

Nos. 22-5884 / 22-5912

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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CHELSEY NELSON PHOTOGRAPHY, LLC, ET AL.

*Plaintiffs-Appellees and Cross-Appellants*

v.

LOUISVILLE-JEFFERSON COUNTY, KY METRO GOVERNMENT, ET AL.

*Defendants-Appellants and Cross-Appellees*

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On Appeal from the United States District Court  
for the Western District of Kentucky  
Case No. 3:19-cv-0851

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**BRIEF OF THE KENTUCKY COMMISSION ON HUMAN RIGHTS  
AS *AMICUS CURIAE* IN SUPPORT OF  
DEFENDANTS-APPELLANTS/CROSS-APPELLEES  
LOUISVILLE-JEFFERSON COUNTY, KY METRO GOVERNMENT, ET AL.  
AND REVERSAL**

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## RULE 29 STATEMENTS

*Amicus Curiae* the Kentucky Commission on Human Rights is an executive branch agency of the Commonwealth of Kentucky, not a corporation subject to disclosure under Fed. R. App. P. 26.1, 6 Cir. R. 26.1, or Fed. R. App. P. 29(a)(4)(A).

This brief is filed with the consent of all parties pursuant to Fed. R. App. P. 29(a)(2).

As required by Fed. R. App. P. 29(a)(4)(E), *Amicus Curiae* the Kentucky Commission on Human Rights states:

No party's counsel authored this brief in whole or in part.

No party or party's counsel contributed money that was intended to fund preparing or submitting this brief.

No person, other than the *amicus curiae*, contributed money that was intended to fund preparing or submitting the brief.

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## INTEREST OF AMICUS AND SUMMARY OF THE ARGUMENT

The Kentucky Commission on Human Rights<sup>1</sup> is a state executive branch agency created by the Kentucky General Assembly “to safeguard the rights of citizens to be free from discrimination on the basis of race and other enumerated characteristics.” *Commonwealth v. Pendennis Club, Inc.*, 153 S.W.3d 784, 786–87 (Ky. 2004) (citing KRS 344.170). To help this Court resolve important issues raised by this appeal, the Commission files the following amicus brief in support of Defendant/Appellant Louisville Metro Government and reversal of the District Court’s decision below.

The Commission administers KRS Chapter 344, the Kentucky Civil Rights Act, through investigation, prosecution, conciliation, cooperation, and regulation. KRS 344.190. The KCRA makes it unlawful to “deny an individual the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation ... on the ground of disability, race, color, religion, or national origin.” KRS 344.120. “Places of public accommodation” include “any place, store, or other establishment ... which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general

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<sup>1</sup> Referred to as “the Commission” in this brief.

public....” KRS 344.130. Sex-based discrimination is prohibited in public accommodations such as restaurants, hotels, motels, “or any facility supported directly or indirectly by government funds.” KRS 344.145.

The KCRA not only empowers the Commission to investigate and prosecute complaints of discrimination statewide, but it also authorizes “[c]ities and counties” to “adopt and enforce ordinances ... prohibiting all forms of discrimination ... and to prescribe penalties for violations thereof...” within their local jurisdictions. KRS 344.300(1). In support, the Commission must “cooperate with state, local, and other agencies, both public and private” to achieve the KCRA’s broad anti-discriminatory goals. KRS 344.190(4),(8). Under this statutory framework, Defendant/Appellant Metro Human Relations Commission<sup>2</sup> performs local administrative duties similar to those performed by the Commission, and the Metro Ordinance challenged in this case was modeled after the KCRA. *Compare* Metro Ord. § 92.05(A), *with* KRS 344.120 (prohibiting discrimination in public accommodations); and Metro Ord. § 92.05(B), *with* KRS 344.140 (prohibiting discriminatory notices).

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<sup>2</sup> Referred to as “Metro” in this brief.

The Commission’s interest in this case lies in the substantive issues of whether a neutral and generally applicable public accommodation law like the Metro Ordinance violates the First Amendment’s free speech clause and whether such a law also imposes a substantial burden on religious belief under Kentucky’s religious freedom restoration act, KRS 446.350. The KCRA requires the Commission to enforce public accommodation laws similar to the challenged Ordinance in this case. Exceptions to these laws would undermine the Commission’s statutory mission to ensure all Kentuckians enjoy equal access to commercial goods and services.

The first substantive issue—whether the free speech clause of the First Amendment requires an exception to public accommodation laws for certain commercial conduct—is already before the U.S. Supreme Court in the case of *303 Creative LLC v. Elenis*, 6 F.4th 1160 (CA10 2021), *certiorari granted in part*, 142 S. Ct. 1106 (U.S. 2022). The Petitioner in *303 Creative* raises free speech arguments like those of Plaintiff/Appellee Nelson in this case. Because the Commission’s constitutional arguments would be duplicative of Metro’s arguments here and the Respondent’s arguments in *303 Creative*, the Commission’s brief will focus on the second substantive

issue: whether Plaintiff/Appellee Nelson's religious rights require an exception to the Metro Ordinance under KRS 446.350.

In its Order granting Nelson a permanent injunction, the District Court dismissed as "academic" the question whether the Metro Ordinance satisfies strict scrutiny under KRS 446.350 and said only that the Ordinance failed "for the same reasons" it failed under the free speech clause of the First Amendment. Order, RE 130, PageID # 5393. But the District Court's strict scrutiny analysis under the free speech clause relied on the finding that Nelson's commercial activities are expressive, not religious, two distinct concepts under the First Amendment. Not all expression is religious, and not all religious exercise is expressive. Expressive activity and "compelled speech" have their own doctrinal rules and standards, which the District Court discussed at length. *Id.* at Page ID# 5365-5371. These rules and standards apply whether religion motivates the expressive activity or not. KRS 446.350, however, applies only to religious belief, regardless of whether it is expressive. There may be overlap between the two doctrines, but as the District Court acknowledged, this Court does not recognize so-called "hybrid-rights claims." *Id.* at Page ID# 5391 n. 16 (citing *Prater v. City of Burnside*, 289 F.3d 417 (CA6 2002)). Thus, Nelson's

free exercise claim under KRS 446.350 requires analysis independent of her free speech claim under the First Amendment.

Because of the overlap in the District Court's analysis, it is not clear to the Commission whether the order below applies to *all* merchants who oppose equal service on religious grounds or only to those who provide commercial services with an expressive element. Either way, this Court should reverse the District Court's holding under KRS 446.350, for three reasons. First, public accommodation laws like the Metro Ordinance distinguish public commercial activity from private religious exercise, and therefore do not substantially burden religion. Second, denial of equal accommodation is a serious harm well within the government's power to prohibit, and religious belief, no matter how sincere, has never been an excuse to harm others. Third, there is no coherent or constitutional way to limit religious exceptions to one protected classification but not others. An exception that would allow sex or sexual orientation discrimination would necessarily extend to discrimination on other bases (such as race or religion), thereby gutting public accommodation laws entirely.

## ARGUMENT

Religious freedom is sacred but not absolute. It does not include a right to harm others. Nevertheless, the District Court in this case held otherwise. It granted Plaintiff/Appellee Chelsea Nelson a right to harm others because she is religiously opposed to treating them equally. This Court should reverse that error.

By ordinance, Defendant/Appellant Metro prohibits discrimination in commercial activity on the basis of several protected classifications, including race, religion, disability status, and sexual orientation. Metro Ord. § 92.05. Merchants may not refuse to serve people simply because of who they are, regardless of the reason why, be it religious or otherwise. In this way, the Metro Ordinance is typical of public accommodation laws like its state and federal counterparts, such as the Kentucky Civil Rights Act, KRS Chapter 344, and Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

Public accommodation laws like the Metro Ordinance, the Kentucky Civil Rights Act, and Title II are crucial to ensure that everyone enjoys equal access to commercial life. These laws, which neutrally prohibit all commercial actors from denying service on the basis of enumerated

protected classifications, have a “venerable history” rooted in English common law. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 571 (1995). The common law “innkeeper rule” generally required merchants to serve all customers unless doing so was impossible. *See Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 259 (1964). In Kentucky, as elsewhere, the law compelled any person engaged in commerce to “receive all comers at a reasonable price.” *Reed v. Teneyck*, 44 S.W. 356, 356 (Ky. 1898). This obligation, which required service regardless of personal prejudice, was a fair tradeoff for the rewards of commercial participation. “For having taken upon himself a public employment, [a merchant] must serve the public to the extent of that employment.” *Kisten v. Hildebrand*, 48 Ky. 72, 74 (Ky. 1848). Violation of this rule carried serious penalties; a merchant who unnecessarily refused a customer was “liable not only to a civil action, but to an indictment.” *Id.*

Unfortunately, the common law innkeeper rule failed to ensure equal access to public accommodations during much of United States history. Before and after the Civil War, white business owners routinely denied service to Black customers, and not just because the common law rule was inconsistently enforced. In many states, including Kentucky,

legislative acts usurped the common law and *required* private businesses to segregate or exclude Black people from their services. *See, e.g., Ohio Val. Ry.'s Receiver v. Lander*, 47 S.W. 344, 350 (Ky. 1898) (affirming Kentucky separate coach law); and *Berea College v. Commonwealth*, 94 S.W. 623, 626 (Ky. 1906) (affirming Kentucky law banning integrated private schools).

Eventually, though, the tide turned. Even before the passage of the federal Civil Rights Act of 1964, thirty-two states enacted public accommodation laws prohibiting discrimination in commercial life. *Heart of Atlanta Motel*, 379 U.S. at 260. The rest soon followed, including Kentucky, which enacted the KCRA in 1966. *Jefferson Cnty. v. Zaring*, 91 S.W.3d 583, 586 (Ky. 2002).

Wherever enacted, public accommodation laws have faced constitutional challenges, but the Supreme Court has held that the First and Fourteenth Amendments offer no safe harbor for discrimination. In *Railway Mail Ass'n v. Corsi*, the Court rejected due process and equal protection challenges to a New York public accommodation law because “[a] judicial determination that such legislation violate[s] the Fourteenth Amendment would be a distortion of the policy manifested in that amendment....” 326

U.S. 88, 93-94 (1945). Justice Frankfurter concurred, writing that “[o]f course ... a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or *religious* prejudice to another’s hurt.” *Id.* at 98 (Frankfurter, J. concurring) (emphasis added).

Since then, the U.S. Supreme Court has repeatedly affirmed the power of states and localities to protect their citizens and residents from class-based discrimination. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (“eliminating discrimination” is a goal that “plainly serves compelling state interests of the highest order”); *Hurley*, 515 U.S. at 572 (public accommodation laws “are well within the State’s usual power to enact”); *Romer v. Evans*, 517 U.S. 620, 627-629 (1996) (discussing the long tradition of anti-discrimination laws); and *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1727 (2018) (discussing the general constitutionality of state and local laws); accord *Lexington-Fayette Urban Cnty. Human Rights Commission v. Hands On Originals*, 592 S.W.3d 291, 294 (Ky. 2019) (“The ability of federal, state and local governments to protect individuals from discrimination by places of public accommodation is beyond question.”).

**I. Public Accommodation Laws Do Not Impose a Substantial Burden on Religious Belief.**

The Metro Ordinance at issue in this case does not substantially burden Plaintiff/Appellee Nelson’s religious beliefs because it applies only to commercial activity that harms others. “The focal point” of public accommodation laws like the Metro Ordinance is “on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.” *Hurley*, 515 U.S. at 572. Public accommodation laws “do not allow business owners and other actors in the economy and society to deny protected persons access to goods and services....” *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

Public accommodation laws are limited in scope. They do not regulate private individuals or noncommercial organizations. They regulate only businesses and proprietors who make the choice to sell goods and services to the public. The Metro Ordinance at issue here specifically defines “public accommodation” as “[a]ny place, store or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds....” Metro Ord. § 92.02; *see also* KRS 344.130 (same). The Ordinance’s text

refers only to commercial activity. Exempted from the law are individuals and organizations who do not supply goods or services to the public.

Because their scope is limited to commercial activity that affects third parties, public accommodation laws do not restrict personal religious belief. A merchant who religiously believes that not all customers should be served equally cannot be punished under a public accommodations law simply for holding such a belief. The merchant becomes subject to penalty or damages only if they deny service on a discriminatory basis. The laws thus create a clear distinction between the personal beliefs of the commercial actor on one hand and their harmful commercial actions on the other.

Under the First Amendment, neutral and generally applicable laws that incidentally conflict with religious belief are subject to rational basis review. *Employment Division v. Smith*, 494 U.S. 872, 878 (1990). The District Court conceded that the Metro Ordinance “would almost certainly survive rational-basis review under *Smith*, given its widely accepted non-discrimination goals.” Order, RE 130, PageID # 5391. However, federal and state “religious freedom restoration acts,” like 42 USC 2000bb and KRS 446.350, create a separate statutory cause of action for free exercise claims. As the District Court noted, these statutes specifically require

strict scrutiny like that applied in pre-*Smith* cases such as *Sherbert v. Verner*, 374 U.S. 398 (1963). Order, RE 130, PageID #: 5391-5392.

Under KRS 446.350, Kentucky’s religious freedom statute, Plaintiff/Appellee Nelson claims a right to refuse service to customers on the basis of their sex or sexual orientation because she is religiously opposed to same-sex marriage. To prevail, KRS 446.350 first requires Nelson to show that her “right to act or refuse to act in a manner motivated by a sincerely held religious belief.” She then must show that this belief has been “substantially” burdened by some government action. *Id.* A burden, according to the statute, “shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.” *Id.* The law does not define the term “substantially,” but nevertheless includes that qualifier. Only after Nelson proves a *substantial* burden must Metro then prove a compelling purpose and narrow tailoring to justify its Ordinance. *Id.*

The District Court found that Plaintiff/Appellee Nelson satisfied the first requirement of KRS 446.350 because her “refusal to photograph same-sex weddings rests on a sincerely held religious belief,” and that “her

faith motivates her to write blog posts” consistent with those beliefs.<sup>3</sup> Order, RE 130, PageID # 5392. Her religious belief, the sincerity of which is unquestioned by Metro and the Commission, is that God “ordained marriage to be a covenant between one man and one woman” only. Order, RE 130, PageID # 5356.

The District Court then held that the Metro Ordinance imposes a substantial burden because Nelson “faces fines, monetary penalties, and investigations” if she “declines to photograph a same-sex wedding.” *Id.* at PageID # 5393. Those monetary penalties could include not just fines levied by Metro but also damages paid to the customers Nelson denies, because public accommodation laws like the Metro Ordinance and the KCRA create a private cause of action for those harmed by discriminatory commercial conduct. *Id.*, and *see* Metro Ord. § 92.09(A), and KRS 344.450. Here the District Court erred because its burden analysis misapplied or omitted controlling free exercise precedent.

First, the misapplication. The District Court relied upon four published decisions: *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610

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<sup>3</sup> Appellee Nelson uses her blog posts to advertise her business to potential customers. Order, RE 130, PageID # 5356.

(CA6 2020), *Livingston Christian Schools v. Genoa Charter Township*, 858 F.3d 996, 1002 (CA6 2017), *Holt v. Hobbs*, 574 U.S. 352, 361 (2015); and *Burwell v. Hobby Lobby*, 573 U.S. 682, 720 (2014).<sup>4</sup> None of these cases involved public accommodation laws and only one implicated third parties who stood to suffer from a denial of service by a religious objector. And even in the case where third parties were at risk, the Supreme Court’s analysis turned heavily on the fact that the government could easily mitigate any potential harm. See *Hobby Lobby*, 573 U.S. at 693 and 732. The District Court in this case gave Plaintiff/Appellee Nelson something none of those cases allowed: a right to harm others because treating them equally offends her religious conscience.

None of the cases cited by the District Court categorically define what constitutes a “substantial burden” to religious belief or exercise. Nevertheless, the District Court relied on *Livingston* for its statement that a substantial burden exists when a law “effectively bar[s] a religious institution from using its property in the exercise of its religion.” Order, RE

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<sup>4</sup> The District Court also cited as authority an unpublished Kentucky Court of Appeals decision, *Lyster v. Woodford Cnty. Bd. Of Adjustment Members*, 2005-CA-1336, 2007 WL 542719 (Ky. App. 2007). *Lyster*, however, is not binding. See Ky. R. of Civ. Pr. 76.28(4)(c).

130, PageID # 5393. For that premise, *Livingston* quoted an earlier, unpublished Sixth Circuit decision, *Living Water Church of God v. Charter Township of Meridian*, 258 F.App'x. 729 (CA6 2007). The District Court noted *Livingston*'s reference to *Living Water* in its citation. Order, RE 130, PageID # 5393.

The District Court did not note, however, that this Court in *Livingston* went on to *reject* the broad burden framework from *Living Water*. See 858 F.3d at 1003. *Livingston*, read fully, offers a more nuanced and less deferential approach to finding substantial burdens. Contrary to *Living Water*'s "effective bar" standard, the *Livingston* court held "not just any imposition on a religious exercise will constitute a violation" of religious freedom restoration statutes like KRS 446.350. *Id.* Religious freedom is, after all, not absolute. The requirement that a burden be "substantial" exists to allow government to continue to regulate important aspects of public life despite religious objectors' incidental conflicts of conscience.

The District Court's burden analysis further omitted other instructive free exercise precedent. It is true that "[t]he purpose of the Kentucky RFRA is to provide more protection than the free-exercise guarantee of the First Amendment" under *Smith*, and for that reason KRS 446.350

incorporates the Supreme Court's First Amendment case law decided prior to 1990. *Maryville Baptist Church*, 957 F.3d at 612. However, that case law, despite applying strict scrutiny to otherwise neutral governmental acts, is not uniformly favorable to religious objectors. *See, e.g., Heffron v. ISKCON*, 452 U.S. 640 (1981) (affirming rule limiting public proselytizing); *United States v. Lee*, 455 U.S. 252 (1982) (rejecting religious objection to payroll taxes); *Bob Jones Univ. v. U.S.*, 461 U.S. 474 (1983) (rejecting religious objection to IRS rules); *Bowen v. Roy*, 476 U.S. 693 (1986) (rejecting religious objection to Social Security); and *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (rejecting religious objection to road construction on sacred property).

This Court's own pre-*Smith* precedent is similarly resistant to overly broad religious exceptions. Even when applying strict scrutiny, this Court has recognized that "the mere fact that [a person's] religious practice is burdened by a governmental program does not mean that an exemption accommodating [their] practice must be granted." *South Ridge Baptist Church v. Industrial Comm'n of Ohio*, 911 F.2d 1203, 1206 (CA6 1990) (quoting *Thomas v. Review Board, Indiana Emp. Sec. Div.*, 450 U.S. 707, 718 (1981)). Competing interests must be balanced. The government may

still incidentally burden religious practice if “accommodation of the [religious objector] would impede the state’s [compelling] objectives.” *U.S. v. Schmucker*, 815 F.2d 413, 417 (CA6 1987) (rejecting church’s objection to state worker compensation system). This balancing framework appropriately respects religious exercise without stripping the government of its police powers.

However, courts need not balance anything if the challenged law regulates only secular acts. For example, in *Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood, Ohio*, this Court rejected the argument that an otherwise neutral city zoning ordinance substantially burdened a church’s religious rights even though it prevented them from building a new facility in 90% of the city. 699 F.2d 303, 307 (CA6 1983). Relying on key pre-*Smith* cases such as *Braunfeld v. Brown*, 366 U.S. 599 (1961), *Sherbert*, and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court concluded that it was not really the church’s *religion* at stake, but its secular desire to construct a new building. The ordinance regulated land use, not religious belief or practice. *Id.* Though the ordinance arguably made the church’s religious operations more expensive, it did so only by

incidentally restricting the church's use of its property on an otherwise permissible basis. *Id.* (citing *Braunfeld* at 605).

Critically, this Court in *Lakewood* said there cannot be a substantial burden where “no pressure is placed on the [religious observer] to abandon its beliefs and observances.” *Id.* at 307. Though it was true that the church would face penalties if it undertook actions prohibited by the ordinance, “the penalties would not have the purpose or the effect of dissuading the [church] from practicing its faith.” *Id.* And this Court rejected the argument that the church's desire to relocate and its religious beliefs were one in the same. *Id.* at 306-307. Building a new facility, even to house its religious worship services, was a “purely secular act.” *Id.* at 307. To be unlawful, this Court held, a government act must substantially burden a *religious* practice, not a secular act like a real estate transaction. *Id.*

Though serving all customers equally may offend Plaintiff/Appellee Nelson's constitutionally protected religious conscience, no aspect of the Metro Ordinance requires her to abandon her faith. She faces no penalty or judgment for her beliefs. But when she decides to act commercially, as a merchant, the Metro Ordinance, like all similar public accommodation laws, requires her to serve all customers equally. The Metro Ordinance

imposes penalties and damages only for Nelson’s secular act of denying customers based on their protected classifications, regardless of her reason for doing so. Because the District Court misapplied or omitted controlling authority and overlooked the long-held distinction between commercial activity and religious belief, its decision should be reversed.

## **II. A Religious Right to Discriminate Causes Harm and Defeats the Purpose of Public Accommodation Laws.**

Even if this Court accepts the District Court’s conclusion that the Metro Ordinance imposes a substantial burden on Appellee Nelson’s religious beliefs, this Court should still reverse because the Ordinance is appropriately tailored to satisfy the compelling purpose of preventing the harm of unequal treatment. Allowing a religious exception for commercial actors to discriminate would create an unprecedented right to harm others and would defeat the entire purpose of public accommodation laws.

Kentuckians, like all Americans, are free to believe whatever they choose to believe without government restriction or coercion. *See generally* U.S. Const. amend. I; and Kentucky Const. § 5. Nevertheless, everyone is governed by limits on their conduct in order to protect the interests of third parties. Both the U.S. and Kentucky Constitutions “embrace[] two concepts—freedom to believe and freedom to act. The first is absolute but, in

the nature of things, the second cannot be.” *U.S. v. Ballard*, 322 U.S. 78, 86 (1944) (quoting *Cantwell v. Connecticut*, 310 US 296, 303-304 (1940)); accord *Lawson v. Commonwealth*, 164 S.W.2d 972, 976 (1942). No religious act, no matter how sincere or sacred to the believer, is above the law. See, e.g., *Ohio Civil Rights Comm’n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 628 (1986) (“Even religious schools cannot claim to be wholly free from some state regulation.”) (citing *Yoder*, 406 U.S. at 213). The government may prohibit harmful conduct even if that conduct is religiously motivated. “[T]he constitutional guarantee of religious freedom does not permit the practice of religious rites dangerous or detrimental to the lives, safety or health of the participants or to the public.” *Gingerich v. Commonwealth*, 382 S.W.3d 835, 841 (Ky. 2012) (quoting *Mosier v. Barren County Board of Health*, 215 S.W.2d 967, 969 (Ky. 1948)).

Despite applying strict scrutiny in cases prior to *Unemployment Division v. Smith*, the Supreme Court still limited the scope of free exercise; religious rights stopped where the rights of others began. For example, in *U.S. v. Lee*, the Court rejected the argument that an Amish merchant should be exempt from withholding payroll taxes for his employees. 455 U.S. 252 (1982). Despite the importance of the merchant’s religious

objection to taxation, “every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs.” *Id.* at 261. Voluntary entry into the commercial market requires compromise, even for the devout. “When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on ... others in that activity.” *Id.* Granting the desired religious accommodation in *Lee* would have “impose[d] the employer’s religious faith on the employees.” *Id.*; see also *Sherbert*, 374 U.S. at 409 (religious exemption allowed partly because it would not “abridge any other person’s religious liberties.”); and *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (“The First Amendment ... gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.”) (quotation omitted).

Though the Supreme Court has since extended religious freedom to some for-profit businesses under 42 U.S.C. § 2000bb (the post-*Smith* federal Religious Freedom Restoration Act), the Court has nevertheless incorporated third party harm into its analysis. In *Burwell v. Hobby Lobby*, for example, the Court noted that “courts must take adequate account of

the burdens a requested accommodation may impose on nonbeneficiaries.” 573 U.S. at 729-730 n. 37 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)). And the Court’s tailoring analysis in *Hobby Lobby* turned on the fact that the government could directly provide the contested health benefits. *Id.* at 728. The burden imposed on the objectors was avoidable because the government could achieve the same compelling legislative goals through different means without harming third parties. *Id.* at 693 (“The effect of ... the accommodation on the women employed by Hobby Lobby ... would be precisely zero.”).

Here, on the other hand, religious exceptions would totally defeat the compelling legislative purpose of public accommodation laws, which is to “protect[] ... citizenry from a number of serious social and personal harms” caused by commercial actors denying the services only they can provide. *Roberts*, 468 U.S. at 625. Discriminatory denial of service, whether motivated by religion or not, “deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.” *Id.* Thus, the “fundamental object” of public accommodation laws is “to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.” *Heart of*

*Atlanta Motel*, 379 U.S. at 250. And the harm caused by discrimination does not vary by protected classification. “That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.” *Roberts*, 468 U.S. at 625.

Perhaps because Plaintiff/Appellee Nelson sought an injunction before she had ever turned away a customer, the District Court did not meaningfully address the question of third-party harm. It should have. Allowing Nelson and others to discriminate will surely cause the harm public accommodation laws were designed to prevent. Here, unlike in *Hobby Lobby*, there is no way for Defendant/Appellant Metro to ensure that a person denied a commercial service by a religious objector can still receive that service from another merchant. And, even if it could, that misses the point of public accommodation laws, which guarantee full and equal access to *all* goods and services. In *Heart of Atlanta Motel*, for example, the Supreme Court upheld Title II of the federal Civil Rights Act against discriminating businesses even though Black people in the South could still sometimes find service elsewhere. 379 U.S. at 253. *Any*

discrimination “discourag[ed] travel on the part of a substantial portion of the [Black] community” and imposed “the obvious impairment of the [Black] traveler’s pleasure and convenience that resulted when he continually was uncertain of finding lodging.” *Id.* Thus, accommodating religious objectors, even a few, would seriously impede the Metro Ordinance’s compelling goal of equal treatment for all.

The District Court’s holding below that religious objectors like Plaintiff/Appellee Nelson should be allowed to deny service on the basis of sexual orientation creates for gay customers the same harmful uncertainty and discouragement acknowledged in *Heart of Atlanta Motel*. No change in circumstances or precedent in the many decades since that decision supports a reversal of course. The Metro Ordinance serves a compelling purpose and appropriately forbids class discrimination by any commercial actor for any reason. The District Court should be reversed.

### **III. A Religious Right to Discriminate Cannot be Coherently or Constitutionally Limited to Sexual Orientation.**

In its Order granting Plaintiff/Appellee Nelson a permanent injunction, RE 130, the District Court chose not to discuss the effect of its ruling on other protected classifications, such as race, religion, or disability. However, in its earlier Order granting Nelson a preliminary injunction, the

District Court acknowledged in a footnote that “a hypothetical case with all the same facts as Nelson’s case, except the photographer refuses to photograph an interracial wedding,” would be “undoubtedly more difficult for a plaintiff to prevail on.” Memorandum Opinion & Order, RE 47, PageID # 1221 n. 133. The District Court offered no explanation why, though, saying only that it was a question “on which the Court takes no position.” *Id.* Nelson, on the other hand, *did* take a position, arguing that orientation-based discrimination was different than race-based discrimination because of dicta from cases like *Loving v. Virginia*, 381 U.S. 1 (1967), and *Obergefell v. Hodges*, 576 U.S. 644 (2015), and because racial discrimination “is a unique constitutional harm.” *Id.*

If religious objectors may deny service because of sexual orientation, why not because of race? Unlike the Supreme Court’s constitutional equal protection cases, the text of the Metro Ordinance lacks a ranking system for its classifications. *See D.F. v. Codell*, 127 S.W.3d 571, 575–76 (Ky. 2003) (summarizing the “tiers of scrutiny” in Fourteenth Amendment claims). Nothing in the Ordinance suggests that other classifications are impervious to religious objection, or that some religious objections are more valid than others, or that discrimination because of sexual

orientation is “not as bad” as discrimination on some other basis. There is no textually coherent way to distinguish the Ordinance’s classifications to allow some discrimination but not all discrimination.

Nor is there a *constitutional* way to accommodate religious objections to some protected classes but not others. The establishment clause of the First Amendment prohibits permissive religious accommodations that benefit believers while burdening others at their expense. *See Caldor*, 472 U.S. at 710; *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n. 8 (1989) (plurality opinion); and *Cutter*, 544 U.S. at 721. And under the Fourteenth Amendment, “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.” *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). Gay people cannot be purposely excluded from anti-discrimination protection. *See Romer*, 517 U.S. at 633.

A religious exception to the Metro Ordinance must apply across all protected classifications, even if it would be awkward to admit. It is no answer to say that religious objections to racial equality are rare. They are not rare historically. For decades, American courts, relying on Biblical law and Christian custom, affirmed the flurry of segregationist legislation passed in the wake of the Civil War. In 1867, the Pennsylvania Supreme

Court held that “[t]he natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures.” *West Chester & P. R. Co. v. Miles*, 55 Pa. 209, 213 (Pa. 1867) (upholding a separate coach law). Four years later, the Indiana Supreme Court agreed, upholding racial segregation in marriage as a rightful part of “a public institution established by God himself” as “recognized in all Christian and civilized nations....” *State v. Gibson*, 36 Ind. 389, 403 (Ind. 1871) (citing *Miles*). Seven years after *Gibson*, the Virginia Supreme Court denounced interracial marriage as one of various “connections and alliances so unnatural that God and nature seem to forbid them” and held that “public morals ... and the highest advancement of our cherished southern civilization” demanded its prohibition. *Kinney v. Commonwealth*, 71 Va. 858, 869 (Va. 1878).

This judicial ratification of religious excuses for Jim Crow continued long past the end of Reconstruction. For example, in 1905, the Kentucky Court of Appeals upheld a state law prohibiting integrated private schools because “[t]he separation of the human family into races ... is as certain as anything in nature. Those of us who believe that all of this was divinely

ordered have no doubt that there was wisdom in the provision....” *Berea College v. Com.*, 94 S.W. at 626. Less than a decade later, that same court for the same reasons upheld a Louisville ordinance mandating housing segregation. *Harris v. City of Louisville*, 177 S.W. 472, 477 (Ky. 1915) (quoting *Miles* and *Berea*). In 1955, one year after *Brown v. Board of Education*, 347 U.S. 483 (1954), the Virginia Supreme Court upheld that state’s anti-miscegenation statute, approvingly quoting the Biblical references made in prior cases such as *Gibson* and *Kinney*. See *Naim v. Naim*, 197 Va. 80, 89 (Va. 1955). Four years later, a Virginia state trial judge upheld the conviction of Mildred and Richard Loving under that same law—and in no uncertain terms: “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages.” *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting the lower court). No doubt the judges who wrote these opinions were sincere in their beliefs.

Nevertheless, the Supreme Court firmly renounced religion-based racial discrimination in *Loving*, and since then legal efforts to carve religious exceptions to anti-discrimination laws have uniformly failed. In

1968, the Court denounced a religious objection to serving Black customers as “patently frivolous.” *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 403 n. 5 (1968). More than a decade later, the Court rejected a religious objection to federal tax rules that denied nonprofit status to a private university, holding that the government’s interest in prohibiting racial discrimination “substantially outweighs whatever burden [it] places on petitioners’ exercise of their religious beliefs.” *Bob Jones Univ.*, 461 U.S. at 604. And, just five years ago, the Supreme Court affirmed that “while ... religious and philosophical objections are protected [by the First Amendment], it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (citing *Newman*).

In its decision now on appeal, the District Court acknowledged none of this history and confronted none of these cases. That silence makes it unclear whether the District Court intended to jettison decades of precedent to carve a blanket exception to all public accommodation laws for any religious objector under KRS 446.350. It is also unclear whether that

exception extends only to sexual orientation discrimination; the District Court left unexplained whether its ruling would apply to other cases, such as “the photographer [who] refuses to photograph an interracial wedding.” Order, RE 47, PageID # 1221 n. 133.

As it stands, the District Court’s ruling in this case implies that public accommodation laws should not apply to any merchants who express any kind of religious objection to serving certain customers. That implication is dire. If Plaintiff/Appellee Nelson must be allowed to turn customers away because of their sex or sexual orientation, other merchants must be allowed to turn customers away because of their race, color, national origin, their status as disabled, or, ironically, their religion. Nelson herself could fall victim to a merchant religiously opposed to serving Christians, and the government would be powerless to protect her. Affirming the court below would effectively repeal public accommodation laws and negate many decades of consistent Supreme Court precedent that has so far prevented a backslide to Jim Crow. Instead, this Court should reverse.

## CONCLUSION

For the above reasons, the District Court erred when it ruled that KRS 446.350 requires a religious exception to the Louisville Metro Fairness Ordinance and this Court should reverse.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. of App. P. 29(a)(5). This brief contains 6117 words, excluding the parts of the brief exempted by Fed. R. of App. P. 32(f).

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Dated: January 30, 2023.

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on January 30, 2023.

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Dated: January 30, 2023