

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION**

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**CHELSEY NELSON PHOTOGRAPHY  
LLC and CHELSEY NELSON,**

**Plaintiffs,**

**v.**

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

**Defendants.**

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**Case No. 3:19-cv-851-BJB-CHL**

**DEFENDANTS' REPLY IN SUPPORT OF  
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

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Defendants Louisville/Jefferson County Metro Government (“Louisville Metro” or “Metro”), Louisville Metro Human Relations Commission – Enforcement (“HRC-Enforcement”), Louisville Metro Human Relations Commission – Advocacy (“HRC-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”)<sup>1</sup>, by counsel, for their reply<sup>2</sup> in support of their cross-motion for summary judgment, which seeks dismissal of the claims asserted by Plaintiffs Chelsey Nelson Photography LLC and Chelsey Nelson (collectively, “Chelsey” or “Plaintiffs”), state as follows:

### **INTRODUCTION**

This is a purely hypothetical and abstract dispute. Chelsey does not face any imminent harm as required to establish standing. Her photography business is barely active—she has photographed just one wedding in the last year. There is no realistic possibility that Chelsey will ever be asked to photograph a same-sex wedding. Chelsey is but a pawn in a national strategy to expand religious exemptions. This is not how Article III is supposed to work.

Chelsey repeatedly asserting that Louisville Metro’s antidiscrimination law compels her to speak messages she disagrees with and compels her to participate in religious ceremonies does not make it so. Metro’s law does not regulate Chelsey’s religious expression—she is free, as she did for many years before being recruited file this lawsuit—to speak about her religious beliefs and views regarding same-sex marriage. What she may not do is refuse services to a customer on the

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<sup>1</sup> Plaintiffs agreed to dismiss all claims against the individual Defendants and HRC-Advocacy. *See* Doc. 104, p. 31 n. 16. Defendants nevertheless file this reply brief on behalf of all Defendants because dismissal of claims against those Defendants is not yet reflected on the docket.

<sup>2</sup> The Court granted the parties’ joint motion for leave to file pages in excess of the limits established by Local Rule 7.1. *See* Doc. 103.

basis of their sexual orientation. Application of Metro's antidiscrimination law to Chelsey's wedding photography business does not abridge her constitutional rights.

## ARGUMENT

### **I. Plaintiffs' Claims Must Be Dismissed for Lack of Standing.**

If Article III's standing requirement is to have any meaning at all in a pre-enforcement challenge, Chelsey does not have standing to bring the claims asserted in this lawsuit. Chelsey advertised her religious beliefs for years without engaging in conduct prohibited by Louisville Metro's antidiscrimination law. Louisville Metro does not regulate Chelsey's expression of her religious beliefs. It was only after Chelsey was recruited by ADF to serve as a vehicle for ADF's nationwide campaign to expand religious exemptions that Chelsey's marketing statement was edited to include an explicit statement that she would not provide services to same-sex couples, a statement which was intentionally crafted to violate Louisville Metro's antidiscrimination law.

Chelsey has never once in the history of her business been asked to provide services for a same-sex wedding and there is no realistic chance she ever would be asked to provide services for a same-sex wedding. Her business has dwindled to almost nothing while she focuses on raising children. *See* Excerpts of Chelsey's Deposition Transcript (Doc. 97-7); Chelsey's Declaration (Doc. 92-2), ¶ 490. Since this Court granted Chelsey a preliminary injunction in August 2020, which allowed her the freedom to advertise her discriminatory intent (which she claims is necessary to help her grow her business), she has photographed exactly one wedding. In short, the likelihood of Chelsey being presented with an opportunity to deny services for a same-sex wedding—and thereby aggrieve an individual who could file a complaint—can only be described as remote, not imminent as required for Article III standing.

Under Chelsey's interpretation of the standing requirements, anyone who intends to engage in a violation of an antidiscrimination law would have standing to file a pre-enforcement challenge.

That interpretation is inconsistent with binding Supreme Court precedent, which requires a separate analysis of whether the plaintiff intends to violate a statute and whether plaintiff faces a credible threat of prosecution thereunder. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (A “plaintiff satisfies the injury-in-fact requirement where he alleges ‘an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.’” (emphasis added) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979))).

Chelsey concedes that she is attempting to conflate the standing analysis by arguing that the Supreme Court and Sixth Circuit *presume* a credible threat of enforcement where the law prohibits a plaintiff’s desired activities. But the cases Chelsey cites do not support any such presumption that could apply to Louisville Metro’s anti-discrimination law. The cases cited by Chelsey either do not apply any such presumption at all (*see Susan B. Anthony List*, 573 U.S. at 164-67 (far from presuming a credible threat of enforcement, the Court based its holding that pre-enforcement standing was appropriate on evidence that plaintiff had already experienced enforcement action in the past election cycle and intended to engage in the same conduct in future elections)), or concerned laws that were targeted at the plaintiff. *See Virginia v. American Booksellers Ass’n, Inc.*, 484 U.S. 383, 392 (1988) (finding a credible threat of enforcement because “the law is aimed directly at plaintiffs”); *Babbitt*, 442 U.S. at 293 (challenge by the United Farm Workers National Union to laws proscribing a range of union practices in the agricultural industry); *Platt v. Board of Com’rs on Grievances and Discipline of Ohio Supreme Court*, 769 F.3d 447 (6th Cir. 2014) (challenge by judicial candidate to Ohio Code of Judicial Conduct restrictions on speech by judicial candidates); *Planned Parenthood Ass’n of Cincinnati, Inc. v. City*

of *Cincinnati*, 822 F.2d 1390 (6th Cir. 1987) (challenge by abortion clinic to city ordinance regulating disposal of fetal tissue).

Chelsey has never argued that Louisville Metro’s antidiscrimination law is targeted at individuals like her, i.e. wedding photographers, creative professionals, or those with religious objections. Nor could she—Louisville Metro’s antidiscrimination law applies broadly to all public accommodations to ensure that community members have equal access to goods and services. The Sixth Circuit has recognized the difference in the standing analysis for targeted and non-targeted laws. *See Plunderbund Media, L.L.C v. DeWine*, 753 Fed. Appx. 362, 371 (6th Cir. 2018) (noting that targeted laws can give rise to standing, but affirming dismissal of pre-enforcement challenge where law was not targeted and plaintiffs failed to establish a credible threat of enforcement). Where the challenged law is not targeted at the plaintiff’s conduct or business practices, the plaintiff must do more than allege an intent to violate the statute to confer standing.

Chelsey’s “allegations of a ‘subjective chill’ on protected speech are insufficient to establish an injury-in-fact for pre-enforcement standing purposes.” *McKay v. Federspiel*, 823 F.3d 862, 868-69 (6th Cir. 2016). Unlike plaintiffs in the cases Chelsey cites, Chelsey has not been threatened with any enforcement action. *Compare G & V Lounge, Inc. v. Michigan Liquor Control Com’n*, 23 F.3d 1071, 1076 (6th Cir. 1994) (plaintiff had standing for pre-enforcement challenge where city threatened to take away plaintiff’s liquor license due to violations of the challenged law); *Kiser v. Reitz*, 765 F.3d 601, 609 (6th Cir. 2014) (plaintiff dentist had standing to challenge restrictions on advertising where Board had previously threatened to enforce the regulations against him).

Moreover, the absence of criminal penalties for violations of Louisville Metro’s antidiscrimination law reduce the potential chilling effect of the statute and undermine Chelsey’s

assertion of standing. See *Updegrove v. Herring*, 2021 WL 1206805, at \*5 (E.D. Va. Mar. 30, 2021) (“In almost every case where standing was found based on a chilling effect, the plaintiff faced the threat of criminal penalty.”); see, e.g., *Susan B. Anthony List*, 573 U.S. at 151; *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010); *Amer. Booksellers Ass’n*, 484 U.S. at 387; *Steffel v. Thompson*, 415 U.S. 452, 455-56 (1974). While it is true that criminal penalties are not essential to confer pre-enforcement standing to challenge a statute, there is no precedent for finding standing to challenge a non-criminal statute without some evidence that plaintiff faced some actual threat of enforcement and/or is the target of the challenged statute.

Chelsey makes much of the fact that Louisville Metro’s antidiscrimination law has enforcement procedures, i.e. provisions allowing for the filing of complaints and procedures for investigations of allegations of discrimination. This is hardly remarkable. If the fact that a statute had an enforcement mechanism was sufficient to confer standing under Article III, courts would not undertake a multi-factored analysis of standing, as all statutes that are subject to constitutional challenge have an enforcement mechanism. But the existence of an enforcement mechanism does not mean that any particular regulated individual faces a credible threat of enforcement. In this case, there are no facts that would support a finding that Chelsey *specifically* faces a credible threat of prosecution under Louisville Metro’s antidiscrimination law. *Updegrove*, 2021 WL 1206805, at \*3 (An enforcement agency’s intent to enforce a law *generally* does not mean that plaintiff *specifically* faces an imminent threat of enforcement.).

Chelsey complains that she has received negative comments on social media due to the attention she brought upon herself by filing this lawsuit, and claims that makes it more likely that she would experience enforcement of Louisville Metro’s antidiscrimination law. But the “existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint*

is filed.” *Newman–Green, Inc. v. Alfonzo–Larrain*, 490 U.S. 826, 830 (1989) (emphasis added); see also *Cleveland Branch, N.A.A.C.P. v. City of Parma, OH*, 263 F.3d 513, 524 (6th Cir. 2001) (“standing . . . is to be determined as of the time the complaint is filed”). Chelsey’s attempt to rely on events that have occurred *after* she filed this litigation to support her assertion of standing are therefore improper. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 569 n.4 (1992).

Chelsey has failed to identify any precedent for her standing to challenge a statute that is not targeted at her and does not impose criminal sanctions for a violation. Put simply, Chelsey is attempting to stretch the bounds of Article III standing too far. There almost certainly are plaintiffs who would have standing to bring a pre-enforcement challenge to Louisville Metro’s antidiscrimination law, but Chelsey is not one of them.

## **II. There Is No Basis for Plaintiffs’ Standing to Bring a Facial Challenge.**

Because there is no dispute that Chelsey’s statement on her website (“I don’t photograph same-sex weddings”) violates the Ordinance (§ 92.05(B)), Chelsey has no standing to pursue a facial challenge to the Unwelcome Clause. Chelsey does not seriously dispute this, reserving just one paragraph of argument for her facial challenge, which offers no response to the binding Supreme Court and Sixth Circuit precedents cited in Defendants’ opening brief which require dismissal of the claim due to Chelsey’s lack of standing. See Doc. 97, pp. 12-13.

Moreover, this Court previously rejected Chelsey’s facial challenge on its (lack of) merits. See Order Granting Chelsey’s Motion for Preliminary Injunction (Doc. 47), p. 24 (rejecting Chelsey’s facial challenge because most commercial conduct covered by the Accommodations Provision is not protected by the First Amendment and citing warning from *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n*, 138 S. Ct. 1719, 1728-29 (2018) that “any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to

put up signs saying ‘no goods or services will be sold if they will be used for gay marriages,’ something that would impose a serious stigma on gay persons”); *see also Virginia v. Hicks*, 539 U.S. 113, 120 (2003) (a statute is not unconstitutionally overbroad if its “application to protected speech [is not] substantial . . . relative to the scope of the law’s plainly legitimate applications”); *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1189 (10th Cir. 2021).

### **III. Competitor Standing Does Not Apply to Chelsey’s Claims**

Competitor standing requires a plaintiff to show that the law being challenged causes “an actual or imminent increase in competition.” *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010). Requiring Chelsey to serve all customers without regard to their sexual orientation does not hinder Chelsey’s competitive position versus other photographers. Louisville Metro’s antidiscrimination law applies equally to all Metro photographers offering their services to the public. *Compare National Rifle Ass’n of America v. Magaw*, 132 F.3d 272, 281 (6th Cir. 1997) (law prohibited the sale of plaintiff’s firearms while permitting competitors to manufacture nearly identical arms). The law does not disadvantage Chelsey or advantage her competitors. If anything, compliance with Metro’s antidiscrimination law means that Chelsey would have *more* not *fewer* customers. Chelsey’s alleged self-imposed restrictions (limiting her advertising, withdrawing from referral groups, and de-publishing her Facebook page) are not caused by Louisville Metro’s antidiscrimination law, but rather Chelsey’s attempt to avoid complying with the law.

Moreover, the harms alleged by Chelsey are utterly “speculative and unsupported by specific facts in the record.” *Block Comms., Inc. v. Federal Comms. Com’n*, 808 Fed. Appx. 332, 337 (6th Cir. 2020) (rejecting assertion of competitor standing where plaintiff failed to submit evidence that it “suffered competitive disadvantage”). The record in this case actually demonstrates that Chelsey is *not* competitively disadvantaged by the Ordinance. The Court’s issuance of an injunction in August 2020 preventing enforcement of the Ordinance against Chelsey

during the pendency of this litigation created a real-world experiment which serves as a test of Chelsey's allegations. After the Court issued the injunction, Chelsey immediately posted her preferred advertising statement, which expressly states that she would refuse services to same-sex couples. In the more than one year that followed, Chelsey has not experienced any growth whatsoever in her business. She has photographed just one wedding. It therefore appears that Chelsey's inability to grow her business has nothing to do with the Ordinance. Chelsey has failed to put forward any evidence that would support a finding that she has experienced any competitive harm. Competitor standing simply does not apply to this case.

#### **IV. Plaintiffs' Claims Are Not Ripe.**

Chelsey's claims are predicated on hypothetical "future events that may not occur as anticipated, or at all." *Magaw*, 132 F.3d at 294. Chelsey has never been asked to provide services for a same-sex wedding and the factual record in this case indicates that it is very unlikely that she ever will be asked to provide such services. As such, prudential considerations demand that the Court avoid premature adjudication of an abstract, manufactured dispute.

Remarkably, Chelsey asserts that "[n]o more facts are needed" and that there are "no relevant disputed or missing facts here." Doc. 104, pp. 18-19. She argues that her subjective belief that "all weddings are religious events" means the Court must find that compliance with the Ordinance would compel Chelsey to participate in a religious event. But whether a law coerces religious exercise is an objective question for the courts. *See, e.g., Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 588-89 (2014) (rejecting plaintiffs' argument that official prayers were coercive based on Court's interpretation of factual record); *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 589 (6th Cir. 2015). As such, additional facts regarding the same-sex wedding ceremony would be relevant to the Court's evaluation of Chelsey's claims under the religion clauses. Details regarding what services are requested by the same-sex couple would allow

the Court to better evaluate whether Chelsey's services constitute protected speech. And nuances regarding Chelsey's reasons for declining service to a same-sex couple are certainly relevant to whether she violates the Ordinance. Only denials *based on* the customer's sexual orientation constitute a violation. *See* Louisville Metro Ordinance § 92.05(A). Declining service because of a dispute with the customer regarding whether Chelsey or the couple controls the creative vision for the wedding ceremony would not necessarily be a denial based on the couple's sexual orientation.

Moreover, Chelsey speaks out of both sides of her mouth. Chelsey sought an extremely broad scope of discovery from Defendants in this case, including nearly all case files from complaints of discrimination received by HRC over the last ten years. *See* Plaintiffs' Motion to Compel (Doc. 63). Defendants objected to such discovery on grounds that it was irrelevant, overbroad, unduly burdensome, and that production of the requested case files would violate confidentiality laws and constitute an unwarranted invasion of personal and sensitive information of third parties. *See* Defendants' Motion for Protective Order (Doc. 64) and Response to Motion to Compel (Doc. 66). Magistrate Judge Lindsay granted in part and denied in part Chelsey's Motion to Compel with a lengthy, reasoned opinion issued on August 25, 2021 (Doc. 89). Judge Lindsay's Order compelled Defendants to retrieve and produce voluminous case files from archives with redactions intended to minimize the infringement on third-party privacy interests.

Presumably due to Chelsey's arguments that such discovery was relevant and indeed essential to resolving her claims, Judge Lindsay stayed the dispositive motion deadline to allow discovery to be completed before the parties filed any motions for summary judgment (Doc. 88). Chelsey nevertheless plowed forward with a motion for summary judgment while Defendants continue to work on complying with Judge Lindsay's order to produce voluminous case files. Defendants agree that the pending discovery is not relevant to Chelsey's claims, which is one of

the reasons they resisted the discovery in the first instance. But having put Defendants through the burden of extensively briefing the discoverability of the requested case files, having forced Judge Lindsay to expend significant time and resources resolving the parties' disputes, and having forced Defendants to incur significant burdens associated with retrieving voluminous files from archives and applying time-consuming and tedious redactions, it is particularly galling for Chelsey to assert that "[n]o more facts are needed." Chelsey should be estopped from supplementing her briefing on the party's cross-motions for summary judgment. *See* Doc. 92-1, p. 5 n.2 (threatening to supplement the summary judgment record with documents produced in response to Judge Lindsay's order).

**V. Application of the Ordinance to Chelsey Does Not Trigger Strict Scrutiny Under the First Amendment's Free Speech Clause.**

Chelsey argues that the Accommodations Provision is subject to strict scrutiny because, as applied, it compels her to speak messages she disagrees with and is content- or viewpoint-based. Chelsey principally relies on *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) and *Holder v. Humanitarian Law Project* ("HLP"), 561 U.S. 1 (2010). Both cases are distinguishable.

As discussed in Defendants' opening brief (Doc. 97, pp. 17-18), *Hurley* presented a "peculiar" challenge to the application of an antidiscrimination law to a private association's parade. A parade is inherently expressive activity, often used to convey a unified message. *See* 515 U.S. at 579 (comparing the parade to a speaker who takes to the street corner to express their views). A same-sex couple's wedding is not Chelsey's parade. Chelsey is a photography business offering services to the general public, not a private expressive association. The Accommodations Provision does not require Chelsey to speak or to convey any particular message through her photography. The law simply requires Chelsey to provide services that she offers to the general

public without regard to a customer's sexual orientation. *Hurley* itself recognized the difference when it held that public accommodations laws are “well within the [government's] usual power to enact” and “do not . . . violate” the First Amendment because they “do[] not . . . target speech” but “foc[us]” instead on prohibiting discrimination in the provision of goods and services. 515 U.S. at 568, 572.

*HLP* further illustrates the difference between a law that regulates speech and one that regulates commercial conduct. The law challenged in *HLP* made it a crime to provide material support to a foreign terrorist association, which was defined to include “expert advice or assistance.” 561 U.S. at 9. Unsurprisingly, the Court held that the regulation of whether the plaintiffs could provide “advice” to a foreign terrorist association was a regulation of plaintiffs’ speech. *Id.* at 27. The regulation at issue in *HLP* was content-based because the prohibition depended on what plaintiffs said to the foreign terrorist association. *Id.* (If plaintiffs’ speech to those groups imparts a “specific skill” or communicates advice derived from “specialized knowledge,” then it is barred, while plaintiffs’ speech is not barred if it imparts only general or unspecialized knowledge.). The Accommodations Provision contains no such regulation of speech.

Chelsey insists that the Accommodations Provision, as applied, requires Chelsey to depict same-sex weddings “in a positive and uplifting way” because that is how she photographs opposite-sex weddings. But the Accommodations Provision does not concern itself with how Chelsey takes photographs. It only prohibits Chelsey from denying photography services on the basis that the customer who is getting married is homosexual. Antidiscrimination laws which require the acceptance of “all-comers” are “textbook viewpoint neutral” even if they affect some speakers or messages but not others. *Christian Legal Soc. Chapter of the University of California*,

*Hastings College of the Law v. Martinez*, 561 U.S. 661, 694-95 (2010); *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 763 (1994) (“[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.”); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 390 (1992) (“Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.”).

Chelsey is correct that our courts have long been engaged in drawing the line between speech and conduct. But the way that line has historically been drawn does not support Chelsey’s position in this litigation. Chelsey is advocating for an interpretation of speech that would include any commercial product or service that has any element of creativity or that is made to a customer’s specifications, a standard which has no mooring in Supreme Court precedent and which would be unworkable in practice. Contrary to Chelsey’s protestations, her theory is not “limited.” At oral argument on her motion for preliminary injunction, she argued that the following wedding vendors, among others, are engaged in speech and must be exempt from antidiscrimination laws that would require these vendors to serve same-sex couples equally with opposite-sex couples: floral arranger, wedding planner, dressmaker, stationary printer, ring maker, deejay. *See* Excerpts from Transcript of Preliminary Injunction Hearing (Doc. 97-10). The dialogue between Chelsey’s attorney and Hon. Justin Walker demonstrates both how expansive Chelsey’s position really is and also how difficult it would be for Courts, not to mention civil servants tasked with enforcing antidiscrimination laws, to apply the rule advocated by Chelsey.

## **VI. The Ordinance Is Neutral and Generally Applicable.**

Louisville Metro’s Ordinance is subject to rational-basis review because it is neutral and generally applicable. *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Chelsey seeks to avoid this result by comparing the Ordinance’s lack of coverage for age

or familial-status protected classes with targeting or discretionary exemptions at issue in other cases. There simply is no comparison.

The Ordinance was not passed to target Chelsey’s religious beliefs, as was the case in *Church of the Lukumi Babalu Aye*. 508 U.S. at 526 (the announcement of plans to open a Santeria church prompted the city council to hold emergency sessions which led to the passage of resolutions and ordinances which specifically noted a concern with religious rituals involving animal sacrifice). There are no discretionary exemptions written into the statute, as was the case in *Fulton v. City of Philadelphia*, Pennsylvania, 141 S. Ct. 1868, 1878 (2021). *See also Resurrection School v. Hertel*, 11 F.4th 437, 459 (6th Cir. 2021) (recognizing that the holding in *Fulton* was “narrow[ly]” based on the commissioner’s “unfettered discretion” to grant exemptions to the city’s non-discrimination law). Indeed, *there are no exemptions* in the provisions of the Ordinance challenged by Chelsey. *See* Louisville Metro Ordinance § 92.05(A) & (B). As such, Chelsey’s citation to cases involving “exception-ridden” policies and statutes with a system of “individualized exemptions” are plainly inapposite. *See Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012); *see also Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020) (“As a rule of thumb, the more exemptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law.”).

Chelsey cannot find exemptions in the text of the Ordinance, so she attempts to create them. Chelsey argues—without citation—that because the Ordinance does not include identical anti-discrimination protections for every protected class it is not neutral or generally applicable. But lack of coverage (or more accurately here, different coverage)<sup>3</sup> is not the same as an exemption.

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<sup>3</sup> Contrary to Chelsey’s claims, Metro prohibits discrimination based on sex in most public accommodations. *See* Louisville Metro Ordinance § 92.05(C).

Anti-discrimination provisions are “well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination.” *Hurley*, 515 U.S. at 572. These laws serve to remedy the effects of past discrimination against “historically disadvantaged groups.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624-26 (1984).

Given the varied history of discrimination against different groups in different places, there may be as many varying anti-discrimination schemes. This does not mean they are not neutral or generally applicable. *See New York State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 12-13 (1988) (upholding law that banned discrimination in clubs with at least 400 people, but not smaller private clubs); *303 Creative*, 6 F.4th at 1178 (states and localities have a “unique interest in remedying [their] own discrimination” against disfavored groups). Indeed, the judiciary has long understood the need to treat suspect classes differently based on the unique discrimination suffered by that group and traits inherent to group members.<sup>4</sup> Louisville Metro may do the same.

Chelsey’s phantom exemption theory is supported by inapplicable case law. She returns to *Lukumi* for the notion that “lack of coverage” is the same as an exemption.<sup>5</sup> But *Lukumi* says no such thing. It states plainly that “government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief.” 508 U.S. at 543. To make this determination, the Court conducted a fact-intensive inquiry into the history of religious discrimination in the community and insidious remarks made by legislators before passing the subject ordinances. The “under inclusiveness” of the statute bolstered the Court’s finding that the

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<sup>4</sup> Courts apply heightened or intermediate scrutiny to sex discrimination cases. *See, e.g., Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 728 (2003). Courts apply strict scrutiny to race discrimination cases. *See, e.g., Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 720 (2007).

<sup>5</sup> The Court also must reject Plaintiffs’ argument to the extent it relies on *Monclova Christian Academy v. Toledo-Lucas County Health Department*, 984 F.3d 477 (6th Cir. 2020), which the Sixth Circuit has recognized as bad law. *Resurrection School*, 11 F.4th at 457.

ordinances were a “religious gerrymander” targeting “only conduct motivated by religious belief.” *Id.* at 545. In other words, the ordinances “ha[d] every appearance of a prohibition that society is prepared to impose upon Santeria worshippers but not upon itself.” *Id.* (citing *Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989)). The Court need not reach the same conclusion here because Louisville Metro has not “selectively imposed” burdens on religious conduct. The Ordinance applies equally across the board. Chelsey faces no greater burden than any other public accommodation.

Chelsey’s argument rests on the “false premise” that the Ordinance is not neutral or generally applicable because it favors secular activity. *See Masterpiece Cakeshop*, 138 S. Ct. at 1737 (Gorsuch, J., concurring) (Colorado could apply its anti-discrimination law uniformly to religious and secular exemptions, “[b]ut the one thing it can’t do is apply a more generous legal test to secular objections than religious ones”). But the Ordinance was “not designed or applied in a manner that create[s] disparate outcomes between religious and non-religious” conduct. *Leone v. Essex Cty. Prosecutor’s Off.*, 2021 WL 4317240, at \*4 (D.N.J. Sept. 23, 2021). Chelsey’s argument conflates normal business transactions with secular activity, suggesting that “business-related” activity is itself secular. “This is an analogical fallacy” that produces absurd results. *Id.* at 5. A public accommodation declining service for “low staffing or lost contact information” or because they have never made the requested product has not discriminated for “secular reasons”—it is simply functioning in the marketplace.

Chelsey’s argument is completely disconnected from the Ordinance’s text and controlling precedent. By its terms, the Ordinance is both neutral and generally applicable. It applies equally to all of Louisville Metro’s public accommodations. Rational-basis review applies.

**VII. The Ordinance Does Not Compel Chelsey to Participate in Religious Ceremonies; Indeed, It is Chelsey’s Requested Exemption That Would Violate the Establishment Clause.**

Compliance with the Ordinance does not compel Chelsey to participate in a religious ceremony. Contrary to Chelsey’s claims, Louisville Metro’s “same-service” rule does not force Chelsey to obey the same-sex wedding officiant or bow her head in prayer. The Ordinance requires Chelsey to provide the services she offers to the general public without regard to the customer’s sexual orientation. Chelsey is a wedding photographer—she sells photography services. Attendance at wedding ceremonies is an unavoidable part of a career as a wedding photographer.

It is well-established that clergy cannot be compelled to perform a wedding ceremony that is inconsistent with his or her beliefs. But the Supreme Court has warned that if the exception applicable to clergy is “not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.” *Masterpiece Cakeshop*, 138 S. Ct. at 1727. Chelsey’s attempt to compare herself to clergy demonstrates just this problem.

The fact that when Chelsey photographs a wedding ceremony based on her own religious faith she gratuitously participates in the religious aspects of the ceremony does not mean that Chelsey is a professional participant in religious services. She is not clergy. She is not a wedding officiant. Chelsey would not violate the Ordinance if she provided her photography services without bowing her head in prayer. The Ordinance leaves Chelsey to decide “[t]he degree to which she voluntarily involves herself in an event outside the scope of services she must provide to all customers on a non-discriminatory basis.” *State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1213 (Wash. 2019), cert. denied, 141 S. Ct. 2884 (2021).

Under Chelsey's logic, her religious faith would require her to refuse services to any couple that did not practice Chelsey's particular version of Christianity, such as an opposite-sex couple that is Jewish, lest she be coerced to practice a religion different from her own. If Chelsey really believes she must limit her business that narrowly, she should not offer her services to the general public. If Chelsey offered her services exclusively to members of her church congregation, she would not be a public accommodation as defined by the Ordinance. Louisville Metro Ordinance § 92.02 (defining public accommodation as one that "supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public"). But having chosen to offer wedding photography services to the general public, Chelsey should not be heard to complain that she is being coerced into religious practice with which she disagrees by virtue of mere attendance at a wedding.

Because this is a pre-enforcement challenge, there are no actual facts regarding a hypothetical same-sex wedding ceremony for the Court to analyze. Chelsey's allegation that she considers all weddings to be religious ceremonies, even those without any overtly religious aspect to the ceremony, is not dispositive. The Court must base its ruling on an objective evaluation of the circumstances. *See, e.g., Town of Greece*, 572 U.S. at 588-89. There is no basis for the Court to impute any element of coerced religious practice in the requirement that, if asked, Chelsey must provide photography services at a same-sex wedding, which may not even be a religious ceremony.

Chelsey does not want fair and equal treatment under the law. She wants special treatment that allows her to refuse services to a historically marginalized group based on her religious beliefs. Granting Chelsey (and others like her) that special privilege would put the governmental thumb on the scale in favor of Chelsey's religious beliefs to the detriment of same-sex couples. That would violate the Establishment Clause.

### VIII. The Ordinance Satisfies Any Level of Scrutiny.

Chelsey argues that her intention to deny services to same-sex couples does not implicate Louisville Metro's interest in eradicating discrimination because she objects only to certain messages, not homosexual people. Chelsey's effort to disassociate from her discriminatory intent may help her sleep better at night, but is completely counterfactual. Chelsey's business is wedding photography. The "message" she objects to is the homosexual identity of the couple seeking wedding services. That is identity-based discrimination because Chelsey's objection to providing the service depends on who is requesting the service.

Chelsey argues that Louisville Metro must identify a prior instance of a same-sex couple being denied wedding photography services in order to justify enforcing its antidiscrimination law against Chelsey. She argues that because there have been no formal complaints filed with HRC alleging discrimination in the provision of photography services for a same-sex wedding in "almost forty years of history" means that there is no actual problem with access to wedding services for same-sex couples. Chelsey has not cited any authority for the requirement she seeks to impose, i.e. that a government be required to identify a prior instance of discrimination precisely like the discrimination at issue in any given case before it can enforce an antidiscrimination law. Moreover, Chelsey's argument reveals just how out-of-touch she is with the history of discrimination against homosexuals.

Same-sex couples did not have the legal right to get married in Kentucky until the Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015). That opinion recognized this country's "long history of disapproval" of same-sex relationships, including treatment of homosexuality as an illness, criminalization of same-sex intimacy, and a litany of state and federal laws which confined the definition of marriage to one man and one woman. *Id.* at 660-63, 675.

These injustices imposed stigma, humiliation, and financial hardship, and impugned the fundamental dignity of homosexuals. *Id.* at 664-70.

Because same-sex couples have only had the legal right to marry in Kentucky for 6 years, it is unsurprising that there is not a 40-year history of recorded complaints of discrimination in the provision of services for same-sex weddings. In light of the history of discrimination against homosexuals—so ingrained in our culture that it was reflected in Kentucky’s Constitution (KY Const § 233A) as recently as 6 years ago—it is astounding to suggest that there is no problem with discrimination in the provision of services for same-sex weddings that can be addressed through an antidiscrimination law. Yet that is exactly what Chelsey is arguing, with no hint of irony regarding the fact that she initiated this litigation precisely to have the Court sanction her “right” to discriminate against same-sex couples in the provision of wedding services. And Chelsey is not the only one seeking the freedom to discriminate. For example, ADF has filed nearly identical pre-enforcement challenges to public accommodations laws in New York and Virginia on behalf of wedding photographers who have the exact same objections to providing services to same-sex couples as those asserted by Chelsey in this case. *See Emilee Carpenter, LLC, et al. v. Letitia James, et al.*, Case No. 6:21-cv-06303 (W.D.N.Y., Judge Frank P. Geraci, Jr.); *Robert Updegrove, et al. v. Mark Herring, et al.*, Case No. 1:20-cv-1141 (E.D. Va., Judge Claude M. Hilton).

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*, 468 U.S. at 624; *see also id.* at 628 (discrimination “cause[s] unique evils that government has a compelling interest to prevent”). No court considering the issue has concluded otherwise. In *Masterpiece Cakeshop*, the U.S. Supreme Court affirmed that antidiscrimination laws are a “valid exercise of state power,” and that it is “unexceptional” that the

“law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.” 138 S. Ct. at 1724, 1728.

Chelsey discounts the dignitary harms associated with being denied services, arguing that Courts cannot consider the consequences of discrimination on the customer being denied services where the service provider characterizes their product as speech. However, Louisville Metro is not invoking the dignitary harms associated with public discourse regarding same-sex weddings or the rights of homosexuals. *Compare Boos v. Barry*, 485 U.S. 312 (1988) (challenge to a prohibition on displaying signs bringing foreign governments into disrepute). Louisville Metro recognizes that the First Amendment reflects a commitment to the principle that “debate on public issues should be uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). That is why the Ordinance does not restrict Chelsey’s ability to speak about her religious beliefs or views on same-sex marriage.

But the First Amendment does not prevent Louisville Metro from enforcing an antidiscrimination law that prohibits denials of service based on sexual orientation. Public accommodations laws “are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.” *Hurley*, 515 U.S. at 572. The Supreme Court has long recognized that “discriminatory denials of access to facilities ostensibly open to the general public” causes “humiliation” that may be addressed through antidiscrimination laws. *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969); *see also Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 250 (1964) (antidiscrimination laws “vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments”).

Chelsey reads into the Supreme Court's recent decision in *Fulton* a sweeping change in strict scrutiny analysis of antidiscrimination laws, arguing that *Fulton* demands that the Court narrowly focus on whether Louisville Metro has a compelling interest in denying an exception to Chelsey. However, the antidiscrimination law at issue in *Fulton*, which required that foster care agencies provide services to foster parents without regard to their sexual orientation, permitted exceptions at the "sole discretion" of the commissioner. 141 S. Ct. at 1878. As such, the question presented was whether Philadelphia's denial of an exception to a Catholic foster care agency violated the agency's rights under the First Amendment. *Fulton*'s narrow framing of strict scrutiny analysis does not apply in this case because the law challenged by Chelsey contains no exceptions, discretionary or otherwise. *See* Louisville Metro Ordinance § 92.05(A) & (B).

But even if the Court accepts Chelsey's invitation to narrowly focus on Louisville Metro's interest in denying an exception to Chelsey, the law withstands strict scrutiny. Chelsey does not need an exemption because she has never been and likely never will be asked to provide services for a same sex wedding. Moreover, Chelsey describes her services as "unique" and her wedding photography as the product of her singular artistic expression and view of the world. *See* Doc. 92-1, pp. 2-3. In *303 Creative*, the Tenth Circuit held that the unique nature of the services provided (in that case by a wedding website designer) mean that same-sex couples could not obtain comparable services from other vendors, making it important for the government to be able to enforce its antidiscrimination law to ensure the public has equal access to those unique services. *303 Creative*, 6 F.4th at 1181 ("unique goods and services [such as wedding website services] are where public accommodation laws are most necessary to ensuring equal access").

Further, granting Chelsey a religious exemption from Louisville Metro's antidiscrimination law could lead to an increase in real-world discrimination that would harm

same-sex couples in Louisville Metro. *See* Professor Barak-Corren’s Expert Report (Doc. 97-11) (describing field experiment conducted during the pendency of the U.S. Supreme Court’s decision in *Masterpiece Cakeshop* which found that the Court’s ruling in favor of a baker that refused to create a wedding cake for a same-sex couple significantly reduced the agreement to serve same-sex couples as compared with opposite-sex couples, even among previously willing vendors). Consideration of social science data like that presented by Professor Barak-Corren dates back over a century to the “Brandeis brief” filed in *Muller v. State of Oregon*, 208 U.S. 412, 419 (1908), which relied more on social science data than legal precedent. The U.S. Supreme Court famously embraced social science evidence in *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 494 n.11 (1954), when it held that the doctrine of “separate but equal” has no place in public education. Chelsey offers meager critiques of Professor Barak-Corren’s methodology, questions whether her findings apply in Louisville Metro, and attempts to minimize the implications of her experiment. Defendants thoroughly addressed these critiques in response to Plaintiff’s motion to exclude Professor Barak-Corren’s report and testimony, which response is incorporated by reference to avoid unnecessary duplication. *See* Doc. 99.

Uniform enforcement of the Accommodations Provision is the least restrictive means for furthering Louisville Metro’s interest in ensuring equal access to goods and services. *See Roberts*, 468 U.S. at 629. Chelsey does not offer any substantive response to the problems Defendants identified with Chelsey’s proposed less restrictive means. *See* Doc. 97, pp. 27-28. Instead, Chelsey doubles-down on her suggestion that Louisville Metro create a “voluntary certification system” for businesses willing to provide services to same-sex couples—a state-sanctioned “Green Book” that would authorize wide-spread discrimination against same-sex couples. Chelsey points to Louisville Metro’s Minority, Female, and Handicapped Business Enterprises ordinance

(Louisville Metro Ordinance § 37.65, et seq.) as a “similar program.” Under this ordinance, LGBT and other minority-owned businesses are eligible for certain preferences in public procurements. *See* Louisville Metro Ordinance § 37.68. There are no similarities between a program designed to assist minority-owned businesses and a certification system pursuant to which businesses willing to serve same-sex couples volunteer to be placed on a list of willing vendors, while others who do not take part in the voluntary certification system are free to deny services to homosexuals. Chelsey’s proposed certification system is not substitute for a generally applicable antidiscrimination law and, indeed, would subvert the law’s purpose of eradicating discrimination based on sexual orientation in the provision of goods and services.

The Ordinance fails to trigger strict scrutiny under the free speech or religion clauses. But even if strict scrutiny applied, application of the law to Chelsey is constitutional.

#### **IX. Plaintiffs’ Kentucky RFRA Claim Fails and Is Barred by Sovereign Immunity.**

Unable to articulate any actual burden that would trigger the application of Kentucky’s Religious Freedom Restoration Act (“KRFRA”), Chelsey resorts once again to misrepresenting what Louisville Metro’s antidiscrimination law requires and what it prohibits. Chelsey claims that the Ordinance “bars her from creating photographs, writing blogs, or posting statements consistent with her faith.” It does no such thing. There is absolutely nothing in the Ordinance which bars Chelsey from taking a picture or writing a blog or statement expressing her religious beliefs. Indeed, throughout this litigation Louisville Metro has maintained that only the part of Chelsey’s marketing statement which states that she would refuse services for same-sex weddings (“I don’t photograph same-sex weddings”) violates the Ordinance. The remainder of the statement, which describes Chelsey’s religious beliefs and how they impact her business, does not violate the Ordinance. *See* Doc. 1-2 (These statements in Chelsey’s marketing statement are all permissible under the Ordinance: “My highest aim of creative expression is to honor God. . . . I believe

marriage is a special gift from God that represents Jesus Christ’s love for his Church, and it all begins at a wedding between a man and a woman. . . . God’s word greatly impacts my life and business.”). As such, it is utterly disingenuous for Chelsey to claim that the Ordinance bars her from “posting statements consistent with her faith.”

What the Ordinance prohibits is Chelsey advertising her discriminatory intent to deny services to same-sex couples. This is the exact type of prohibition which the Supreme Court embraced as necessary and appropriate in *Masterpiece Cakeshop*: “any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying ‘no goods or services will be sold if they will be used for gay marriages,’ something that would impose a serious stigma on gay persons.” 138 S. Ct. at 1728-29. This is hardly the type of substantial burden a plaintiff must prove to trigger the protections of KRFRA. Indeed, a comparison to the examples of burden provided in the text of KRFRA demonstrate that the Ordinance’s limited prohibition is not substantial. *See* KRS 446.350 (“A ‘burden’ shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.”). Chelsey has not been penalized or excluded from a program. She has not experienced any enforcement activity at all. She is the party who picked this fight.

Chelsey cites *On Fire Christian Center, Inc. v. Fischer*, 453 F. Supp. 3d 901 (W.D. Ky. 2020) in support of the notion that plaintiffs can prevail on KRFRA claims before the government takes any enforcement action. *On Fire* is one of a handful of recent cases applying KRFRA to Covid-19 restrictions on church gatherings. In those cases, the government regulation was targeted directly at religious observance, obviously burdening the plaintiffs’ freedom to exercise their religion. By contrast, the Ordinance is not targeted at any religious beliefs or practices. It is a

generally applicable antidiscrimination law. Chelsey's religious freedom has not been substantially burdened because the Ordinance does not restrict Chelsey's religious practices, she has not faced any enforcement action, and the factual record in this case demonstrates that it is highly unlikely that Chelsey ever would be presented with an opportunity to violate the Ordinance by denying services for a same-sex wedding. Chelsey's claim under KRFRA therefore fails.

Chelsey does not dispute that Defendants are entitled to state sovereign immunity. *See Fletcher-Hope v. Louisville-Jefferson County Metro Gov't*, 2019 WL 498853, at \*4-5 (W.D. Ky. Feb. 8, 2019). The Kentucky Supreme Court considered the question and concluded that KRFRA includes no express waiver of sovereign immunity. *In re Ruplinger v. Louisville/Jefferson Cnty. Metro Gov't*, 607 S.W.3d 583, 585-86 (Ky. 2020). But Chelsey argues that immunity only bars claims for damages and does not extend to state-law claims for injunctive relief. However, there is no suggestion that the defendants in the *Ruplinger* case argued that they were immune from claims for injunctive relief and, instead, apparently sought immunity only with respect to claims for damages. *See Ruplinger v. Louisville/Jefferson County Metro Gov't*, 2021 WL 682075, at \*4 (W.D. Ky. Feb. 22, 2021). In other cases, Courts have dismissed all claims against Kentucky counties even where the plaintiff sought declaratory and injunctive relief. *See, e.g., Combs v. Breathitt County Fiscal Court*, 2017 WL 4287545, at \*2 (E.D. Ky. Sept. 27, 2017). Chelsey's request for injunctive or declaratory relief under KRFRA is barred by the doctrine of sovereign immunity.

**X. All Claims Against HRC-Enforcement, HRC-Advocacy, and the Individual Defendants Must Be Dismissed.**

Chelsey agreed to dismiss all claims against HRC-Advocacy and the individual Defendants. *See* Doc. 104, p. 31 n.16. She also agreed to dismiss her constitutional claims against HRC-Enforcement, but contends that HRC-Enforcement is a proper defendant for the claim under

KRFRA. *Id.*

Defendants submit that HRC-Enforcement has no independent authority and is not a separate legal entity capable of being sued. *See Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994); *Carver v. Louisville/Jefferson County Metro Gov't*, 2014 WL 2805539, at \*4 (W.D. Ky. June 20, 2014). Chelsey's only response to this argument is to point to a case in which the Lexington Fayette Urban County Human Rights Commission was a party. *See Lexington Fayette Urban County Human Rights Commission v. Hands on Originals, Inc.*, 2017 WL 2211381 (Ky. App. May 12, 2017). However, that case involved a direct appeal from an administrative hearing in which the Lexington Commission prevailed in establishing that the business violated Lexington's antidiscrimination ordinance. *Id.* at \*3. It was not a case like this one, where the local commission was sued in a pre-enforcement constitutional challenge. Moreover, there is no indication that the Lexington Humana Rights Commission contested whether it was an entity capable of being sued. As such, the case is not relevant to the argument presented by Defendants' motion.

### **CONCLUSION**

For the foregoing reasons and those set forth in their opening brief, Defendants respectfully request that the Court deny the motion for summary judgment filed by Plaintiffs, grant Defendants' motion for summary judgment, and dismiss all of Plaintiffs' claims with prejudice.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 10, 2021, the foregoing was filed via the Court's electronic filing system, which will automatically send notice of such filing to all counsel of record.

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