' MSJ 29. Louisville's law puts Chelsey to a "stark choice": "forsake [her] religious convictions" or face "severe" penalties. *B&N*, 448 P.3d at 920. That's a substantial burden. *Id. Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) (substantial burden in "choos[ing] between saving their companies and following the moral teachings of their faith").

For these reasons, Chelsey can raise KRFRA in this "pre-enforcement" case. *Contra* Defs.' MSJ 29. Nothing in the law's text restrict KRFRA's use to "a defense to government" action. *Contra id.* Courts in this district agree. *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 913 (W.D. Ky. 2020) (finding Louisville's restrictions on church gatherings violated KRFRA before they were enforced).

Finally, Louisville confuses state sovereign immunity with Eleventh Amendment immunity. Defs.' MSJ 29–30. Eleventh Amendment immunity applies to states, not Louisville. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). *Contra* Defs.' MSJ 29–30 (citing cases with state-law claims against states). That's true no matter how Kentucky defines state sovereign immunity. *Fletcher-Hope v. Louisville-Jefferson Cnty. Metro Gov't*, 2019 WL 498853, at *4 (W.D. Ky. Feb. 8, 2019) (explaining immunity differences). Though state-sovereign immunity sometimes bars state-law claims for damages, Chelsey only seeks declaratory and injunctive relief under KRFRA, as Kentucky law allows. *Ruplinger*

v. Louisville/Jefferson Cnty. Metro Gov't, 607 S.W.3d 583, 585 (Ky. 2020) (KRFRA remedy limited to "declaratory judgment enjoining Louisville[]").[16]

VI. The Accommodations and Publication Provisions fail strict scrutiny.

Because Louisville's law violates Chelsey's constitutional and KRFRA rights, the law must pass strict scrutiny. Louisville must prove that applying its law to Chelsey is narrowly tailored to serve a compelling interest. MSJ 20–24.

As for Louisville's asserted interest in ending discrimination (App. 390), that interest does not apply here. Louisville never disputes that Chelsey only objects to creating certain messages, not to serving certain people. MSJ 11–12 (explaining this distinction). So Louisville can still end discrimination without punishing Chelsey. Order 26–27 (making this point).

In any event, Louisville must "identify an actual problem," *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011) (cleaned up), before it can claim a "compelling reason why it has a particular interest in deny an exception" to Chelsey. *Fulton*, 141 S. Ct. at 1882. And actual problems require actual evidence. Louisville has none. *Contra* Defs.' MSJ 24–26 (relying on general statements). Louisville is unaware of any case where a person has been denied access to a wedding photographer because of sexual orientation. App. 385; MSJ 21 n.12. Despite producing almost forty years of history, Louisville cannot muster *a single example* of this ever happening. Defs.' MSJ Ex. 2, ECF No. 97-2 (reports from 1985–1993); Defs.' MSJ Ex. 3, ECF No. 97-3 (public hearing testimony).

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[16] Chelsey agrees to dismiss all claims against the individual defendants and the Advocacy Commission. Chelsey also agrees to dismiss her constitutional claims against the Enforcement Commission. But since the Enforcement Commission is the "government," the Enforcement Commission is a proper KRFRA defendant. *See* KRFRA § 446.350; *Lexington Fayette Urban Cnty. Hum. Rts. Comm'n v. Hands on Originals, Inc.*, 2017 WL 2211381, at *8 (Ky. Ct. App. May 12, 2017) (Lambert, J., concurring) (applying KRFRA against a local commission).

Neither can Louisville's proffered expert, Professor Netta Barak-Corren. Barak-Corren did not audit professionals in Louisville, has no evidence about how Louisville professionals would react to a ruling favoring Chelsey, has no evidence about how the public reacts to district court cases, has no evidence about how her study might apply today in Louisville, and cannot compare the studied states' demographics to Louisville's. Pls.' Mot. to Exclude Testimony of Netta Barak-Corren (Mot. to Exclude) 17–19, ECF No. 90.[17] *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (findings of discrimination in a general industry had "little probative value in establishing" discrimination in particular industry). In almost 2,000 interactions with wedding professionals, *only one* explicitly declined a same-sex wedding request because he or she "only does traditional weddings." Mot. to Exclude at 25. That professional is not in Louisville and is not identified as a baker, florist, or photographer. Barak-Corren found no explicit decline by a photographer. Barak-Corren never even measures the effect of speech-based exemptions. *Id.* at 22–24. Nothing justifies Louisville alleged need to regulate Chelsey.

If anything, Barak-Corren's study undermines Louisville's alleged interest. That study alleges that *Masterpiece* did not change professionals' willingness to provide services for same-sex weddings in some jurisdictions in Texas. *Id.* at 10–11. But those are the exact jurisdictions similar to Louisville, i.e. they both have anti-discrimination laws and RFRAs. So Barak-Corren's study suggests that ruling for Chelsey would not affect Louisville professionals at all.

Changing gears, Louisville mentions that preventing "dignitary harms" and ensuring access to public accommodations justifies regulating Chelsey. Defs.' MSJ 25–26. But these interests do not justify restricting or compelling speech or forcing participation in religious ceremonies. *Hurley*, 515 U.S. at 574, 578–79 (protecting

[17] This motion and its exhibits are incorporated by reference. Fed. R. Civ. P. 10(c).

content-based choices, including ones that others consider "misguided, or even hurtful"); *id.* at 577–78 (rejecting "enviable vehicle" access argument); *Boos v. Barry*, 485 U.S. 312, 322 (1988) (rejecting dignity concerns as basis for restricting speech); *Tornillo*, 418 U.S. at 256–58 (rejecting "compulsory access law"). Plus, Chelsey doesn't discriminate, and there's no photography-access problem in Louisville. People can easily understand and respect speakers like Chelsey who want the freedom to control what they say. *Masterpiece*, 138 S. Ct. at 1727 ("[G]ay persons could recognize and accept without serious diminishment to their own dignity and worth" declining to speak or participate in weddings).

Louisville's law is also massively underinclusive as to these interests. MSJ 21–22. Private homeowners, employers, and public accommodations can deny access for many discriminatory reasons and post whatever they want about age, sex, or familial status. *Id.* at 17, 21–22. Even restaurants, hotels, and motels—which cannot deny services "because of sex"—can lawfully post sexist signs like "No Women Allowed" without penalty. Metro Ord. § 92.05(C) (no equivalent Publication Provision). Louisville never responds to this under-inclusivity.

Lacking evidence or compelling interests, Louisville retreats to supposed slippery slopes—that protecting Chelsey will lead to widespread sexual-orientation discrimination. Defs.' MSJ 27–28. This argument "echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006). Slippery slopes don't count as evidence; strict scrutiny demands "a more precise analysis." *Fulton*, 141 S. Ct. 1881.

Louisville also equates Chelsey's activities to discrimination based on race. Defs.' MSJ 27. This Court rejected that type of equivalence. Order 20 n.133 (explaining "Chelsey's suit does not present [that] question"). And for good reason. Louisville's hypothetical involves a status-based decline. But Louisville does not

dispute that Chelsey only objects to messages, not people. Decl. ¶¶ 396–409. The Supreme Court has also explained that the state's interests are higher in prohibiting race discrimination—which is a "recurring evil"—than sexual-orientation discrimination. *Compare Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (racial bias "implicates unique historical, constitutional, and institutional concerns") *with Obergefell v. Hodges*, 576 U.S. 644, 657 (2015) (objections to same-sex marriage are held "in good faith by reasonable and sincere people"). Louisville's hypothetical is just a different case. And Louisville creates the real slippery slope problem. Under its theory, Louisville can compel any speaker. *See supra* § II.C. Louisville encourages courts to tolerate government hostility towards religion. App. 920–26. And Louisville never considers the harm to religious communities and persons in refusing to grant any religious exemptions. *Id.*

Besides no compelling interest, Louisville's law lacks narrow tailoring. Louisville must show that it considered and rejected alternatives more tailored to its interests. *See* MSJ 22–23 (collecting cases). But Louisville admits that it "do[es] not currently possess any information regarding what alternative measures those legislators may have considered." App. 950. That admission decides strict scrutiny.

What's more, many better alternatives exist. MSJ 22–24. Louisville calls some alternatives "unworkable" because it is "difficult … to define what constitutes an 'expressive' business." Defs.' MSJ 27. Louisville also claims that exempting some wedding businesses could violate "the establishment clause." *Id.* But many places (including Kentucky and Louisville for sex-based discrimination) apply their laws only to non-expressive businesses without problems. MSJ 23–24. And Louisville could write its law to protect artists without creating Establishment Clause violations. *See 303 Creative*, 6 F.4th at 1204 (Tymkovich, C.J., dissenting) (offering this proposal). Finally, there's nothing "shocking" about a voluntary certification program. *Contra* Defs.' MSJ 28. Louisville already has a similar program. MSJ 23.

While Louisville claims "[n]one" of these proposals "would accomplish [Louisville's] compelling interest" (Defs.' MSJ 27), there's no evidence for this since Louisville never considered them. Louisville cannot infringe Chelsey's rights based on speculation—particularly when many other jurisdictions manage to protect constitutional rights and stop discrimination without any trouble.

VII. The Unwelcome Clause is facially overbroad, vague, and allows unbridled discretion.

The Publication Provision's Unwelcome Clause is facially vague, overbroad, and grants unbridled discretion. Louisville does not dispute this. But Louisville says Chelsey does not have "standing" as to this Clause because her statement violates the law.[18] Defs.' MSJ 12. But the terms "objectionable, unwelcome, unacceptable, [and] undesirable" are so vague that anyone could file a complaint based on *any portion* of Chelsey's statements. MSJ 24–25 (explaining vagueness). What's more, Louisville misstates the law. Even if Chelsey engages in "clearly proscribed" speech, she still "may have a valid overbreadth claim." *HLP*, 561 U.S. at 20. She can also bring a vagueness claim because the law grants too much enforcement power. *Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia*, 846 F.3d 391, 409–10 (D.C. Cir. 2017). So this Court can and should enjoin the Unwelcome Clause under any of these theories.

Conclusion

The undisputed facts show that Louisville's law violates Chelsey's rights many times over. This Court should grant Chelsey's summary-judgment motion, declare her constitutional and statutory rights, and permanently enjoin Louisville.

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[18] Framed as "standing," Louisville really objects to Chelsey's Unwelcome Clause claim on the merits. *See HLP*, 561 U.S. at 15–16, 21–22 (finding standing and then addressing vagueness merits); *303 Creative*, 6 F.4th at 1171–75, 1189 (same). Chelsey has standing to challenge the Unwelcome Clause. *Supra* § I.A & n.5.

Respectfully submitted this 20th day of October, 2021.

By: s/ Bryan D. Neihart

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2021, I electronically filed the foregoing document with the Clerk of Court using the ECF system which will send notification of such filing to all counsel of record who are registered users of the ECF system.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Chelsey Nelson Photography LLC, and **Chelsey Nelson**,

Plaintiffs,

v.

Louisville/Jefferson County Metro Government; **Louisville Metro Human Relations Commission-Enforcement; Louisville Metro Human Relations Commission-Advocacy; Verná Goatley**, in his official capacity as Executive Director of the Louisville Metro Human Relations Commission-Enforcement; and **Marie Dever**, **Kevin Delahanty**, **Charles Lanier**, **Sr.**, **Leslie Faust**, **William Sutter**, **Ibrahim Syed**, and **Leonard Thomas**, in their official capacities as members of the Louisville Metro Human Relations Commission-Enforcement,

Defendants.

Case No. 3:19-cv-00851-BJB-CHL

Chelsey Nelson's Declaration in Support of Plaintiffs' Combined Response to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Their Summary Judgment Motion

I, Chelsey Nelson, declare as follows:

1. I am over the age of eighteen and competent to testify, and I make this declaration based on my personal knowledge.

2. This declaration supplements Chelsey Nelson's Declaration in Support of Plaintiffs' Summary Judgment Motion ("Chelsey Nelson Declaration") filed on September 1, 2021. That declaration is incorporated by reference.

3. As I mentioned in paragraphs 480 and 481 of the Chelsey Nelson Declaration, I continue to receive requests to providing wedding-celebration and boutique-editing services.

4. On September 10, 2021, I agreed to a one-year commitment to provide boutique-editing services to edit wedding photographs for a wedding photography editor from a state in the northwestern region of the United States.

5. Whenever I receive an inquiry, I continue to evaluate the inquiry based on the policy and practice outlined in paragraph 409 of the Chelsey Nelson Declaration.

Declaration under penalty of perjury

I, Chelsey Nelson, a citizen of the United States and a resident of the State of Kentucky, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 20th day of October, 2021, at Louisville, Kentucky

Chelsey Nelson

Chelsey Nelson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Chelsey Nelson Photography LLC and **Chelsey Nelson,** Plaintiffs, **v.** **Louisville/Jefferson County Metro Government; Louisville Metro Human Relations Commission-Enforcement; Louisville Metro Human Relations Commission-Advocacy; Verná Goatley,** in her official capacity as Executive Director of the Louisville Metro Human Relations Commission-Enforcement; and **Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Leslie Faust, William Sutter, Ibrahim Syed,** and **Leonard Thomas,** in their official capacities as members of the Louisville Metro Human Relations Commission-Enforcement, Defendants.	**Case No. 3:19-cv-00851-BJB-CHL** **Bryan D. Neihart's Declaration in Support of Plaintiffs' Combined Response to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Their Summary Judgment Motion**

I, Bryan D. Neihart, declare as follows:

1. I am over the age of eighteen and competent to testify, and I make this declaration based on my personal knowledge.

2. I am one of the attorneys representing Plaintiffs Chelsey Nelson Photography LLC and Chelsey Nelson in this litigation.

3. On August 28, 2020, Defendants filed their answer to Plaintiffs' complaint. A true and correct copy of excerpts of that answer are in the Appendix at pages 893–897.

4. On January 25, 2021, Defendants served Defendants' Responses to Plaintiffs' First Set of Requests for Admissions. True and correct copies of the relevant excerpts of Defendants' responses and the relevant exhibits sent with the requests for admissions are in the Appendix at pages 898–902.

5. On July 26, 2021, Plaintiffs produced the rebuttal expert report of George Yancey, Ph.D. A true and correct copy of Dr. Yancey's rebuttal report is in the Appendix at pages 903–941.

6. On March 5, 2021, Defendants filed Defendants' Motion for Protective Order with certain attachments. A true and correct copy of the relevant excerpts of Verná Goatley's affidavit and Exhibit B to that affidavit—which were both attached to Defendants' Motion for Protective Order is in the Appendix at pages 942–948.

7. On October 8, 2021, Defendants served supplemental Objections and Responses to Plaintiffs' First Set of Interrogatories. A true and correct copy of the relevant excerpts of Defendants' supplemental Objections and Responses to Plaintiffs' First Set of Interrogatories is in the Appendix at pages 949–951.

Declaration Under Penalty of Perjury

I, Bryan D. Neihart, a citizen of the United States and a resident of the State of Arizona, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 20th day of October, 2021, at Scottsdale, Arizona.

s/ Bryan D. Neihart

Bryan D. Neihart

CONTINUED TABLE OF CONTENTS: APPENDIX TO PLAINTIFFS' BRIEF IN SUPPORT OF PLAINTIFFS' SUMMARY JUDGMENT MOTION

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

ANSWER TO COMPLAINT

Defendants Louisville/Jefferson County Metro Government ("Metro"), Kendall Boyd in his official capacity as (former) Director of the Louisville Metro Human Relations Commission, Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Laila Ramey (former member), William Sutter, Ibrahim Syed, and Leonard Thomas, in their official capacities as members of the Louisville Metro Human Relations Commission Enforcement Board (collectively, "Defendants"), by counsel, for their Answer to the Complaint, state as follows:

FIRST DEFENSE

1. Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

2. Each averment of the Complaint not specifically admitted to be true is denied.

THIRD DEFENSE

3. The Introduction section of the Complaint contains characterizations and arguments to which no response is required. To the extent any response is required, Defendants

7. Defendants deny any averments contained in paragraphs 11 and 12 of the Complaint that are inconsistent with Louisville Metro Ordinance No. 157-2003, Sec. 32.760 and 32.761, which speak for themselves. Defendants further answer that the Louisville Metro Human Relations Commission is an agency within Louisville/Jefferson County Metro Government which maintains two distinct Boards: Louisville Metro Human Relations Commission-Advocacy and Louisville Metro Human Relations Commission-Enforcement. These two boards are not suable entities.

8. With respect to the allegations in paragraph 13 of the Complaint, Defendants admit that Kendall Boyd was the Director of the Louisville Metro Government Human Relations Commission at the time the Complaint was filed, but deny that Mr. Boyd currently holds that position.

9. Defendants deny any averments in paragraphs 14 and 17 of the Complaint that are inconsistent with Louisville Metro Ordinance No. 193-2004, Sec. 92.08-92.10, which speak for themselves.

10. Defendants admit the averments contained in paragraphs 15, 18, 19, 269-71, 273, 303, and 306 of the Complaint.

11. With respect to the allegations in paragraph 16, Defendants admit that Defendants Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Laila Ramey, William Sutter, Ibrahim Syed, and Leonard Thomas were Enforcement Board Commissioners at the time the Complaint was filed, but deny that Ms. Ramey is currently an Enforcement Board Commissioner.

12. With respect to the averments contained in paragraph 48 of the Complaint, Defendants admit that filings available on the Kentucky Secretary of State Website reflect that Chelsey Nelson Photography, LLC was organized and registered as an LLC in October 2019.

Defendants lack sufficient information to admit or deny the averments with respect to Chelsey Nelson's motivations and therefore deny those averments.

13. Defendants deny any averments in paragraphs 214-16 and 220 of the Complaint that are inconsistent with Louisville Metro Ordinance Sec. 92.01 and 92.02 and 92.05, which speak for themselves.

14. Defendants deny the averments in paragraphs 226-28, 235, 245, 308, 310, and 321-325 of the Complaint.

15. Paragraphs 242 and 258-60 set forth legal conclusions not requiring a response and/or describe hypothetical, speculative, non-imminent scenarios which improperly request an advisory opinion. To the extent any further response is required, Defendants deny said averments.

16. Defendants deny any allegations in Paragraphs 246-49 which are inconsistent with Louisville Metro Ordinance Sec. 92.05, which speaks for itself.

17. With respect to the allegations in paragraphs 256 and 257 of the Complaint, Defendants admit that, if posted, the portion of the statements attached as Exhibits 1 and 2 to the Complaint which state that services that are provided to different-sex couples will be denied to same-sex couples because of their sexual orientation would violate the Denial Clause and the Unwelcome Clause as those terms are defined in the Complaint. Defendants deny all other allegations in paragraphs 256 and 257 of the Complaint.

18. The allegations in paragraphs 261 and 267-68 are too vague and ambiguous to permit Defendants to admit or deny the allegations. To the extent any further response is required, Defendants deny any allegations inconsistent with the Metro Ordinance sections cited or referenced therein.

19. Paragraphs 262-66, 272, 274-81, and 284-302 of the Complaint purport to quote from and/or characterize various provisions of the Metro Ordinance, which speak for themselves. Defendants deny any allegations that are inconsistent with the sections of the Metro Ordinance cited or referenced in these paragraphs.

20. With respect to the allegations in paragraph 304 of the Complaint, Defendants admit that the Enforcement Commission regularly investigates and processes complaints it receives against places of public accommodation. With respect to the exact number of such complaints in a particular range of years, Defendants admit to the number of complaints reflected in Metro's public records.

21. Paragraph 309 of the Complaint combines legal conclusions to which no response is required with an incomplete hypothetical scenario. To the extent any further response is required, Defendants deny the allegations in paragraph 309.

22. Paragraph 320 of the Complaint sets forth a legal conclusion based on incomplete facts and qualifications with respect to the scope of services that would subject Plaintiffs to Louisville's Accommodations and Publication Provisions. Further with respect to the averments contained in paragraph 320 of the Complaint, Chelsey Nelson Photography, LLC is an LLC as set forth in the Complaint and not a sole proprietorship and therefore Chelsey Nelson does not have standing for an advisory opinion and she is not a proper Plaintiff in this case.

23. With respect to the averments contained in paragraphs 326, 343, 360, 366, and 373 of the Complaint, said averments are merely restatements of the allegations contained in paragraphs 1-325 of the Complaint and therefore Defendants restate their Answers contained in paragraphs 1-22 of this Answer as if set forth in full.

WHEREFORE, the Defendants named above respectfully demand as follows:

1. That the Complaint and all claims be dismissed with prejudice and that Plaintiff take nothing thereby;

2. That Defendants be awarded their cost herein expended and, if applicable, their reasonable attorneys' fees;

3. That the Court find Plaintiffs lack standing to assert the claims in the Complaint;

4. Trial by jury on all issues so triable;

5. For apportionment if appropriate; and

6. For any and all other relief to which Defendants may appear to be entitled.

Respectfully submitted,

/s/ *Casey L. Hinkle*

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CHELSEY NELSON PHOTOGRAPHY LLC and CHELSEY NELSON, **Plaintiffs,** **v.** **LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT, et al.,** **Defendants.**	**Case No. 3:19-cv-851-BJB-CHL**

DEFENDANTS' RESPONSES TO
PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSIONS

Defendants Louisville/Jefferson County Metro Government, Louisville Metro Human Relations Commission – Enforcement, Louisville Metro Human Relations Commission – Advocacy, Kendall Boyd, in his official capacity as (former) Executive Director of the HRC, Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Laila Ramey (former member), William Sutter, Ibrahim Syed, and Leonard Thomas, in their official capacities as members of the Louisville Metro Human Relations Commission-Enforcement (collectively, "Defendants"), by counsel, pursuant to Federal Rule of Civil Procedure 26 and 36, for their objections and responses to the First Set of Requests for Admissions served by Plaintiffs Chelsey Nelson Photography LLC and Chelsey Nelson (collectively, "Plaintiffs" or "Chelsey Nelson"), state as follows:

GENERAL OBJECTIONS

1. Defendants object to Plaintiffs' First Set of Requests for Admissions as needlessly and unreasonably duplicative and therefore unduly burdensome and harassing.

2. Defendants object to the requests as abusive for utilizing a discovery tool intended

for fact discovery to request admissions or denials with respect to the contents of an unambiguous statute.

3. Defendants object to the requests as improper to the extent they seek admissions or denials with respect to pure legal conclusions based on hypothetical scenarios unrelated to the facts of this case. *See, e.g.*, *Abbott v. U.S.*, 177 F.R.D. 92, 92-94 (N.D.N.Y. 1997); *The Atlanta Channel, Inc. v. Solomon*, 2020 WL 6781221, *6 (D.D.C. Nov. 18, 2020); *St. Jude Children's Research Hospital, Inc. v. Quest Diagnostics Inc.*, 2009 WL 10665119, *3 (W.D. Tenn. May 1, 2009); *Buchanan v. Chicago Transit Authority*, 2016 WL 7116591, *5 (N.D. Ill. Dec. 7, 2016).

OBJECTIONS AND RESPONSES TO REQUESTS FOR ADMISSIONS

Request for Admission No. 1: Please admit or deny whether, according to you, Chelsey Nelson Photography LLC is a place of public accommodation under the Metro Ordinance.

Response: Admit.

Request for Admission No. 2: Please admit or deny whether the Enforcement Commission has the power to enforce the Metro Ordinance.

Response: Admit.

Request for Admission No. 3: Please admit or deny whether the Advocacy Commission has the power to enforce the Metro Ordinance.

Response: Deny.

Request for Admission No. 4: Please admit or deny whether, according to you, any person may file with the Enforcement Commission a complaint alleging an unlawful practice against a place of public accommodation under Metro Ordinance § 92.05(A).

Response: Deny. In order to file a complaint, the person must either claim to be aggrieved by an unlawful practice or be a member of the Human Relations Commission – Enforcement who

has reason to believe an unlawful practice has occurred. *See* Metro Ordinance § 92.09.

Request for Admission No. 5: Please admit or deny whether, according to you, any person may file with the Enforcement Commission a complaint alleging an unlawful practice against a place of public accommodation under Metro Ordinance § 92.05(B).

Response: Deny. In order to file a complaint, the person must either claim to be aggrieved by an unlawful practice or be a member of the Human Relations Commission – Enforcement who has reason to believe an unlawful practice has occurred. *See* Metro Ordinance § 92.09.

Request for Admission No. 6: Please admit or deny whether, according to you, any person may file with the Advocacy Commission a complaint alleging an unlawful practice against a place of public accommodation under Metro Ordinance § 92.05(A).

Response: Deny. The Advocacy Commission does not receive complaints.

Request for Admission No. 7: Please admit or deny whether, according to you, any person may file with the Advocacy Commission a complaint alleging an unlawful practice against a place of public accommodation under Metro Ordinance § 92.05(B).

Response: Deny. The Advocacy Commission does not receive complaints.

Request for Admission No. 8: Please admit or deny whether, according to you, a member of the Enforcement Commission may file with the Commission a complaint alleging an unlawful practice against a place of public accommodation under Metro Ordinance § 92.05(A).

Response: Admit, provided the member has reason to believe an unlawful practice has occurred. *See* Metro Ordinance § 92.09.

Request for Admission No. 9: Please admit or deny whether, according to you, a member of the Enforcement Commission may file with the Commission a complaint alleging an unlawful practice against a place of public accommodation under Metro Ordinance § 92.05(B).

Response: Admit, provided the member has reason to believe an unlawful practice has occurred. *See* Metro Ordinance § 92.09.

Request for Admission No. 10: Please admit or deny whether, according to you, a member of the Advocacy Commission may file with the Commission a complaint alleging an unlawful practice against a place of public accommodation under Metro Ordinance § 92.05(A).

Response: Admit, provided the member claims to be aggrieved by an unlawful practice prohibited by the Ordinance.

Request for Admission No. 11: Please admit or deny whether, according to you, a member of the Enforcement Commission may file with the Commission a complaint alleging an unlawful practice against a place of public accommodation under Metro Ordinance § 92.09(B).

Response: Admit, provided the member has reason to believe an unlawful practice has occurred. *See* Metro Ordinance § 92.09.

Request for Admission No. 12: Please admit or deny whether the photograph attached as Exhibit 1 conveys a message.

Response: Deny.

Request for Admission No. 13: Please admit or deny whether the photograph attached as Exhibit 2 conveys a message about a marriage.

Response: Deny.

Request for Admission No. 14: Please admit or deny whether the blog post attached as Exhibit 3 conveys a message about marriage.

Response: Deny.

Request for Admission No. 15: Please admit or deny whether, according to you, if Chelsey Nelson Photography LLC supplies the wedding services described under the heading "Services,

information, or belief after reasonable inquiry to admit or deny this request.

Request for Admission No. 56: Please admit or deny whether, according to you, a place of public accommodation supplying paid photography services to the general public violates Metro Ordinance Metro Ordinance § 92.05(A) if it provides the same photography services for opposite-sex and same-sex weddings.

Response: Deny.

Request for Admission No. 57: Please admit or deny whether, according to you, a place of public accommodation supplying paid photography editing services to the general public violates Metro Ordinance Metro Ordinance § 92.05(A) if it provides the same photography editing services for opposite-sex and same-sex weddings.

Response: Deny.

Request for Admission No. 58: Please admit or deny whether, according to you, a place of public accommodation supplying blogging services as part of its paid photography services to the general public violates Metro Ordinance Metro Ordinance § 92.05(A) if it provides the same blogging services for opposite-sex and same-sex weddings as part of its paid photography services.

Response: Deny.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Chelsey Nelson Photography LLC and **Chelsey Nelson,** Plaintiffs, **v.** **Louisville/Jefferson County Metro Government; Louisville Metro Human Relations Commission-Enforcement; Louisville Metro Human Relations Commission-Advocacy; Verná Goatley,** in her official capacity as Executive Director of the Louisville Metro Human Relations Commission-Enforcement; and **Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Leslie Faust, William Sutter, Ibrahim Syed,** and **Leonard Thomas,** in their official capacities as members of the Louisville Metro Human Relations Commission-Enforcement, Defendants.	**Case No. 3:19-cv-00851-BJB-CHL** **Rebuttal Expert Report of George Yancey, Ph.D.**

I have been retained by Plaintiffs Chelsey Nelson Photography LLC and Chelsey Nelson, through their counsel, Alliance Defending Freedom, to serve as a rebuttal expert in *Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metro Government*, Case No. 3:19-cv-00851-BJB-CHL. I submit the following report in rebuttal to Professor Netta Barak-Corren's June 30, 2021 report in this matter.

I. Educational Background and Professional Credentials.

1. I am a tenured Professor of Sociology at Baylor University with a joint appointment in the Department of Sociology and the Institute for Studies of Religion. I received my Ph.D. in Sociology from the University of Texas at Austin in 1994, my M.A. in Economics from the University of Texas at Austin in 1989, and my B.A. in Economics from West Texas State University in 1985.

2. To date, I have authored or co-authored 14 academic books and thirty-nine peer reviewed articles. I have co-authored a book (Yancey and Brunson 2018) explaining how individuals in the media shape stories according to their racial, gender, and religious biases. I have also published on other subjects including media and academic bias, institutional racial diversity, racial identity, and anti-Christian attitudes. I have been published in the *American Sociological Review*, the top-rated journal in sociology. Another of my publications won the Charles J. Miller Christian Scholar's Award which is given to the best article of the year in *Christian Scholar Review*.

3. I bring special expertise to the topics raised by Professor Barak-Corren's report as it concerns the potential effect on Christian communities. This expertise comes from my peer-reviewed work on anti-Christian hostility (Yancey and Williamson 2014, Yancey 2010) and the treatment of Christians by those with high levels of cultural power (Yancey and Brunson 2018, Yancey 2011). I have been recognized as one of the few scholars who have studied anti-Christian bias in the

United States (Shellnutt 2017) and may arguably be the most prominent expert on that subject.

4. I also have experience in producing peer-review qualitative and quantitative empirical work and have acted as a reviewer for the top sociological journals, including *American Journal of Sociology* and *Social Forces*. This experience includes, but is not limited to, assessing experimental techniques, determining the viability of qualitative methodology to comprehend the actions of social actors, and applying statistical analysis to the understanding of sociological phenomenon. I also have used audit research (defined below) in my previous publication concerning media bias (Yancey and Brunson 2018). In that book we sent out surveys with contrasting potential media stories to see if reporters would react differently if certain racial, sexuality, religious or political characteristics were altered in those stories. This work informs my awareness of the strengths and weaknesses of audit approaches as well as the way bias affects the way media stories are presented.

5. A fuller review of my professional experience, publications, and awards is provided in my curriculum vitae, a copy of which is attached as Exhibit A. In addition to the publications listed in Exhibit A, I have published on the following websites: https://www.patheos.com/blogs/shatteringparadigms/2017/07/welcome-to-shattering-paradigms/; https://www.christianitytoday.com/edstetzer/2020/august/white-fragility-order-of-unity.html; https://www.christianitytoday.com/ct/2015/march-web-only/what-christianophobia-looks-like-in-america.html; https://stream.org/california-universities-religious-discrimination-problem/; https://spiritualdirections.tumblr.com/post/626881579992662017/not-white-fragilitymutual-responsibility; https://www.thepublicdiscourse.com/author/george-yancey/; and https://www.thegospelcoalition.org/profile/george-yancey/.

6. This is my first engagement to provide expert services in connection with litigation. I am being compensated for my services at a rate of $200/hour. My compensation does not depend in any way on the outcome of this litigation, or the opinions stated herein.

7. In this rebuttal report, I provide my expert views, with reference to my own scholarship, other academic literature, and other cited materials, on two questions:

- Does Professor Barak-Corren's report support the conclusion that a judicially created religious exemption for Plaintiffs' photography and editing services from Louisville's Metro Ordinance (§ 92.01, et seq.) will significantly increase the likelihood that same-sex couples will be denied services because of their sexual orientation when attempting to hire photographers in Louisville, Kentucky?
- Does Professor Barak-Corren's report adequately account for the potential costs to religious freedom if Louisville's Metro Ordinance (§ 92.01, et seq.) is allowed to force Plaintiffs to create photographs and blogs to celebrate same-sex marriage in violation of their religious beliefs?

II. Summary of Opinions.

8. In my opinion, Professor Barak-Corren's report cannot determine the potential effect on same-sex couples of a religious exemption from Louisville's Metro Ordinance for Plaintiffs' photography and editing services. I explain the basis for this opinion in Section III below. It is also my opinion that Professor Barak-Corren's report does not sufficiently account for the converse of her conclusions, i.e., how the lack of a religious exemption for Plaintiffs in this case could limit religious freedom and how the loss of that freedom will impact the larger society. I explain the basis for this opinion in Section IV below.

9. In developing my opinions in this matter, I reviewed and/or relied on Professor Barak-Corren's report and her forthcoming papers Netta Barak-Corren, A License to Discriminate? The Market Response to *Masterpiece Cakeshop*, 56(2), Harvard Civil Rights-Civil Liberties Law Review (forthcoming 2021) ("HCRCL") and Netta Barak-Corren, Religious Exemptions Increase Discrimination Towards Same-sex Couples: Evidence from *Masterpiece Cakeshop*, Journal of Legal Studies (forthcoming 2021) ("JLS").[1] I also reviewed and/or relied on Professor Barak-Corren's online appendix and anonymized data and code (available at https://osf.io/ve5yn/?view_only=8853549b0fc248afb793ef41d4e953f8). I also reviewed and/or relied on Plaintiffs' Complaint. Furthermore, I reviewed and/or relied upon the academic articles and other materials cited in this report and/or listed below as references as well as my background as researcher in forming my opinions.

III. The Report cannot assess the potential impact of a ruling in favor of Plaintiffs on discrimination against same-sex couples in Louisville, Kentucky.

10. The Report is unable to show that same-sex couples in a specific area (Louisville, Kentucky) will be adversely impacted by a court ruling in favor of Plaintiffs with the current data. The Report uses an audit study design. An audit study is a type of study used to test for potential discrimination where investigators pose as fictitious customers who differ by one key factor, send requests to experimental units, and then the study compares treatment and control groups on a dichotomous outcome. For example, in the Report's study, auditors differed by sexual orientation (the key factor), sent requests to wedding vendors (the

[1] For clarity, I will refer to Professor Barak-Corren's report in the remainder of this rebuttal as "the Report." When I reference the "Report" I am referring to her written report, her article A License to Discriminate? The Market Response to *Masterpiece Cakeshop*, and her article Religious Exemptions Increase Discrimination Towards Same-sex Couples: Evidence from *Masterpiece Cakeshop*.

experimental united), and measured responses (the dichotomous outcome). The key in audit studies is to keep all characteristics of the fictitious customers the same and only change the one factor being tested. That way the test can determine if the experimental units react differently to the changed characteristic.

11. But the Report here used multiple contacts to the same vendors. This creates several problems with the audit. First, there is the possibility of a fatigue effect where the experimental units (e.g., wedding vendors), no longer respond to the audit. As I explain below, this may have led to a problem of attrition between waves 1 and 2 of the Report, a problem which significantly undermines the Report's findings.

12. Second, repeated audits may allow the sampled wedding vendors to suspect they are being studied. For example, Barak-Corren noted twelve instances of explicit or implicit suspicion and identified several additional instances of suspicion in follow-up telephone calls. (Appendix pp. 10-11, 13-14). Despite Barak-Corren's attempts to account for those possibilities, it is not possible to completely control for the effects of the problems identified in paragraphs 11 and 12 because of the study's design.

13. A third problem is the way the Report contacts the same business multiple times, specifically that Barak-Corren must fashion different emails for each hypothetical couple. (Appendix p. 1-10). This is problematic because the use of different emails in Barak-Corren's study introduces the potential problem that vendors react differently to the contrasting ways the emails are worded. In my research using an audit study (Yancey and Brunson 2018), I handled this problem by including enough respondents so that I could provide half of the respondents with the treatment condition and half with the control condition. But other than the experimental treatment, my audit study used the same documents. Other researchers have tried to alleviate the problem posed by different content in

requests by rotating many different content among the respondents. This minimizes the impact that minor variations in only two inquires (for example, the use of a general date in waves 1 and 2 and a specific date in waves 3-4 in Barak-Corren's study) has on the experimental unit's outcome. (Neumark, Bank, and Van Nort 1996).

14. The issue of content differences is compounded by Barak-Corren's strategy to send out the emails in waves. For example, emails to photographers in wave 1 (emails from purported same-sex couples) asked for the services to be provided in April generally. (Appendix p. 2). But emails to photographers in waves 3 and 4 from purported same-sex couples identified a specific date in May for their proposed wedding. (Appendix pp. 4-8). Then Barak-Corren coded a suggestion of a different date in wave 1 as a positive response but coded a suggestion of a different date in waves 3 and 4 as a negative response. (Appendix p. 29 n.16). The change in the date for the requested services combined with the coding differences in the responses compound the problem of the change in the email content. We cannot know how the vendors would have reacted to identical emails where the only difference was whether the couple was the same or different sex. An approach that is more appropriate and more widely accepted in the field of audit studies would have been for Barak-Corren to send out emails from same-sex testers to half of the vendors and emails from opposite-sex testers to the other half of the vendors. Then after the *Masterpiece* decision, she should have sent out identical emails of the opposite type of couple to those wedding vendors (so that a wedding vendor who received an email from a same-sex couple before *Masterpiece* would receive an email from an opposite-sex couple after *Masterpiece* and vice versa). As it stands, these problems alone make it difficult to have any confidence in the Report's findings since different wording and timing in emails likely affected the propensity of a wedding vendor to respond to an email.

15. The analysis in the Report is bivariate, meaning that the Report tests two variables: the purported customer's sexual orientation and the vendor's response. Barak-Corren provides a multivariate analysis (meaning an analysis measuring more than one outcome variable, like AD law, RFRA, Republican vote rate) in the Appendix to try to determine whether the relative power of a single variable (i.e., sexual orientation) affects a given statistical relationship (the likelihood of a positive response). (Appendix pp. 15-17, 20, 23, 25). But one of the assumptions of the linear or logistic regression analysis used in the Appendix is that the vendors' characteristics are not related to each other. When I say a regression analysis, I mean the method for measuring the relationship between a dependent variable (in this case a positive or negative response to providing a service for a same-sex wedding) and one or more independent variables (such as whether the vendor lives in an AD state or RFRA state, Republican vote rates, etc.). This assumption is violated, though, when drawing cases from only four states and using the characteristics of those states (i.e., +/- AD and +/- RFRA) as potential independent variables. Because the vendors come from the same states and vendors within the same jurisdictions share AD/RFRA characteristics, the vendors are "nested."

16. A nested dataset means that the subject data come from the same cluster (e.g., students in a classroom or vendors from the same geographical region). When you have a nested dataset, the researcher cannot run a linear or logistic regression analysis because those analyses assume the individuals' independence. But vendors nested in the same geographic cluster are more likely to behave the same way—and therefore be more dependent. For example, by coming from the same jurisdiction, these vendors share social contexts in a variety of ways, such as socialization patterns, traditions, attitudes, outlooks, and professional goals.

17. To account for this issue, the research must use some type of multilevel modeling to disaggregate the clustered subjects from their cluster. For example, in

the Report, a multilevel model could include assessment of the data on multiple levels such as the level of the individual (level 1), possibly the level of the county or municipality (level 2), and the level of the state (level 3). This would make any inferences more accurate by reducing standard errors and increasing the chances of locating more significant relationships. Stated differently, a multilevel model would increase the accuracy of predicting whether certain variables (i.e., sexual orientation of the purported customer, income level of the wedding vendor, etc.) are significant in determining likely positive or negative responses. By failing to use a multilevel model, the conclusions in the Report possibly overestimate the potential impact of a ruling in Plaintiffs' favor by downplaying the possible significance of independent variables other than a couple's sexual orientation.

18. I also question how much we can assert about the effect of same-sex status on the customer's ability to receive services given the relatively low number of independent variables in the Report's regression models. The Report relies on discussing a few state-level characteristics (religiosity, attitudes towards homosexuality, Republican vote) to assess a particular metropolitan area (Louisville). (e.g., Report ¶¶ 19-23). But it is risky to rely on so few variables to predict what will occur in Louisville. We simply do not know if those variables sufficiently explain the results. Without the inclusion of other independent variables (e.g., income level, education, percent of population that are sexual minorities, racial makeup) in a robust multivariate model, we can only speculate about the potential of discrimination against same-sex couples in Louisville. A multilevel regression model would provide important information such as whether the effect of different types of couples can be explained by differences in other variables. This is critical if we are going to make assertions about whether these results indicate whether the status of same-sex couples leads them to face discrimination. Are the number of variables used by Barak-Corren sufficient for us

to have confidence that she has captured alternative explanations of differential treatment by the couples? It is impossible to say because the regression models did not have any measurement of coefficient of determinants. So I could not determine how much of the variation in responses was due to the other variables which could affect response rate. Coefficient of determinants tell us the degree to which vendors' willingness to respond to emails is tied to the independent variables in the models such as the sexual orientation of the couple or some other variable (i.e., income of wedding vendor, education level of wedding vendor, etc.). In other words, coefficient of determinants would help to explain how one factor (i.e., a positive or negative response) can be caused by its relationship to another related factor (i.e., sexual orientation of the couple or income, race, or political affiliation of the wedding vendor). The higher the coefficient, the more likely that relationship would lead to a particular conclusion. Do the variables in Barak-Corren's model (i.e., sexual orientation, political population, religiosity) explain half of that willingness? Ten percent? Half of one percent? We cannot know without any measurement of coefficient of determinants.

19. My inclination is to include as many independent variables as possible regardless of the size of coefficient of determinants. The exclusion of other social and demographic measurements (such as income level, education, percent of population that identify as LGBT, or support for LGBT issues) indicates that we will not know if those other variables explain the relationship between a couple's same-sex status and their ability to find a wedding vendor. For example, it may be that certain metropolitan areas contain a high percentage of African-Americans who tend to be more religious than whites (Smith et al. 2002, Yancey 2005) and may be less supportive of sexual minorities (Lewis 2003, Glick and Golden 2010). Without racial controls, we do not know if the results in the Report would be mediated with the inclusion of a racial makeup variable. Nevertheless, we cannot

determine the degree to which religiosity or attitudes towards homosexuality matter in the potential effects observed in the current data because the Report does not account for additional variables and cannot assess the particular results in Louisville.

20. But even if the Report included sufficient independent variables and utilized the proper statistical techniques (which it does not), we still cannot state that we know what will happen in Louisville. We would be limited in making assessments of how a ruling in favor of Plaintiffs will impact individuals in this particular metropolitan area. Sociological methodology does not allow us to determine what will happen in a particular case. It only allows a prediction, and that prediction will always be incomplete. For example, if you told me a person was five feet ten inches tall and asked me to guess the sex of that person, I would say that this person is a male. Regression models can show that men are taller than women even after all appropriate controls (such as income and nutrition content) have been utilized. Since five feet ten inches is taller than the average height for women, I will be right more times than wrong. But I could generally be wrong if the sample size included only women from the WNBA. I will also always be wrong if the person in question is Brittney Griner (a 6 foot 9 inches tall WNBA basketball player), Maria Sharapova (a 6 foot, 2 inches tall profession tennis player), my first adult girlfriend (who was 6 foot, 4 inches tall), or many other above-average woman. Similarly, solid systematic work can be predictive over a large number of metropolitan areas, but it is much less reliable when predicting the actions of persons within a specific city or county. The Report's findings, as applied to Louisville, are speculative and cannot be an accurate prediction of what will happen in Louisville in the event of a favorable ruling for Plaintiffs.

21. Beyond the statistical limitations, there are also methodological assumptions made by Barak-Corren in the Report that affect its usefulness in this particular

court case. One of the first problems is the short-term nature of the study. Barak-Corren argues that a change in social norms allows vendors to perceive service refusals to be more permissible (HCRCL pp. 38, 47-48; JLS p. 37), which allows even formerly "gay-friendly" businesses to decline wedding services to perceived same-sex couples. Yet this argument assumes that these attitudes will persist over time. But the Report's research design does not measure long-term effects. To the degree the Report measures attitudinal change, there is no guarantee that such a change will be lasting.

22. To illustrate the likely temporal nature of attitude changes, we can examine the literature on diversity training and prejudice reduction. In contrast to a single public event, individuals in diversity training are subject to an intense program with the aim to reduce their prejudice. Generally, there is a short-term reduction of prejudice. Yet meta-analysis research on prejudice reduction indicates that six months after such a program, individuals exhibit similar levels of prejudice than they had going into the program (Bezrukova et al. 2016).

23. Given what we know about the inability of diversity programs to produce long-term change, the burden is on the Report to show that a single court case will impact attitudes long-term. But if individuals are unlikely to alter their long-term racial prejudices after an intense program designed to produce such attitudinal alterations, then it is highly unlikely that a significant number of individuals alter their long-term attitudes after a single court verdict. To the degree that the Report has captured any attitudinal change, it is doubtful that this change is permanent or even long-lasting.

24. By contrast, an adverse ruling against Plaintiffs in this case could have an ongoing damaging impact on the religious freedom of religious groups who share Plaintiffs' views on marriage as I will assess in Section IV.

25. It should also be noted that there was not a differentiation of the effects between photographers, bakers, or florists in the bivariate presentation of Barak-Corren's research in Table 5. (JLS pp. 24-25). In her regression analysis, there is an attempt to measure whether photographers, bakers, or florists have different propensities to offer services in general. This measurement is noted in the tables as an "Agreement to Provide Service." (Appendix pp. 23-28). But I could not find a direct measurement of differences between photographers, bakers, and florists in their explicit declines to provide a service for a same-sex couple because of their sexual orientation. That is an important omission and requires the Report's conclusions to be based on the assumption that all types of wedding vendors respond to all requests for services equally because Barak-Corren equates a "no response" to a decline in waves 3 and 4. (HCRCL pp. 38-39; JLS p. 26). If explicit refusals of service are nearly identical between photographers, bakers, and florists though, then this should be part of the research. Such a finding would not be conclusive, but it would indicate that we have reason to believe that there is a similar effect across all wedding vendors. Without such information, it is unrealistic to believe that all different types of wedding vendors will treat all requests for same-sex weddings equally. In fact, Barak-Corren notes that vendors do not respond to requests for services equally. Barak-Corren notes that photographers "were less likely to agree to provide service than bakers and florists" and hypothesized that "photographers might be pickier in general about their customers as they are more intimately involved in the wedding than bakers and florists." (Appendix p. 17 n.11). But Barak-Corren assumes photographers, bakers, and florists respond to all requests similarly to predict an increase in same-sex discrimination across all wedding vendors. Without some evidence that wedding vendors will act in similar manners when processing requests for services, that assumption is not sustainable. Indeed, it is possible that there may be certain types

of vendors who prefer same-sex marriages to opposite-sex marriages and their inclusion would dramatically lower, or even possibly erase, any impact on same-sex couples.

26. There are also questions about whether the Report's experimental design reflects reality. An experimental design is when a researcher introduces a population to a situation that is normal (control group) and one that includes the characteristic the experimenter wants to learn about (treatment group). Experimental designs are useful because they allow the research to control for all possible effects except the one being studied. Indeed, as I explained above (paragraphs 11-14), part of my disappointment with Barak-Corren's treatment of the email messages is that by offering different emails from same-sex and opposite-sex couples, she allows for the possibility of different content to impact the results, instead of having a pure study concentrated on same-sex/opposite-sex differences.

27. However, even in the best of circumstances, the artificial nature of this experiment does not allow it to reflect reality. For example, this research is based only on email communication. At best, this research may indicate the potential actions of wedding vendors when contacted by emails. It is unclear how often a couple uses email as opposed to social media messaging or phone or face-to-face conversations to initiate a request for wedding services. Barak-Corren states that it is common to communicate with wedding vendors via email (HCRCL pp. 32-33), but I did not see any statistics on how often emails are the first contact for wedding vendors or any analysis about whether photographers, bakers, or florists have different preferences for the initial inquiry. Barak-Corren also assumes that same-sex couples will require multiple services to be obtained through cold calling different wedding vendors (HCRCL p. 7), but she supplies no evidence that this is the typical experience for wedding couples. Without such information, it is

impossible to calculate even a baseline prediction of the extent of discrimination same-sex couples may face.

28. Barak-Corren argues that using emails instead of real individuals in an audit study reduces the chances of accidental bias by real life auditors. (JLS pp. 20-21). However, it is quite possible that the email audit technique increases the possibility of false negatives. The classic work of LaPiere (1934) strongly suggests that individuals are more tolerant in person than they are through a remote medium. LaPiere sent mail correspondence to hotels to see if they would accept a Chinese guest. The vast majority (over 90 percent) of the hotels stated that they would not accept a Chinese guest. Yet when LaPiere went to the hotels with a Chinese couple only one of sixty-six hotels refused the couple a room. Mailing correspondence is a poor predictor of how individuals are likely to act. Accordingly, I would expect that email correspondence to be a poor predictor of how wedding vendors would react to face-to-face or phone contacts or direct social-media messaging. LaPiere's work suggests that more personal contacts are more likely to elicit a supportive response than an email inquiry. Barak-Corren's research supports LaPiere's conclusions. For example, of the wedding vendors who answered phone calls requesting services for a same-sex wedding, eighty-three percent of those who answered the phone responded favorably to the request and only one vendor (unidentified by service type) declined because of an objection to same-sex weddings. (Appendix p. 14 n.9).

29. I find the attrition (i.e., non-responses) between wave 1 and wave 2 to be problematic to the Report's conclusions as well. The response rates in waves 1 and 2 were 70.8% and 58.7% respectively. (HCRCL p. 36; JLS p. 21). Since the first wave inquired about services for same-sex couples and the second wave inquired about services for opposite-sex couples, this non-response cannot be due to hostility towards same-sex couples. Yet Barak-Corren codes non-responses in waves 3 and 4 as discrimination against same-sex couples. (HCRCL pp. 38-39; Appendix pp. 15,

20, 23, 25). She argues that the greater attrition (i.e., non-response) for same-sex couples in waves 3 and 4 is due to discrimination. (HCRCL pp. 38-39; Appendix pp. 15, 20, 23, 25). Yet same-sex couples were more likely to receive responses in wave 1 than opposite-sex couples in wave 2. Applying Barak-Corren's logic of attrition in waves 3 and 4 to waves 1 and 2 would lead to the conclusion that businesses discriminated more against opposite-sex couples than same-sex couples prior to *Masterpiece*. But this result calls into question the idea of using attrition (or non-response) as a measurement of discrimination. Since there are other reasons for possible non-response (differences in email language between waves, lost emails, failed business, change in response policies, business is overbooked, vendors vacation more in June when waves 3 and 4 were sent), it is possible that businesses that were more responsive to same-sex requests in wave 1 are more vulnerable to other reasons for attritions and thus were less likely to respond in waves 3 and 4. I note that Barak-Corren's telephone survey identified many reasons for non-responses, including "various reasons for not responding" such as "having intended to respond." (Appendix p. 14). The use of a more traditional audit study where half of the businesses received identical inquiries from the same-sex couple and half from an opposite-sex couple would have helped answer this question, but it is not possible to replicate that design from this point forward.

30. Barak-Corren argues that the *Masterpiece* case changes attitudes towards religious exemptions, making it more plausible for discrimination against same-sex couples to take place. (HCRCL pp. 38-40, 46-49). Yet the *Masterpiece* case wasn't a religious exemption case, and indeed the Supreme Court did not rule on the viability of a religious exemption. The *Masterpiece* ruling was based on the presence of religious hostility by government officials. So, to make her argument that religious exemptions may lead to an increase in sexual orientation discrimination, Barak-Corren cannot use the ruling in the case itself. Instead, Barak-Corren relies

on how the media reports about the case. (HCRCL pp. 25-27). Most notably, she cites conservative media sources such as FOX news and Catholic News Agency. But they are a minority of the media sources reporting on the case, as Barak-Corren acknowledges. (HCRCL pp. 25-27). Barak-Corren must rely on one of two assumptions to reach her conclusions.

31. First, Barak-Corren could be assuming that most media covered *Masterpiece* positively as a religious exemption case. But I do not think this assumption is justifiable. My research suggests that most of the media is not sympathetic to conservative Christians, generally defined as conservative Protestants (which would include Southern Baptists) who are likely to share Plaintiffs' beliefs about marriage. (Yancey and Brunson 2018). My co-author and I showed that when given competing scenarios, media personnel are more likely to emphasize free speech rights when speech is aimed at criticizing Christians than when free speech is directed at objecting to same-sex marriage. It is unlikely that general media coverage of the *Masterpiece* decision focused on a positive assertion of the right of conservative Christians to exercise their religious freedom. It seems more likely that most news coverage criticized the opinion or presented the case as a narrow opinion, not as a religious exemption case, and/or criticized the opinion. Barak-Corren even confirms that "[a]ll mainstream outlets" reported the decision as "narrow." (HCRCL p. 25). Barak-Corren's potential assumption that a few conservative media outlets created a generally favorable media atmosphere for conservative Christians and for broad religious exemptions goes against current research on religious media bias. (Kerr 2003, Kerr and Moy 2002, Yancey and Brunson 2018).

32. Second, Barak-Corren could be assuming that the vendors who responded negatively or with no-response in waves 3 and 4 were exposed only or primarily to conservative media sources. But this assumption is not justifiable either because Barak-Corren did not provide any evidence about which vendors were exposed to

what news coverage. Barak-Corren also does not differentiate the responses between vendors who consume conservative media sources and vendors who consume mainstream or liberal media.

33. In sum, for the reasons I have described above, I must conclude that the Report cannot determine the potential effect that a religious exemption from Louisville's Metro Ordinance for Plaintiffs' photography and editing services would have across all wedding vendor's willingness to provide services for same-sex couples in Louisville or anywhere else. However, the lack of such an exemption could come at considerable costs of religious freedom to the larger Christian communities, a factor Barak-Corren also did not adequately consider. I will do so in the next section.

IV. The Report does not assess the potential harm an adverse ruling against Plaintiffs may inflict on Christian vendors.

34. It is essential to weigh the issues of sexual-orientation antidiscrimination laws and religious freedom. Barak-Corren argues that a favorable ruling for Plaintiffs will change the social atmosphere in such a way as to make discrimination against same-sex couples by wedding vendors more acceptable. (HRCLC pp. 46-49). I question whether her analysis adequately measures this potential change in our social atmosphere and urge caution in using this assertion as a basis for a ruling, as I discuss in Section III. By contrast, it is also plausible that a ruling against Plaintiffs—meaning a court finding that the Metro Ordinance requires Plaintiffs to create photographs and blogs contrary to their religious beliefs—could threaten religious freedoms by making Christian communities vulnerable to attack. Barak-Corren does not consider this possibility.

35. Predicting how this case will affect the larger Louisville community with absolute certainty is not possible with even the best sociological techniques. However, Barak-Corren has derived her prediction based on either bivariate

analysis of type of couple and type of response (which cannot assess causality) or regression models that fail to account for other independent variables (income, race, etc.) and failed to use a coefficient of determination to measure causal connections, as I explained in Section III. In contrast, in my work, I rely on both qualitative and quantitative analysis. My assessment about the characteristics of those likely to reject Christians (Yancey and Williamson 2014) and my assertion that many individuals favor those in the LGBT community due to apathy towards Christians (Yancey 2018) are based on regression models using national probability data and use a reliable number of social and demographic independent variables as controls. The nature of that animosity and the willingness of those with it to take away the rights of Christians are shaped by qualitative analysis of hundreds of respondents (Yancey and Williamson 2014) and experimental research not burdened by the content and timing issues of Barak-Corren's work (Yancey 2013). Overall, the empirical evidence presents a stronger possibility of the potential detrimental effects on the Christian community than the evidence of potential detrimental effects on same-sex couples. For these reasons, as well as the additional reasons explained below, it is reasonable to argue that an adverse ruling against Plaintiffs could possibly lead to more loss of rights by Christians compared to the potential loss of services by same-sex couples in the event of a favorable ruling for Plaintiffs.

36. Recent research I have conducted indicates that some individuals favor members of the LGBT community due to their antipathy towards conservative Christians, as defined by the respondents in the study. (Yancey 2018). For example, in an academic book (Yancey 2013), I used a scenario in a survey asking respondents how much they would punish a Christian landlord who refused to rent an apartment to a same-sex couple. Nearly fifty percent of those that demonstrated hostility towards Christians wanted a maximum fine ($10,000) while only about fifteen percent of those that did not demonstrate hostility towards Christians

wanted the maximum fine. It is not surprising that those with animosity towards Christians are much more likely to pronounce the highest punishment possible when provided an opportunity to punish Christians. The support and implementation of sexual orientation anti-discrimination laws can provide individuals with anti-Christian animosity the opportunity to punish Christians. This is not to say that all individuals eager to enforce such laws have such animosity or that we cannot have laws to protect against sexual-orientation discrimination. But this research does point out the importance of building safeguards into such laws to protect conservative Christians from aversive effects.

37. We have already seen examples of the link between hostility towards conservative Christians and sexual-orientation antidiscrimination laws. The *Masterpiece* decision turned largely on the anti-Christian comments of the members of the Colorado Civil Rights Commission and how the Commission treated Jack Phillips differently from three other bakers because of his religious objection to creating a wedding cake celebrating a same-sex wedding.

38. Indeed, since *Masterpiece* was decided, Jack Phillips has been sued two more times. In one case, a federal judge in *Masterpiece Cakeshop Incorporated v. Elenis*, 445 F. Supp. 3d 1226 (D. Colo. 2019) found that it was plausibly alleged that the Colorado Civil Rights Commission again demonstrated hostility towards Jack Phillips and may have prosecuted him in bad faith for declining to create a custom cake that violates his religious beliefs. After that case was dismissed, a private litigant sued Jack Phillips again for declining to create that cake. Amended Complaint, *Scardina v. Masterpiece Cakeshop Inc.*, Case No. 2019CV32214 (Colo. Dist. Ct. May 13, 2020).

39. The very framing of the Report can make discrimination against Christians more possible. Barak-Corren's argument is that *Masterpiece* has led to an increase in discrimination against same-sex couples due to religious exemptions from

antidiscrimination laws. But *Masterpiece* did not grant a religious exemption. It was a religious hostility case that found the government acted with hostility. The underlying assumption of the Report's argument is that courts should allow religious hostility against religious wedding vendors to avoid same-sex discrimination.

40. It is also important to explore who is likely to possess anti-Christian hostility. In my previous work, I documented that those with hostility towards conservative Christians are more likely to be well-educated (meaning at least a college degree), wealthy, politically progressive, and non-religious. (Yancey and Williamson 2014, Yancey 2010). These are also fairly accurate descriptions of two groups that have been documented as discriminating against conservative Christians: academics (Yancey 2011, Hyers and Hyers 2008, Gartner 1986) and media personnel (Yancey and Brunson 2018, Kerr 2003). Furthermore, higher education and political progressiveness also predict prejudice against conservative Christians (Yancey and Williamson 2014). To the extent that administrators responsible for enforcing sexual-orientation antidiscrimination laws have college degrees and are politically progressive, then there is reason to believe that such rules would not be enforced in a neutral manner against conservative Christians and in fact may be enforced more rigidly than in other circumstances.

41. If Plaintiffs and those who hold similar beliefs about marriage are not allowed a religious exemption from the Metro Ordinance (and especially if administrators of such laws have a higher propensity to rule against conservative Christians), then Plaintiffs and those with their religious beliefs lose rights to self-expression not denied to other individuals. In this case, the rights of a photographer are at stake. Photographers make artistic decisions as Plaintiffs explain in their Complaint. They can create their photos to express and promote their values. If courts do not protect Plaintiffs' free-speech and free-expression rights, then the

freedom to exercise those rights become tied to the expression of acceptable secular or religious beliefs as determined by the administrators of the Metro Ordinance.

42. The potential cost to Christian communities is possibly higher in the case of an adverse ruling than the potential cost to same-sex couples in the case of a ruling in Plaintiff's favor for other reasons. A positive ruling for Plaintiffs does not require members of the LGBT communities to violate their strongly held norms and values. This is not the case for those in conservative Christian communities. Instead, individuals external to Christian communities (potential consumers and government officials) will assess and approve which values Christians can maintain in their businesses and occupations. I have cited previous court cases and sociological research indicating that those who tend to have anti-Christian sentiment are unlikely to apply the same rules to other social communities that they do to Christians.

43. While some people are tempted to think of religious freedom as issues relegated to only one's thoughts, families, and church/synagogue/mosques, this limited vision underestimates the full value of religious communities and the benefits they provide their members and the rest of society. Religiosity has been found to contribute to an individual's happiness (Childs 2010, Argyle 2003, Stavrova, Fetchenhauer, and Schlösser 2013), reduction of suicide (Ellison, Burr, and McCall 1997, Saiz et al. 2021, Gearing and Lizardi 2009), aid in the coping of trauma (Krause, Pargament, and Ironson 2017, Reiland and Lauterbach 2008), and marital stability/satisfaction (Brown, Orbuch, and Bauermeister 2008, Olson, Goddard, and Marshall 2013, Schramm et al. 2012, Wilmoth, Blaney, and Smith 2015), among other social benefits. These positive characteristics are not simply buttressed by individual's religiosity but also rely upon the social support of a religious community. (Olson, Goddard, and Marshall 2013, Galen, Sharp, and McNulty 2015, Crosby III and Smith 2015, Van Cappellen, Saroglou, and Toth-

Gauthier 2016, McClure 2017). Thus, for individuals to gain the full benefit of their religious belief system, they must have access to a larger religious community. Public-sector efforts that attack this community have the potential to reduce the potential pro-social benefits found within religious communities because these attacks will hinder the ability of those in the community to live out their stated values.

44. Costs of a loss of vitality from religious communities is not limited to those with faith but also to those who may benefit from those religious communities. Given the importance of religious communities in supporting both religious and non-religious charities (Regnerus, Smith, and Sikkink 1998, Brooks 2007), providing support for marginalized groups (Stivers 2011, Sherman 2017, Sullivan 2008), and acting as a buffer against criminality (Jang and Johnson 2001, Salas-Wright, Vaughn, and Maynard 2014, Desmond, Soper, and Kraus 2011, Kerley, Matthews, and Blanchard 2005), it is in the interest of the state to do what it can to aid religious communities. Given that previous research has indicated that highly educated and political progressives are more vulnerable to anti-Christian attitudes and are more likely to enforce antidiscrimination rules against Christian wedding vendors, (Bolce and De Maio 1999, Yancey and Williamson 2014), courts must be careful in how such rules are constructed and be relatively liberal in allowing for religious exemptions.

45. It is possible that an unfavorable ruling against Plaintiffs will inhibit the ability of Christian communities to continue to deliver prosocial benefits to the larger society because it could allow those outside the Christian community to pressure Christians to give up their stated values in order to deliver benefits to that society. In this current case, driving out conservative Christian wedding vendors reduces the services of those business and makes them less assessable to others. The ramifications of such decisions are possibly even greater when considering how

such rulings may eventually help to drive out Christian social work agencies (like foster care and adoption agencies), educational institutions, or perhaps even medical facilities. As suggested in the last paragraph, the loss of the ability of Christians communities to fully serve society will be felt by individuals both inside and outside Christian communities.

V. Conclusion.

46. In closing, Barak-Corren's report is not adequate to predict whether a decision in favor of Plaintiffs in this case will lead to more discrimination against same-sex couples in Louisville. Because of the weaknesses I pointed out, it is reasonable to assume that Barak-Corren has vastly overestimated the potential for discrimination against same-sex couples by wedding vendors in the event of a favorable decision for Plaintiffs. Barak-Corren's study also does not account for the possibility that the policies advocated for by Louisville/Jefferson County Metro Government would have an aversive antireligious effect on wedding vendors. I also anticipate that such policies could over time have a detrimental effect on valuable Christian communities and extract a toll on the larger society.

/s/ George Yancey
George Yancey, Ph.D.

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2020. Scardina v. Masterpiece Cakeshop Inc. Colorado District Court.

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EXHIBIT A

DR. GEORGE ALAN YANCEY
Professor

One Bear Place #97236
Baylor University - Institute for Studies of Religion
Waco, TX 76798

Education

1994 Ph.D., Sociology, (1994) University of Texas at Austin
Dissertation Topic: "The Utilization of Weber's Elective Affinity to Reconcile the Macro and Micro Schools within Sociology of Science" (Advisor - Norval Glenn)
1989 M.A., Economics, University of Texas at Austin
1985 B.S., Economics, West Texas State University

Employment

2019 – Present	Professor, Institute for Studies of Religion/Sociology, Baylor University
2008 – 2019	Professor, Department of Sociology, University of North Texas
2002 – 2008	Associate Professor, Department of Sociology, University of North Texas
1999 – 2001	Assistant Professor, Department of Sociology, University of North Texas
1996-1999	Assistant Professor, Department of Sociology, University of Wisconsin at Whitewater
1993-1996	Visiting Assistant Professor, Division of Social and Policy Science, University of Texas at San Antonio
1994-1996	Special Projects Consultant, Round Top Consulting Associates 11901 Toepperwein Road, San Antonio, Texas 78233

Grants

2020 "Planning Grant for "Evaluation of Effectiveness of Faith Based, and Non-Faith Based Agencies in Creating Long Term Change in Homeless Clients" project. $50,000

2011-2012 "Administrative Support for Development of Christian Studies Initiative" funded by Apgar Foundation. $25,000

2009 "A Qualitative Examination of the Challenges Faced by Hispanic-American, First Generation College Students" $14,695.49

2003-2004 "Handling Cultural Differences Among Interracial Couples" Faculty Research Grant funded by the University of North Texas. $3,500

1999-2001 "Multiracial Congregations and their People" funded by the Lilly Endowment. Co-Investigator with Michael Emerson. $484,884.

1997-1998 "Course Development - "Biracial Families'" funded by the University of Wisconsin System Institute on Race and Ethnicity. $750.

Academic Books

Yancey, George and Ashlee Quosigk (2021) *One Faith No Longer: The Transformation of Christianity in Red and Blue America* New York: NYU Press.

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- Winner of Charles J. Miller Christian Scholar's Award

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Yancey, George, Marie A. Eisenstein and Ryan Burge (2017) "Christian Theology and Attitudes Towards Political and Religious Ideological Groups." *Interdisciplinary Journal of Research on Religion*13: Article 6.

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Yancey, George, Sam Reimer, Jake O'Connell (2015) "How Academics View Conservative Protestants." *Sociology of Religion* 76(3): 315-336.

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Yancey, George (1997). "Getting an Academic Job: Strategies for Success" *The Journal of Staff, Program and Organization Development*. 15(1): 37-38.

Yancey, George (1996)."The Arena of Racism" *The Great Plains Sociologist* 9

(Paper presentations available upon request)

Community Service

2004-2010 Board of Directors – Mosaix

2002-2008 Campus Advisor – Plumbline (A predominately black campus ministry on the University of North Texas)

2004-2008 Campus Advisor - International Dream & Love Fellowship (A predominately Asian campus ministry on the University of North Texas)

2007-present Campus Advisor – Graduate Christian Student Fellowship.

2007 Consultant – Harrisburg Brethren in Christ. This is a multiracial urban church that sought advice as to how to deal with some current issues of diversity and how to become more racially diverse.

2006 Consultant – Cornerstone Bible Church in Cedar Hill, Texas– This is a predominately white church. I am in the process of using sociological techniques so that I can provide advice that will help it to reach people of other races and become multiracial.

2005 Consultant – Grace Presbyterian Church in Dover, Delaware – This is a predominately white church. I used sociological analysis to evaluate the church to provide advice that will help it to reach people of other races and become multiracial.

1998 Consultant - Bridgebuilders of Janesville/Beloit. (A group of church leaders who are dealing with issues of racial reconciliation). I provided racial sensitivity training for the group.

Non-Academic Publications

Yancey, George (2022) *Beyond Racial Division: A Unifying Alternative to Colorblindness and Antiracism* Downers Grove, IL: Intervarsity Press

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CHELSEY NELSON PHOTOGRAPHY LLC and CHELSEY NELSON, **Plaintiffs,** **v.** **LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT, et al.,** **Defendants.**	**Case No. 3:19-cv-851-BJB-CHL**

AFFIDAVIT OF VERNÁ GOATLEY

Verná Goatley, after first being duly sworn, states as follows:

1. I am the Executive Director of the Louisville Metro Human Relations Commission ("HRC").

2. I understand that as part of discovery in this litigation the Plaintiffs have requested that HRC produce case files (including complaints, reasonable cause determinations, settlement agreements, hearing transcripts, and other documents) related to HRC's past enforcement of Louisville's Fairness Ordinance in discrimination claims against employers, housing accommodations, and public accommodations. I submit this affidavit to describe restrictions and burdens associated with complying with Plaintiffs' requests for production of these documents.

3. HRC's case files are maintained in hard copy, paper format. There is no electronic copy of HRC's case files. The hard copy, paper file is the only source of the complete file for each complaint investigated by HRC.

my understanding that, in addition to specified statutory penalties, the funding received by Louisville Metro Government pursuant to its contract with EEOC would be threatened if HRC disclosed information in violation of these confidentiality and privacy obligations.

11. As set forth in the Worksharing Agreement that is part of the EEOC contract, HRC and EEOC regularly and freely share information regarding their investigation of complaints of employment discrimination. As such, information obtained from the EEOC is regularly mixed together with information obtained by HRC in HRC's case files.

12. HRC is prohibited from disclosing a significant portion of its case files relating to complaints of employment discrimination pursuant to the federal confidentiality and privacy laws identified in the EEOC contract and Louisville Metro's contractual obligations to EEOC.

13. Louisville Metro Government has a contractual relationship with the federal Department of Housing and Urban Development ("HUD"), pursuant to which HRC and HUD work together to investigate allegations of housing discrimination in the Louisville Metro area. An example of a contract between Louisville Metro Government and HUD is attached hereto as Exhibit B.

14. Pursuant to Section 26 of the HUD contract, HRC is prohibited from releasing information collected during the course of an investigation of housing discrimination while the complaint is open, except in limited circumstances that do not apply here. *See* Exhibit B, Section 26.

15. In the course of preparing this affidavit, I contacted my counterparts at HUD to ask whether they considered complaints of housing discrimination and investigative files subject to public disclosure. These HUD agents vehemently objected to public disclosure of files relating to housing discrimination complaints and indicated that they considered the files to be confidential.

discrimination training or other remedial measures. As such, the confidentiality of HRC's files serves the important purpose of eliminating discrimination in the Louisville community.

Further affiant sayeth naught.

VERNÁ GOATLEY

COMMONWEALTH OF KENTUCKY)
) SS
COUNTY OF JEFFERSON)

Subscribed and sworn to before me by Verná Goatley this 5th day of March, 2020.

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

Notary Public

Exhibit B

2017 CONTRIBUTIONS AGREEMENT

SCHEDULE OF ARTICLES

26. RELEASE OF INFORMATION WHILE COMPLAINT IS OPEN

27. SEXUAL ORIENTATION, GENDER IDENTITY, MARITAL STATUS, AND SOURCE OF INCOME CAUSE DETERMINATIONS

Appendix A: Statement of Work

Attachment A: Criteria for Processing
Attachment B: Standards for Timeliness
Attachment C: Payment Amounts for FHAP Complaint Processing
Attachment D: LOCCS Security Procedures (FHAP)

23. CHANGES LIMITING EFFECTIVENESS OF RECIPIENT'S LAW

Pursuant to 24 C.F.R. 115.211(a), if a state or local fair housing law that a Recipient enforces is amended, or rules or procedures concerning the fair housing law are adopted, or judicial or other authoritative interpretations of the fair housing law are issued, the Recipient must notify HUD's Fair Housing Assistance Program Division within 60 days of its discovery. This requirement also applies to the amendment, adoption, or interpretation of any related law that bears on any aspect of the effectiveness of the FHAP agency's fair housing law. Send correspondence to:

Director, Fair Housing Assistance Program Division
Office of Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development
451 Seventh Street, SW, Room 5206
Washington, DC 20410

24. FHAP AND THE FIRST AMENDMENT

None of the funding made available under the FHAP may be used to investigate or prosecute any activity engaged in by one or more persons that may be protected by the First Amendment of the United States Constitution.

25. TESTING

The following requirements apply to testing activities funded under the FHAP:

A. Testing must be done in accordance with a HUD-approved testing methodology;
B. Testers must not have prior felony convictions or convictions of any crimes involving fraud or perjury;

C. Testers must receive training or be experienced in testing procedures and techniques;

D. Testers and the organizations conducting tests, and the employees and agents of these organizations, may not: 1) have an economic interest in the outcome of the test, without prejudice to the right of any person or entity to recover damages for any cognizable injury; 2) be a relative or acquaintance of any party in a case; 3) have had any employment or other affiliation, within five years, with the person or organization; or 4) or be a competitor of the person or organization to be tested in the listing, rental, sale or financing of real estate.

26. RELEASE OF INFORMATION WHILE COMPLAINT IS OPEN

As a general rule, the Recipient will not release information collected during the course of the investigation while the complaint is open. There are three exceptions. First, the Recipient will provide information to HUD, consistent with Section 11 of this document. Second, a party to a complaint being investigated by the Recipient is entitled to receive a copy of any document it submitted during the investigation of the complaint. Third, during conciliation, a conciliator may opt to use the strategy of revealing portions of the evidentiary section of the investigative file to

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CHELSEY NELSON PHOTOGRAPHY LLC and CHELSEY NELSON, **Plaintiffs,** **v.** **LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT, et al.,** **Defendants.**	**Case No. 3:19-cv-851-BJB-CHL**

DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Defendants Louisville/Jefferson County Metro Government, Louisville Metro Human Relations Commission – Enforcement, Louisville Metro Human Relations Commission – Advocacy, Verná Goatley, in her official capacity as Executive Director of the HRC, Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Leslie Faust, William Sutter, Ibrahim Syed, and Leonard Thomas, in their official capacities as members of HRC-Enforcement (collectively, "Defendants"), by counsel, pursuant to Federal Rules of Civil Procedure 26 and 33 and the Court's Memorandum Opinion and Order dated August 25, 2021, hereby provide supplemental answers to Interrogatories 15-17 served by the Plaintiffs Chelsey Nelson Photography LLC and Chelsey Nelson (collectively, "Plaintiffs" or "Chelsey Nelson"), as follows:

PRELIMINARY AND GENERAL OBJECTIONS

1. Defendants repeat and incorporate by reference the preliminary and general objections set forth in their initial responses.

INTERROGATORIES

15. Do you contend that the least restrictive means to achieve any government interest is to require Chelsey Nelson Photography LLC and Chelsey Nelson to provide paid photography services for same-sex weddings when she already provides paid photography services for opposite-sex weddings? If so, identify all material facts that support your contention, including all other alternative means you considered, when you considered those alternative means, and why you concluded those alternative means were ineffective.

Supplemental Answer:

Yes. The Metro Ordinance cannot accomplish its important and compelling purpose of preventing discrimination if a significant segment of the population is permitted to discriminate on grounds of a sincere religious belief. To the extent this interrogatory is intended or interpreted to request information regarding what alternative measures were considered by the legislators who passed the antidiscrimination ordinance, Defendants respond that they were not legislators at the time the ordinance was considered and passed and do not currently possess any information regarding what alternative measures those legislators may have considered. To the extent this interrogatory is intended or interpreted to request information regarding whether Defendants considered granting Chelsey Nelson a religious exemption to the antidiscrimination ordinance, Defendants respond that Chelsey Nelson never requested such an exemption and, indeed, never contacted Defendants before filing this lawsuit. To the extent this interrogatory is intended or interpreted to request information that supports Defendants' position in this litigation that the ordinance satisfies any level of scrutiny, Defendants respond as follows:

As recognized by Judge John G. Heyburn II, "[h]istorical discrimination against homosexual persons is readily apparent and cannot reasonably be disputed." *Love v. Beshear*, 989 F. Supp. 2d 536, 545 (W.D. Ky. 2014). The Supreme Court has repeatedly held that the government has a compelling interest in "eliminating discrimination and assuring its citizens equal access to publicly available goods and services." *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609,

16. Do you contend that the least restrictive means to achieve any government interest is to require Chelsey Nelson Photography LLC and Chelsey Nelson to provide paid editing services for photographers photographing same-sex weddings when she already provides paid editing services for photographers photographing opposite-sex weddings? If so, identify all material facts that support your contention, including all other alternative means you considered, when you considered those alternative means, and why you concluded those alternative means were ineffective.

Supplemental Answer:

See Supplemental Answer to Interrogatory No. 15.

17. Do you contend that the least restrictive means to achieve any government interest is to require Chelsey Nelson Photography LLC and Chelsey Nelson to write blogs celebrating same-sex weddings as part of her paid photography services when she already writes blogs celebrating opposite-sex weddings as part of her paid photography services? If so, identify all material facts that support your contention, including all other alternative means you considered, when you considered those alternative means, and why you concluded those alternative means were ineffective.

Supplemental Answer:

See Supplemental Answer to Interrogatory No. 15.

Respectfully submitted,

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JEFFERSON COUNTY ATTORNEY

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Chelsey Nelson Photography LLC, and **Chelsey Nelson,** Plaintiffs, **v.** **Louisville/Jefferson County Metro Government; Louisville Metro Human Relations Commission-Enforcement; Louisville Metro Human Relations Commission-Advocacy; Verná Goatley,** in her official capacity as Executive Director of the Louisville Metro Human Relations Commission-Enforcement; and **Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Leslie Faust, William Sutter, Ibrahim Syed,** and **Leonard Thomas,** in their official capacities as members of the Louisville Metro Human Relations Commission-Enforcement, Defendants.	**Case No. 3:19-cv-00851-BJB-CHL** **Statement of Stipulated Fact**

The parties stipulate to the following fact:

The Louisville Metro Human Relations Commission-Enforcement received and investigated more than 100 discrimination complaints against public accommodations from 2010-2020.

Respectfully submitted this 20th day of October, 2021.

By: s/ Bryan D. Neihart

By: s/ Casey L. Hinkle (with permission)

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2021, I electronically filed the foregoing document with the Clerk of Court using the ECF system which will send notification of such filing to all counsel of record who are registered users of the ECF system.

By: s/ Bryan D. Neihart

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