

**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' RESPONSE TO PLAINTIFFS'
MOTION TO SUPPLEMENT SUMMARY JUDGMENT RECORD
OR TO TAKE JUDICIAL NOTICE**

Defendants Louisville/Jefferson County Metro Government (“Louisville Metro”), 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 (“HRC”), 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 (collectively, “Defendants”), by counsel, in response to the Motion to Supplement the Summary Judgment Record or to Take Judicial Notice (Doc. 119) (“Motion to Supplement”) filed by Plaintiffs Chelsey Nelson Photography and Chelsey Nelson (collectively, “Chelsey” or “Plaintiffs”) state as follows:

Chelsey moves to supplement the record on the parties’ fully-briefed cross-motions for summary judgment with just 162 of the 13,536 pages of HRC case files produced by Defendants.

These documents were produced, as required by Judge Lindsay's August 25, 2021 Order (Doc. 89), over Defendants' objections that the burdens associated with retrieving and producing these archived case files were disproportionate to the needs of the parties in this litigation because the case files are irrelevant to Chelsey's claims. Chelsey's strained attempts to argue that any of these files are relevant to the pending summary judgment motions bears out Defendants' objections. Moreover, because Chelsey filed a motion for summary judgment before these files were produced and argued in her summary judgment briefs that "[n]o more facts are needed" to resolve the motions (Doc. 104 at PageID #4564), she should be estopped from supplementing the already-voluminous record on the parties' cross-motions for summary judgment. *See* Doc. 111 at PageID #4786-88.

This litigation is not a proper vehicle for Chelsey to relitigate HRC's handling of discrimination complaints filed by third parties which have nothing to do with Chelsey's wedding photography business. Chelsey has no standing to assert complaints on behalf of these third parties with respect to HRC's handling of their cases or burdens associated with defending these claims of discrimination. The Court should not accept Chelsey's invitation into the weeds of these third-party disputes.

Chelsey already highlighted HRC's investigation of Scooter Triple B's in her summary judgment briefing (Doc. 104 at PageID #4555-56), therefore there is no need to supplement the record with additional files from this case which merely "confirm[]" (Doc. 119, p. 6) what is already in the record.

Chelsey cites a complaint filed by the Lexington Fair Housing Council, *which was dismissed by HRC*, as evidence to support her assertion of standing in this case. But this case file does nothing more than establish that HRC investigates complaints according to the enforcement

mechanisms set forth in Louisville Metro’s antidiscrimination law, which include an evaluation of whether the complainant has standing to pursue the complaint and whether there is evidence of a violation. All statutes that are subject to constitutional challenge have an enforcement mechanism. But, as argued in Defendants’ summary judgment briefing, 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. *See* Doc. 111 at PageID #4780-84.

Chelsey also references the Lexington Fair Housing Council case file to argue that she faces a credible threat of prosecution because she is “high profile.” But Chelsey brought whatever notoriety she has on herself by filing this lawsuit. Defendants had never heard of Chelsey before she initiated this litigation. *See* Doc. 97-9 at PageID #4013-14. Chelsey’s standing must be evaluated based on the facts as they existed when her complaint was filed, not events that occurred after she filed this litigation. *See Newman–Green, Inc. v. Alfonzo–Larrain*, 490 U.S. 826, 830 (1989); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 569 n.4 (1992).

Chelsey’s invocation of HRC case files to argue that Metro Louisville’s antidiscrimination law compels her to speak or constitutes a content- or viewpoint-based regulation adds nothing to the legal arguments already extensively briefed by the parties. As repeatedly recognized by the United States Supreme Court, antidiscrimination laws which require the acceptance of “all-comers” are “textbook viewpoint neutral” even if they affect some speakers or messages but not others. *See, e.g., Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez*, 561 U.S. 661, 694-95 (2010). And laws which prohibit discrimination in the provision of goods and services do not violate the First Amendment. *Hurley v. Irish-American*

Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 568, 572 (1995).

Chelsey disingenuously cites discrimination complaints filed against a newspaper and a Catholic school to argue that Louisville Metro is attempting to compel speech through enforcement of its public accommodation law. Those complaints had nothing to do with speech. The complaint filed against the newspaper alleged discrimination based on disability because the paper was not delivered to the complainant's porch. *See* Chelsey's App. at 953. The complaint filed against the Catholic school sought redress for expulsion of a student, allegedly based on the child's sex and disability. *See id.* at 955. These files are plainly irrelevant.

Chelsey also attempts to equate her refusal to photograph a same-sex wedding to a "prior-goods exception," i.e. the notion that a nondiscrimination law does not require a public accommodation to sell a good or provide a service that it does not provide to any customer. The examples cited by Chelsey are a tire shop which only sells tires in bulk refusing to sell a small number of tires to a particular customer and a medical doctor refusing to provide non-medical therapy services. There is no comparison. Chelsey is a wedding photographer. Her objection to photographing same-sex weddings is not because she does not offer wedding photography services to other customers, but because she wants to discriminate against customers based on their sexual orientation.

Chelsey argues that files relating to HRC's dismissal of a sex discrimination complaint against a penal institution and a disability discrimination complaint against a private dog club evidence that Louisville's antidiscrimination law is underinclusive. These complaints were dismissed on grounds that penal institutions and private clubs are not regulated as public accommodations under Louisville Metro's ordinance. These cases do not undermine Louisville Metro's interest in applying its public accommodations law to a business that, unlike a penal

institution or private club, offers services to the general public, such as Chelsey’s wedding photography business. Moreover, the cited case files establish nothing beyond what is apparent from the text of the law and are therefore irrelevant to the Court’s analysis.

Chelsey suggests that Louisville Metro’s antidiscrimination law must be unconstitutional because HRC failed to conclude there was probable cause in every case alleging name-calling or humiliation. These claims were dismissed because HRC’s investigation revealed the facts did not satisfy the elements of the alleged violation. Those findings in no way undermine Louisville Metro’s interest in applying its public accommodations law to facts that would establish a clear violation.

Finally, Chelsey argues that the case against Scooter Triple B’s and the case filed by the Lexington Fair Housing Council support her facial challenge to the Unwelcome Clause as vague, overbroad, and allowing unbridled discretion. As set forth in Defendants’ summary judgment briefing, because there is no dispute that Chelsey’s statement on her website (“I don’t photograph same-sex weddings”) violates the Unwelcome Clause, Chelsey has no standing to pursue a facial challenge. *See* Doc. 97 at PageID #3826-27, Doc. 111 at PageID #4784-85. 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 at PageID #1225.

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Because the case files Chelsey seeks to add to an already voluminous summary judgment record are irrelevant and/or duplicative of the evidence already before the Court, Defendants respectfully request that the Court deny Plaintiffs’ Motion to Supplement the Summary Judgment Record or to Take Judicial Notice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2022, the foregoing was filed via the Court's electronic filing system, which will automatically send notice of such filing to all counsel of record.

/s/ Casey L. Hinkle

Counsel for Defendants