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' Response to Defendants' Combined Response to Plaintiffs' Supplemental Authority and Notice of Supplemental Authority Relevant to the Pending Cross-Motions for Summary Judgment

Louisville asks this Court to "give due consideration to" *Emilee Carpenter, LLC v. James*, 2021 WL 5879090 (W.D.N.Y. Dec. 13, 2021). Doc. 115, PageID.4846. Louisville is partially correct. This case should be considered because it supports Chelsey Nelson's standing. *Emilee Carpenter* also confirms that Chelsey's photography and blogging are speech and that Louisville's law compels Chelsey's speech, regulates her speech based on content, and triggers strict scrutiny. But that court's strict-scrutiny, free-exercise, and due-process analyses should be rejected because they are either wrong, distinguishable, or both.

Start with standing. Citing this Court's prior decision, *Emilee Carpenter* found standing because New York's laws arguably prohibited Emilee's desired activities—maintaining an editorial policy of only photographing and blogging about certain content and explaining that choice in a statement. *Emilee Carpenter, LLC*, 2021 WL 5879090, at *7. And *Emilee Carpenter* presumed credible enforcement because New York's laws were "not moribund" and "are reasonably read to prohibit the kinds of conduct in which Plaintiff has engaged and intends to engage." *Id.* at *8. *See id.* at *7 (noting that "courts generally presume" governments enforce their laws, especially given the "low threshold" and "quite forgiving" standard for First Amendment pre-enforcement review). The court then bolstered that presumption because New York had "taken the position that conduct like Plaintiff's violates public-accommodation laws and is not protected under the First Amendment." *Id.* at *8.[1]

The same logic applies here. Louisville's law prohibits Chelsey's editorial policy and desired statement, and Louisville actively enforces its law. So this Court can presume a credible threat of enforcement. Doc. 104, PageID.4549–60. Louisville has also repeatedly claimed that Chelsey violates its law and touted its authority to

[1] *Emilee Carpenter* also found Emilee's case to be ripe and agreed that New York's Accommodations and Publication Provisions were intertwined. *Id.* at *5 n.5, *17.

apply its law to Chelsey. Doc. 104, PageID.4551–52. *See also* Doc. 92–7, PageID.3329, 3335 (Louisville explaining its compelling interest to journalist); Andrew Wolfson, *Despite Ruling for Christian Photographer, Louisville Will Still Enforce Gay Rights Law*, Louisville Courier Journal (Aug. 18, 2020), https://bit.ly/3pSVwOU (similar). That seals Chelsey's standing.

In fact, Chelsey presents *a stronger basis* for standing in some respects than Emilee. While Louisville has consistently affirmed its enforcement intent against Chelsey for over two years, one New York official disavowed enforcement—but the *Emilee Carpenter* court still found standing. That's because Emilee's "interpretation" of the law was "reasonable enough" to cause "legitimate[] fear." *Emilee Carpenter, LLC*, 2021 WL 5879090, at *9 (internal quotation marks omitted). Chelsey has shown much more here.

To be sure, Louisville tries to distinguish Emilee's case because the laws there imposed criminal penalties. Doc. 115, PageID.4843 n.2. But that didn't affect the court's analysis—"[t]he same [standing] analysis applies whether the plaintiff faces the threat of criminal prosecution, a civil action, or the institution of administrative proceedings." *Emilee Carpenter, LLC*, 2021 WL 5879090, at *6 (collecting cases). Louisville does no better saying Emilee "would be presented with further opportunities to violate the law" while Chelsey will not. Doc. 115, PageID.4843 n.2. The court rejected this argument too—"[n]o specific threat of enforcement is necessary to confer standing." *Emilee Carpenter, LLC*, 2021 WL 5879090, at *8. Indeed, Emilee Carpenter's editorial policy and proposed statement violated New York's laws just like Chelsey's policy and statement violate Louisville's law—no requests necessary. *Id.* at *7.

Move next to free speech. The *Emilee Carpenter* court started on the right foot, holding that the New York laws compel Emilee "to create speech"—photographs and blogs celebrating same-sex weddings—"to the same extent she

creates such speech for opposite-sex clients." *Id.* at *11; *id.* at *11 n.10. Just like Louisville's laws do to Chelsey.

But the court then mis-applied strict scrutiny in three ways. First, relying on *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021), the court upheld the New York laws as narrowly tailored because Emilee's photography and blogging are "the product of her unique artistic style and vision" and an exemption for her "unique, nonfungible services would necessarily undermine" New York's interests. *Emilee Carpenter, LLC*, 2021 WL 5879090, at *16. Translation: government officials can compel unique, one-of-a-kind speech because those speakers have created a monopoly for their distinct expression. But this logic "is, in a word, unprecedented." *303 Creative*, 6 F.4th at 1204 (Tymkovich, C.J., dissenting). The United States Supreme Court has already rejected it. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 577–78 (1995) (denying that parade created a "monopoly" sufficient to justify compelled speech even though parade was "an enviable vehicle for the dissemination of GLIB's views"); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 656 (1994) (affirming right of newspaper with "local monopoly" to avoid compelled speech because newspaper still could not "obstruct readers' access to other competing publications…"); *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 9–17, 22 n.1 (1986) (protecting utility company against compelled speech though it was a "regulated monopoly").[2] The *Emilee Carpenter* court never considered this binding analysis.

[2] The Sixth Circuit likewise rejects this speakers-are-monopolies argument. *See Groswirt v Columbus Dispatch*, 238 F.3d 421, *2 (6th Cir. 2000) (published) (protecting editorial discretion of local newspaper); *Johari v. Ohio State Lantern*, 76 F.3d 379, *1 (6th Cir. 1996) (unpublished) (same as to "the student newspaper of Ohio State University"). *Cf. Tanaka v. Univ. of S. California*, 252 F.3d 1059, 1063 (9th Cir. 2001) (UCLA women's soccer program not a monopoly—and does not violate the Sherman Act—though it is "unique").

Second, the court misinterpreted *Hurley* by cabining it to non-commercial activities. *Emilee Carpenter, LLC*, 2021 WL 5879090, at *14–15 (claiming that *Hurley* did not consider "economic justification" or "a state's ability to compel a commercial transaction"). But *Hurley* rejected this argument and extended protections to "business corporations generally." *Hurley*, 515 U.S. at 574. Indeed, *Hurley* involved commercial transactions—parade participants could "pay to enter the parade" or "make a contribution to the council." *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. v. City of Bos.*, 636 N.E.2d 1293, 1298 n.13 (Mass. 1994).

Finally, the court improperly re-wrote New York's alleged compelling interest. While New York claimed an interest in eradicating discrimination generally, the court narrowly "delineated" that interest to ensuring access to goods and services for individuals "without regard to sexual orientation." *Emilee Carpenter, LLC*, 2021 WL 5879090, at *12. That was a mistake because the government—not the court—has the burden to articulate its compelling interest. *See, e.g.*, Doc. 104, PageID.4576 (making this point). In any event, Louisville's claimed interests here are in "rooting out all forms of discrimination." Doc. 92–1, PageID.2825. And Louisville's law is massively underinclusive as to that interest. *Id.* at 2826–27.

Now shift to free exercise. For these 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. *See* Doc. 104, PageID.4570. But the *Emilee Carpenter* court erred by defining New York's interests too narrowly—limiting that interest as protecting only against sexual-orientation discrimination. That in turn required Emilee to identify an exact comparator—i.e., exempted secular conduct that is the same as Emilee's non-exempted religious conducted. *Emilee Carpenter, LLC*, 2021 WL 5879090, at *20. The Sixth Circuit rejects this exact-comparator requirement. *Monclova Christian Acad. v. Toledo-Lucas Cnty.*

Health Dep't, 984 F.3d 477, 481 (6th Cir. 2020) (rejecting argument that court could only consider "other schools" and evaluating "activities that are in other ways very different").[3] And Louisville broadly defines its interest as ending "all forms of discrimination." Doc. 92–1, PageID.2825.

Moving to free-exercise participation, the court's conclusions there are distinguishable because Louisville's same-service rule "forces Chelsey to attend and actively participate in same-sex wedding ceremonies to the same extent she does so when photographing opposite-sex weddings." *Id.* at 2824. Louisville's rule requires Chelsey to participate in religious ceremonies that violate her beliefs.

Finish with due process. The *Emilee Carpenter* court did not decide overbreadth or unbridled-discretion claims. These claims are proper even if desired speech is "clearly proscribed." Doc. 104, PageID.4580. The Unwelcome Clause is also so vague that anyone could file a complaint based on any portion of Chelsey's statements. *Id.* And Louisville must investigate all complaints. Metro Ord. § 92.09(C)–(D). So *Emilee Carpenter*'s due-process analysis is distinguishable too.

In sum, *Emilee Carpenter* confirms that Chelsey has standing, that Chelsey engages in protected speech, that Louisville's law compels speech, and that Louisville's law triggers strict scrutiny here. For everything else, the case is unpersuasive.

[3] The Sixth Circuit vacated *Resurrection School v. Hertel*, 11 F.4th 437 (6th Cir. 2021), which criticized *Monclova. Resurrection Sch. v. Hertel*, 16 F.4th 1215, 1216 (6th Cir. 2021) (granting en banc review). *Monclova* remains binding precedent.

Respectfully submitted this 5th day of January, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of January, 2022 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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