Nos. 22-5884 / 22-5912

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

On Appeal from the United States District Court
for the Western District of Kentucky
Case No. 3:19-cv-00851

THIRD BRIEF OF APPELLANTS / CROSS-APPELLEES LOUISVILLE-JEFFERSON COUNTY, KY METRO GOVERNMENT, ET AL.

John F. Carroll, Jr.
ASST. JEFFERSON COUNTY ATTORNEY
MICHAEL J. O'CONNELL
JEFFERSON COUNTY ATTORNEY
200 South 5th St., Suite 300N
Louisville, KY 40202
(502) 574-6321
john.carroll2@louisvilleky.gov

Casey L. Hinkle
KAPLAN JOHNSON ABATE & BIRD LLP
710 W. Main St., 4th Floor
Louisville, KY 40202
(502) 416-1636
chinkle@kaplanjohnsonlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Ordinances

SUMMARY OF THE ARGUMENT

This case presents an abstract and entirely hypothetical pre-enforcement challenge to Louisville Metro[1]'s public accommodations law. The law does not target expression or burden the exercise of religion. Like antidiscrimination laws which have been upheld and enforced by courts for decades, Louisville Metro's law merely requires that goods and services which a public accommodation chooses to offer for sale to the general public not be denied to particular customers on the basis of their sexuality and other protected characteristics. The District Court's summary judgment and permanent injunction enjoining application of Louisville Metro's antidiscrimination law to Chelsey Nelson[2]'s wedding photography business based on her objection to same-sex marriage must be reversed.

The District Court's rulings challenged by Nelson's cross-appeal must be affirmed. The District Court did not abuse its discretion in denying Nelson's motion to supplement the summary judgment record where the Court had already decided to grant Nelson the relief she sought without considering the supplemental documents. Nelson has no standing to assert a facial challenge to that part of Louisville Metro's law which prohibits public accommodations from

[1] "Louisville Metro" means Defendant-Appellant Louisville-Jefferson County, KY Metro Government.

[2] "Nelson" collectively means Plaintiff-Appellees Chelsey Nelson, individually, and her photography business Chelsey Nelson Photography LLC.

communicating that customers are unwelcome based on their protected characteristics. Nor has Nelson demonstrated that the law suffers from substantial overbreadth or is so standardless that it warrants the strong medicine of facial invalidation. Finally, the District Court correctly dismissed Nelson's claim for damages. She has no proof of lost business opportunities. It would be wildly speculative to award damages based on Nelson's self-imposed decision to scale back marketing activities, particularly where Nelson was never the subject of any enforcement activity.

ARGUMENT

I. The District Court Erred in Deciding that Nelson Has Standing to Pursue Her Claims.

It is Nelson's "burden" to prove that she has standing by identifying "specific" evidence supporting her invocation of federal jurisdiction.[3] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Because Nelson has not and cannot do that, she resorts to presenting a misleading description of her business, mischaracterizing Louisville Metro's Ordinance[4], and invoking instances of other jurisdictions

[3] Nelson argues that the only way for Louisville Metro to prevail on the issue of standing is for it to "disavow[] enforcement or establish[] that the law is unused." Second Brief, p. 40. That argument flips the burden of proof; Nelson has the burden to establish standing.

[4] The "Ordinance" means Louisville Metro Ordinance § 92.05(A) & (B). A complete copy of Louisville's antidiscrimination law was filed with the District Court as RE 97-1.

enforcing other antidiscrimination laws, which cannot, as a matter of law, be used to prove that *Nelson* faces a credible threat of enforcement under *Louisville Metro's* Ordinance.

Nelson would like the Court to believe that she has a thriving wedding photography business that may at any moment receive a request to photograph a same-sex wedding. *See* Second Brief[5], p. 29 (asserting that Nelson was "forced" to file this lawsuit because she "could [not] continue to live under the constant threat posed by Louisville's laws"). In reality, Nelson has only ever professionally photographed six weddings as primary shooter and five weddings as a second shooter for other photographers since she started her photography business in 2016. She has never been asked to photograph a same-sex wedding. Since filing the Complaint on November 19, 2019, Nelson has photographed just two weddings, one in the same month the Complaint was filed and a second in June 2021. Nelson has apparently not photographed a single wedding in the nearly two years since June 2021. *See* Nelson's Blog (where she posts pictures from each wedding she photographs), available at: https://www.chelseynelson.com/blog. As such, it is not even clear that Nelson still has an active wedding photography business, much less a business likely to be asked to photograph a same-sex wedding. In this

[5] Citations to Nelson's Second Brief are to Sixth Circuit Document No. 38. Page references are to the ECF-generated page number.

circumstance, Nelson cannot prove that she faces a "credible threat of prosecution." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979); *see also Davis v. Federal Election Com'n*, 554 U.S. 724, 733 (2008) ("an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed" (citation omitted)).

Nelson exaggerates what is prohibited by the Ordinance to suggest that it abridges her "freedom to speak ideas" or "publicly proclaim her beliefs about God's design for marriage" and "ban[s] her editorial policy." Second Brief, pp. 19, 29, 49. The Ordinance does no such thing. The Ordinance does not prohibit Nelson from advertising her religious beliefs or communicating those beliefs to potential customers. Only that portion of Nelson's marketing statement which states "I don't photograph same-sex weddings" (Ex. 1 to Verified Complaint, RE 1-2, PageID # 58) violates the Publication Provision. *See* Louisville Metro Ordinance § 92.05(B). The Ordinance has no application whatsoever to Nelson's "editorial policy." Nelson would only violate the Accommodations Provision by refusing to provide a service she offers to the general public on the basis of a protected class. *See* Louisville Metro Ordinance § 92.05(A).

Indeed, before she was represented by Alliance Defending Freedom ("ADF"), Nelson advertised her religious beliefs for years without directly stating that she would refuse services relating to a same-sex wedding. Deposition of Chelsey Nelson

("Nelson Tr."), RE 97-7, PageID # 3979-3981, 3992-3993, 3999. Nelson's website described her as having a "heart for Jesus" and under the heading "I believe" stated: "I believe God's vision for marriage is beautiful" and "I believe in spreading the truth and love of Jesus." *Id.*, PageID # 3999. None of these statements are subject to the Ordinance and Nelson is free to continue to proclaim her religious beliefs however she chooses.

This is relevant to the analysis of Nelson's standing because this freedom to advertise her religious beliefs makes it extremely unlikely that Nelson would ever be asked to photograph a same-sex wedding. *See Hyman v. City of Louisville*, 53 Fed. Appx. 740, 744 (6th Cir. 2002) (dismissing for lack of standing the only prior constitutional challenge to Louisville Metro's antidiscrimination law because plaintiff's views with respect to homosexuals were "known in the community," no homosexuals had ever applied to work for plaintiff during the history of his practice, and therefore plaintiff "did not have any real expectation" of being presented with a real-world opportunity to violate the ordinance).

Nelson also mischaracterizes the Ordinance by claiming that she is the "object" of the law and therefore deserves a "presumption" of enforcement. *See* Second Brief, pp. 38-41. There is no legal authority for Nelson's argument that the Court can bypass the multi-factored standing analysis required by *McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016), even if the law is targeted at plaintiff.

A plaintiff bringing a pre-enforcement challenge must establish "some combination of the following factors: (1) a history of past enforcement against the plaintiffs or others; (2) enforcement warning letters sent to the plaintiffs regarding their specific conduct; and/or (3) an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action." *Id.*

Moreover, it simply is not true that the Ordinance is targeted at Nelson. The Ordinance applies to all public accommodations, defined 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." Louisville Metro Ordinance § 92.02, RE 97-1, PageID # 3849. The Ordinance plainly is not targeted at photography businesses, wedding-related businesses, creative professionals, or religious objectors. Further, there is no evidence that the Ordinance has *ever* been enforced against a photographer or any wedding-related business.

For standing analysis, there is a difference between being within a broad group of individuals or businesses to whom a law applies, and being an individual or business who is specifically targeted by the law being challenged. *See Plunderbund Media, L.L.C v. DeWine*, 753 Fed. Appx. 362, 372 (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). The Ordinance does not specifically target Nelson's photography business. She must, therefore, do more to establish that she faces a credible threat of enforcement.[6]

In Louisville Metro's First Brief, it observed that there is no precedent in the Sixth Circuit for 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. Nelson has failed to identify any such precedent in her Second Brief. Every case cited by Nelson in support of the argument that she is entitled to a presumption of enforcement because she is the "object" of the Ordinance is plainly distinguishable. Instead, these cases support Louisville Metro's position that the Ordinance does not target Nelson's photography business by providing counterexamples of targeted laws. *See Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988) (booksellers had standing to challenge law prohibiting display for commercial purpose of written material depicting sexually explicit

[6] *Lujan*'s reference to being the "object of the action" does not help Nelson. In that case, the Supreme Court held that an environmental group lacked standing to challenge a rule promulgated by the Secretary of Interior which interpreted the Endangered Species Act to apply only within the United States or on the high seas. *See* 504 U.S. 555. The Court observed that when the law being challenged regulates *someone other than the plaintiff*, i.e. when the plaintiff is not "an object of the action," establishing standing is "substantially more difficult." *Id.* at 561-62. Of course, that observation does not mean that all plaintiffs who are within a broad group to whom the law applies always have pre-enforcement standing.

conduct because the law was "aimed directly at plaintiffs" and included criminal penalties); *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1394-95 (6th Cir. 1987) (abortion clinic had standing to challenge a fetal disposal ordinance); *Babbitt*, 442 U.S. at 299 (farmworkers union had standing to challenge provisions of Arizona's farm labor statute regulating procedures for election of employee bargaining representatives and limiting union publicity); *Doe v. Bolton*, 410 U.S. 179, 187 (1973) (abortion providers had standing to challenge statute imposing criminal penalties if provider procures an abortion that does not meet the statutory exceptions and conditions); *Doster v. Kendall*, 54 F.4th 398 (6th Cir. 2022) (challenge by Air Force service members to Department of Air Force order that all service members must get vaccinated against COVID-19); *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1034-35 (6th Cir. 2022) (citing evidence that statute prohibiting persons who received their ordinations online from performing civil marriages was targeted at ministers from Universal Life Church); *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 696 (6th Cir. 2015) (minor political parties had standing to challenge statute explicitly establishing ballot access rules for "recognized minor part[ies]"); *Platt v. Board of Com'rs on Grievances and Discipline of Ohio Supreme Court*, 769 F.3d 447 (6th Cir. 2014) (prospective judicial candidate had standing to challenge provisions of Ohio Code of Judicial Conduct setting forth rules for endorsements and solicitation of campaign

funds); *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (challenge by abortion providers to Texas law enforceable through private civil actions which made it illegal to perform an abortion if the physician detects a fetal heartbeat); *Kentucky v. Yellen*, 54 F.4th 325 (6th Cir. 2022) (challenge by Kentucky and Tennessee to requirement in American Rescue Plan Act of 2021 that states certify compliance with the Act's "Offset Provision" in order to get or keep funds distributed under the Act). Because the Ordinance does not target Nelson's photography business, there is no basis in fact or law to relieve Nelson of her burden of proof by applying a "presumption" of enforcement.

There is no evidence that Louisville Metro has ever enforced the Ordinance against a wedding-related business for refusing to provide services to a same-sex wedding. Because Nelson has no evidence to justify a credible threat of enforcement of Louisville Metro's antidiscrimination against her photography business, she focuses on enforcement of other laws by other jurisdictions. *See* Nelson Decl. ¶ 412, RE 92-2, PageID # 2882 (describing becoming aware of enforcement of antidiscrimination laws in Colorado, Arizona, Minnesota, and Lexington, Kentucky); Second Brief, p. 36 (asserting that "governments have fined and ruined businesses that share Nelson's beliefs" despite utter lack of evidence that Louisville

Metro's Ordinance has been used to "ruin" any business,[7] much less a wedding-related business with a religious objection to same-sex marriage). There is no legal basis to consider enforcement history from other laws and jurisdictions in the analysis of pre-enforcement standing. *See McKay*, 823 F.3d at 870 (focusing analysis of past enforcement narrowly on the order being challenged by the plaintiff in that case).

Nelson's counsel, ADF, invokes *National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415 (1963) in defense of its national strategy of using manufactured cases to expand religious exemptions to antidiscrimination laws. That case recognized that the NAACP has rights of association and expression that protect its advocacy through representation of individual clients. Louisville Metro is not challenging ADF's right to advocate. But it is salient to the analysis of Nelson's standing that ADF has filed identical pre-enforcement challenges throughout the country based on similar threadbare allegations of credible threat of enforcement. ADF is abusing pre-enforcement standing doctrine to develop a new body of law

[7] In reality, violators of the Ordinance generally pay modest settlement amounts, if any monetary amount at all. *See* First Brief, p. 26. Nelson points to one $23,000 settlement of a claim of discrimination on the basis of sexual orientation reached in 2010-2011, which is presumably the largest monetary settlement Nelson could find in the voluminous enforcement records produced by Louisville Metro. Nelson claims that is a "steep price for free speech." Second Brief, p. 48. But there is no evidence in the record of the nature of the discrimination alleged in that case or any basis to assert that it implicated the respondent's free speech rights.

with sweeping consequences, all in the name of figurehead plaintiffs who have never been harmed. *See Telescope Media Group v. Lucero*, 2021 WL 2525412, at *3 (D. Minn. Apr. 21, 2021) (granting ADF's motion to voluntarily dismiss on remand from the Eight Circuit because the plaintiff was no longer in the wedding video business and lamenting the litigation of a "smoke and mirrors case or controversy . . . conjured up by [ADF-represented] Plaintiffs to establish binding First Amendment precedent rather than to allow them to craft wedding videos, of which they have made exactly two").

This case, filed in the name of a wedding photographer who has photographed two weddings in the span of the last four years, challenging a general public accommodations law that has never been enforced against a wedding-related service provider, is exactly the sort of abstract and hypothetical dispute standing doctrines are meant to gatekeep. The District Court's holding that Nelson has standing must be reversed and her claims dismissed for lack of a real case and controversy.

II. The District Court Erred in Deciding that Nelson's Claims Are Ripe.

Nelson's claim is "anchored in future events that may not occur as anticipated, or at all" (*Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997))—i.e., that she would be asked to provide services for a same-sex wedding and would refuse to provide those services on the basis of her religious objection to same-sex marriage. By deciding Nelson's claim based on these hypothetical facts that are

unlikely to ever occur in real life, the District Court improperly entangled itself in an abstract disagreement. *Kentucky Press Ass'n, Inc. v. Kentucky*, 454 F.3d 505, 509 (6th Cir. 2006). Nelson's claims should be dismissed as unripe.

III. The District Court Erred in Deciding that Enforcement of the Ordinance Violates Nelson's First Amendment Right to Free Speech.

A. The Ordinance Regulates Nelson's Conduct, Not the Content of Her Speech.

Nelson argues that her wedding photography is "pure speech." But professional wedding photography is unlike the examples from the cases cited by Nelson because Nelson takes the photographs only after being hired to do so by a customer. *Compare ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915 (6th Cir. 2003) (painting of Tiger Woods replicated and sold by the artist as limited edition prints); *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011) (video games). Nelson is paid to provide the service of documenting a wedding.

Nelson argues that makes the Ordinance an even "more egregious[]" violation of her rights, because she is required to "originate expression" to which she objects. Second Brief, p. 56. But Nelson's photography services are a far cry from what has traditionally been considered expressive activity. *See*, *e.g.*, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (parade); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (sleeping in national park in connection with demonstration intended to call attention to the plight of the

homeless); *Sistrunk v. City of Strongsville*, 99 F.3d 194 (6th Cir. 1996) (political rally). That Nelson *intends* to convey a message with her wedding photography does not convert a generally applicable public accommodations law into a regulation of speech. *United States v. O'Brien*, 391 U.S. 367, 376 (1967) (rejecting the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

Louisville Metro's Ordinance does not regulate what Nelson chooses to offer for sale to the general public. The Ordinance does not target expression. The Ordinance merely requires that Nelson not discriminate among customers on the basis of a protected class. This is a regulation of commercial conduct that Courts have long recognized as an appropriate means of guaranteeing equal access to goods and services. *See*, *e.g.*, *N.Y. State Club Ass'n, Inc. v. New York*, 487 U.S. 1, 6-7, 13-14 (1988) (holding antidiscrimination law governing businesses consistent with First Amendment).

Nelson's argument that, through her professional wedding photography services, she celebrates weddings that are "consistent with her religious beliefs" (Second Brief, p. 53) exposes that Nelson's photography business is not truly a public accommodation. She does not want to offer her services for sale to the "general public." Louisville Metro Ordinance § 92.02 (defining public accommodation as a store or other establishment that "supplies goods or services to

the general public or which solicits or accepts the patronage or trade of the general public"). Nelson wants to photograph weddings of people in her church congregation, or at least within her religious faith. Although this case was filed to assert Nelson's objections to photographing same-sex weddings, Nelson's arguments would also apply to an objection to photographing a Jewish, Muslim, Hindu, or Buddhist wedding.

Nelson compares her pictures of opposite-sex weddings with pictures of same-sex weddings taken by other photographers to argue that the photographs "express a different message." *See* Second Brief, pp. 54-55. Louisville Metro discerns no difference in the "message" conveyed by the photographs. Nelson's argument falls just as flat as a comparison of pictures of white children and black children to suggest they convey a different message, and Courts have long rejected religion as an excuse to discriminate on the basis of race. *See*, *e.g.*, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.5 (1968).

Even though Nelson's work product involves creative decisions, that "hardly means" that any regulation of its business operations "should be analyzed as one regulating [Nelson's] speech rather than conduct." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 62 (2006).

B. The Ordinance Is Not Content- or Viewpoint- Based.

Nelson admits that the Ordinance is facially content-neutral, but argues that the Ordinance compels speech based on content as applied to Nelson. But the Ordinance does not apply to Nelson's photography business "*because of* the topic discussed or the idea of message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). The Ordinance applies to public accommodations regardless of what type of good or service they offer for sale. The Ordinance is a textbook example of a content- and viewpoint-neutral law. *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) ("federal and state anti-discrimination laws" are "an example of a permissible content-neutral regulation of conduct"); *Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez*, 561 U.S. 661, 694-95 (2010) (antidiscrimination laws which require the acceptance of "all-comers" are "textbook viewpoint neutral").

Nelson mischaracterizes the Ordinance by arguing it requires her to "accept all same-sex wedding requests." Second Brief, p. 58. Not so. Nelson is free to establish the terms and conditions on which she is willing to offer her services for sale. If a same-sex couple asks Nelson to provide a service she does not offer for sale to the general public, Nelson does not violate the Ordinance by denying that request. The Ordinance prohibits only a denial on the basis of a protected

characteristic of a request to provide services otherwise offered for sale to the general public.

C. Any Burden on Expression Is Incidental to the Ordinance's Regulation of the Conduct of Providing Goods and Services.

Nelson relies on *Hurley*, 515 U.S. 557, to argue that the Ordinance compels speech, rather than regulates conduct. Louisville Metro's First Brief thoroughly explained why *Hurley* is distinguishable. Nelson cites two Sixth Circuit opinions for the notion that courts have adopted the logic of *Hurley* to prevent antidiscrimination laws from interfering with speech. These citations are puzzling, because neither case involved an antidiscrimination law. *Groswirt v Columbus Dispatch*, 238 F.3d 421 (6th Cir. 2000); *Johari v. Ohio State Lantern*, 76 F.3d 379 (6th Cir. 1996). Both cases affirmed dismissal of *pro se* complaints seeking relief under 42 U.S.C.A. § 1981 for a newspaper's refusal to publish the plaintiff's letters and articles. Neither case cited *Hurley*. These cases are inapposite.

Nelson argues that she "objects to creating messages, not selling products," but also argues that her product is her message ("[e]ach photograph, edit, and word contributes to this message"). Second Brief, p. 51, 63. Nelson's argument is based on her belief that a photograph of a same-sex couple is a different product than a photograph of an opposite-sex couple. She claims she does not discriminate on the basis of protected class because she would not create a photograph of a same-sex couple for anyone. Nelson's argument is disingenuous. A photograph of a couple

being married is the same product regardless of the gender of the people being married. Just as a photograph of a white child is the same product as a photograph of a black child. Nelson would not argue that a portrait studio could have a "whites only" policy, but there is no coherent distinction between that and the "heterosexual only" policy Nelson asks the Court to sanction here.

The Ordinance affects what public accommodations "*do*—afford equal access . . . —not what they may or may not *say*." *FAIR*, 547 U.S. at 60 (emphasis original). The obligation to serve customers equally is determined by the identity of the customer, not the content of the product. Any effect on speech is entirely incidental.

D. The Ordinance Satisfies Any Level of Scrutiny.

Nelson asserts that there is no historical evidence of similar applications of public accommodations laws. But public accommodations laws have been used to guarantee equal access to goods and services for decades, even where the public accommodation objects under the First Amendment. *See* First Brief, p. 33 (citing cases); *see also Emilee Carpenter, LLC v. James*, 575 F. Supp. 3d 353, 377 (W.D.N.Y. 2021) (describing how application of public accommodations laws to expressive goods and services is consistent with historical use of such laws to police ordinary commercial transactions). It is Nelson (really ADF)—not Louisville Metro—that is attempting to change how Courts apply constitutional principles to generally applicable public accommodations laws.

Nelson argues that *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868 (2021), demands that the Court narrowly focus its analysis of government interest on whether Louisville Metro has a compelling interest in denying an exception to Nelson. 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. *Id.* 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 Nelson contains no exceptions, discretionary or otherwise. *See* Louisville Metro Ordinance § 92.05(A) & (B). The District Court agreed. *See* Opinion & Order, RE 130, PageID # 5377 (declining to adopt Nelson's framing of the compelling interest inquiry and finding that Louisville Metro asserted a compelling interest in ensuring its citizens have equal access to publicly available goods and services).

Nelson argues the Ordinance cannot survive strict scrutiny as applied to her because there is no evidence that same-sex couples have experienced problems identifying willing vendors to provide services for their weddings in Louisville Metro. Because same-sex couples have only had the legal right to marry in Kentucky since 2015 (*Obergefell v. Hodges*, 576 U.S. 644 (2015)), 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) until the Supreme Court's ruling in *Obergefell*—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 Nelson argues, 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.

Nelson argues there are less restrictive alternatives that could be used to serve Louisville Metro's interest, but each one involves excluding large swaths of the commercial marketplace from coverage under antidiscrimination laws. As such, none would guarantee equal access to publicly available goods and services. There is a "tight fit" between the kinds of businesses regulated under the Ordinance—those that sell their goods and services to the public—with Louisville Metro's interest in ensuring equal access to publicly available goods and services. *Emilee Carpenter*, 575 F. Supp. 3d at 378 (upholding New York public accommodation law in nearly identical challenge brought by wedding photographer).

The Court should apply rational basis review, which is easily satisfied by the Ordinance's widely accepted nondiscrimination goals. But, even if the Court applies strict scrutiny, the Ordinance must be upheld.

E. The Free Speech Clause Does Not Protect a Public Accommodation's Right to Publish Its Unlawful Policy of Discrimination.

Nelson brings an as-applied challenge to that part of the Publication Provision which prevents a public accommodation from publishing a statement that it will refuse goods and services on the basis of protected class. Louisville Metro Ordinance § 92.05(B). Nelson fails to address the U.S. Supreme Court's explicit disapproval of signs saying "no goods or services will be sold if they will be used for gay marriages," because such signs would "impose a serious stigma on gay persons." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719, 1728-29 (2018). Nothing in the Ordinance prevents Nelson from posting her "comprehensive views on marriage" (Second Brief, p. 68) provided she does not state she will refuse services to homosexual customers. Nelson has no right to advertise an illegal policy of discrimination. *FAIR*, 547 U.S. at 62

IV. The District Court Erred in Deciding that Enforcement of the Ordinance Violates Nelson's Rights Under KRFRA.

To state a cause of action under the Kentucky Religious Freedom Restoration Act ("KRFRA"), KRS 446.350, plaintiff "must first demonstrate that the government *has placed* a substantial burden on the exercise of his religion."

Sutherland v. Kentucky Dep't of Corrections, 2022 WL 17365886, at *3 (Ky. App. Dec. 2, 2022) (emphasis added). Nelson argues that Louisville Metro burdened Nelson's religious exercise by "assessing penalties" against Nelson. *See* Second Brief, p. 69. But Louisville Metro did no such thing. Nelson has never been the target of any enforcement action. Nelson also claims she has been forced to create photographs and blogs that violate her beliefs. *Id.* No, she has not. Not only has Louisville Metro not enforced the Ordinance against Nelson to require her to provide services for a same sex wedding, but Nelson has never even been asked to provide services for a same sex wedding. Nelson cannot pursue a claim under KRFRA by pretending that what she allegedly feared has actually occurred in real life.

Nelson's alleged hypothetical, never-actually-happened "burdens" stand in stark contrast to the examples of burden listed in KRFRA: "A 'burden' shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities." KRS 446.350. These examples constitute actual government action. Because there has been no government action against Nelson, her claim under KRFRA must fail.

Nelson argues that operating her photography studio is a form of religious observance. Second Brief, p. 69. Nelson's argument has no limiting principle. By Nelson's faulty logic, *any law* which imposes *any burden* on her photography studio could trigger a claim under KRFRA. Does the tax code burden Nelson's religious

observance? What about laws regulating the public parks where Nelson may choose to take photographs? If business equals religious observance, how can the government ever impose any regulations on a business?

Common sense requires the Court to analyze the degree of burden on religious observance. If a law does not have the purpose or effect of preventing or dissuading a plaintiff from observing her religious faith, the law should not trigger strict scrutiny analysis under KRFRA. *See Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303, 306-07 (6th Cir. 1983) (affirming dismissal of religious congregation's challenge to city's zoning plan). Not even Nelson contends that the Ordinance was enacted for the *purpose* of preventing religious observance. The Ordinance also does not have the *effect* of preventing Nelson from observing her religious faith.

The Ordinance is a generally applicable public accommodations law which merely requires Nelson to offer her services without regard to protected class. The Ordinance is plainly distinguishable from executive orders restricting church services due to the Covid-19 pandemic. *See*, *e.g.*, *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 612-13 (6th Cir. 2020). In those cases, the government regulation was targeted directly at religious observance, obviously burdening the plaintiffs' freedom to exercise their religion. *Id.* at 611. Nelson has not identified

any precedent for applying KRFRA in the way she asks the Court to apply it in this case, i.e. as a general shield against any regulation of her business.

The District Court's erroneous determination that the Ordinance substantially burdens Nelson's religious beliefs and failure to consider the harms associated with providing religious exemptions to generally applicable public accommodations laws requires reversal of the Court's judgment in favor of Nelson under KRFRA.

V. The District Court Erred in Granting Nelson's Motion to Exclude Expert Testimony from Professor Barak-Corren.

Professor Barak-Corren's opinion is sufficiently reliable and relevant. Nelson's critiques of Professor Barak-Corren's methodology should have affected the weight assigned to her opinion, not its threshold admissibility. *Best v. Lowe's Home Centers, Inc.*, 563 F.3d 171, 181 (6th Cir. 2009). Louisville Metro's First Brief squarely addressed nearly all of Nelson's critiques, which will not be repeated here. Louisville Metro will take this opportunity to address Nelson's suggestion that Professor Barak-Corren's results are explained by regression to the mean, and Nelson's critique that Professor Barak-Corren failed to account for what Nelson characterizes as the "message-based exemption" to the Ordinance granted to Nelson by the District Court's injunction.

Nelson argues that focusing on vendors willing to provide services to same-sex couples in Wave 1 may have created a regression fallacy. But Professor Barak-Corren tested her conclusion against different data sets (a control group of vendors,

businesses that indicated willingness to serve both types of couples pre-*Masterpiece*, and businesses that indicated willingness to serve same-sex couples pre-*Masterpiece*) and all data sets produced the same result, i.e. a statistically significant increase in discrimination against same-sex couples. Barak-Corren Tr., RE 99-2, PageID # 4259-60. Professor Barak-Corren's conclusions were also bolstered by her examination of within business transitions, i.e., an examination of how an individual business changed its response from Wave-to-Wave, which demonstrated that same-sex couples were much more likely to experience negative transitions. *Id.*, PageID # 4260; JLS Paper, RE 99-3, PageID # 4389-91.

Professor Barak-Corren's conclusions are not drawn from changes in responses to same-sex couples from Waves 1/2 to Waves 3/4, but rather from a comparison of responses to identical inquiries from opposite- and same-sex couples in Waves 3/4. If she had tested only responses to same-sex couples in Waves 3/4, then Plaintiffs' argument with respect to regression fallacy may have some merit, but that is not what Professor Barak-Corren did. Absent the *Masterpiec*e effect, the response rates would have been the same for both couple types. Professor Barak-Corren's conclusion that post-*Masterpiece* responses reflects an increase in discrimination against same-sex couples does not depend on any comparison to pre-*Masterpiece* responses.

Professor Barak-Corren's opinions are plainly relevant to this litigation. Nelson's argument that they are is irrelevant improperly assumes her conclusion, i.e. that all declines or non-responses are discriminatory, while Plaintiffs argue that asserting a "message-based objection" to providing services to same-sex couples is not discriminatory. Professor Barak-Corren *made no assumptions* about what she would find when she embarked on the *Masterpiece* experiment. *See* JLS Paper, RE 99-3, PageID # 4363-63; Barak-Corren Tr., RE 99-2, PageID # 4239-40. Indeed, she thought that arguments on both sides of the debate were potentially plausible. *Id.* The opponents of exemptions were arguing that exemptions will expand discrimination towards same-sex couples, and this squares with classic law and economics theories. *Id*. But the proponents of exemptions had an argument that looked plausible as well, a-priori, which is that support for same-sex marriage and homosexuality is rising and that the whole issue of religious objection applies to a negligible minority of businesses and individuals. *Id.* The goal of the *Masterpiece* experiment was to "bring more empirical clarity to normative debates that often have . . . assumptions about consequences . . . that are often just not based on actual evidence." Barak-Corren Tr., RE 99-2, PageID # 4239.

Professor Barak-Corren hoped to explore the distinction Plaintiffs highlight, i.e. refusals to provide a service to a same-sex couple due to a "message-based objection" rather than discriminatory animus towards same-sex couples. To her

disappointment, vendors did not make this distinction in their responses to inquires sent during the *Masterpiece* experiment, for example by offering to provide off-the-shelf products to same-sex couples instead of a custom wedding cake. *Id*., PageID # 4273-74. More importantly, there is no difference in the impact to same-sex couples between a "message-based objection" and a refusal of service due to discriminatory animus.

For these reasons and those set forth in Louisville Metro's First Brief, the District Court abused its discretion in excluding Professor Barak-Corren's expert opinion.

VI. The District Court's Denial of Nelson's Motion to Supplement the Record Must Be Affirmed.

During the trial court proceedings, Nelson sought an extremely broad scope of discovery from Louisville Metro, including nearly all case files from complaints of discrimination received by Louisville Metro over the ten years prior to Nelson's requests. Motion to Compel, RE 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. Motion for Protective Order, RE 64. The Magistrate Judge ultimately granted in part and denied in part Nelson's motion to compel discovery with a lengthy, reasoned opinion. Opinion & Order, RE 89. Louisville Metro was compelled to retrieve and

produce voluminous case files from archives with redactions intended to minimize the infringement on third-party privacy interests. *Id.*

Presumably due to Nelson's arguments that such discovery was relevant and indeed essential to resolving her claims, the Court stayed the dispositive motion deadline to allow discovery to be completed before the parties filed any motions for summary judgment. Order, RE 88. Nelson did not wait. Instead, Nelson 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. Resp. to Mot. for Summary Judgment, RE 104, PageID #4564.

After the parties' cross-motions for summary judgment were fully briefed, Nelson filed a motion to supplement the summary judgment record with just 162 of the 13,536 pages of case files produced by Louisville Metro. Mot. to Supp., RE 119. Louisville Metro opposed Nelson's motion on grounds that Nelson should be estopped from supplementing the summary judgment record given her election to file a summary judgment motion before the case files were produced, and also because the case files were irrelevant to Nelson's claims. Resp. to Mot. to Supp., RE 120.

The District Court ruled on Nelson's motion to supplement the same day it ruled on the parties' cross-motions for summary judgment. Opinion & Order, RE 130; Text Order, RE 131. The Court denied Nelson's motion to supplement because

it had already granted Nelson's motion for summary judgment, without considering the supplemental documents proffered by Nelson. Text Order, RE 131.

Nelson argues that the District Court's denial of her motion to supplement should be reviewed *de novo* because it was based on a determination that Nelson's motion was moot. Nelson is wrong. The Sixth Circuit reviews rulings on motions to supplement the record only for abuse of discretion. *See Duha v. Agrium, Inc.*, 448 F.3d 867, 882 (6th Cir. 2006); *Haywood v. DeJoy*, 2022 WL 16647967, at *2 (6th Cir. Oct. 6, 2022). There can be no serious contention that the District Court abused its discretion in denying Nelson's motion. The Court had already issued a ruling in Nelson's favor pursuant to Fed. R. Civ. P. 56 without considering the supplemental evidence. The summary judgment ruling resolved all claims in the litigation. The District Court correctly held that Nelson's motion to supplement was therefore moot.

Nelson cites the supplemental documents throughout her Second Brief to make arguments and draw inferences that are unwarranted by the case files themselves. *See* Resp. to Mot. to Supp., RE 120 (explaining in more detail how Nelson mischaracterizes these cases). These case files would have been irrelevant to Nelson's claims even if they had properly been before the District Court, but this appeal is certainly not the venue to relitigate Louisville Metro's handling of discrimination complaints filed by third parties which have nothing to do with Nelson's wedding photography business. The District Court did not abuse its

discretion. It would be improper for this Court to accept Nelson's invitation to consider the supplemental evidence for the first time on appeal. *See Abu-Joudeh v. Schneider*, 954 F.3d 842, 848-49 (6th Cir. 2020) (new evidence should not be considered for the first time on appeal).

VII. Nelson's Facial Challenge to the Unwelcome Clause Must Be Rejected.

Nelson asserts that the "Unwelcome Clause" in Louisville Metro's Ordinance is facially unconstitutional because it is overbroad and vague. The Unwelcome Clause is that part of the Publication Provision which makes it unlawful for a public accommodation to communicate that "patronage of, or presence at" a public accommodation "is objectionable, unwelcome, unacceptable, or undesirable" on account of the individual's "race, color, religion, national origin, disability, sexual orientation or gender identity." Louisville Metro Ordinance § 92.05(B), RE 97-1, PageID # 3853-54.

At the preliminary injunction stage, the District Court rejected Nelson's facial challenge on its (lack of) merits. *See* Order Granting Nelson's Motion for Preliminary Injunction, RE 47, PageID # 1225 (rejecting Nelson'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*, 138 S. Ct. at 1728-29 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").

Nelson devoted very little attention to her facial challenge before the District Court, using less than two pages for the facial challenge in her motion for summary judgment (RE 92-1, PageID # 2829-30), and just one paragraph in her summary judgment reply brief. RE 104, PageID # 4580. In its summary judgment ruling, the District Court declined to decide Nelson's facial challenge because the argument was "largely unbriefed" and because Nelson obtained the relief she sought through other claims. RE 130, PageID # 5390.

Nelson now reasserts her facial challenge to the Unwelcome Clause, largely based on documents that were the subject of Nelson's denied motion to supplement the summary judgment record. The documents are therefore not properly before this Court. *See* Argument VI, *supra*. Nelson's facial challenge to the Unwelcome Clause should be denied for that reason alone.

Nelson also lacks standing to bring a facial challenge to the Unwelcome Clause. Nelson "bears the burden of showing that [s]he has standing for each type of relief sought." *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009). Nelson argues that the prohibition on statements which indicate that the presence of individuals in protected classes is "objectionable, unwelcome, unacceptable, or

undesirable" is overbroad and vague. But there is no dispute that Nelson's statement on her website ("I don't photograph same-sex weddings" (Ex. 1 to Verified Complaint, RE 1-2, PageID # 58)) violates the Ordinance. *See* Metro Ordinance § 92.05(B) (prohibiting notices which indicate that the services of a public accommodation "will be refused, withheld, or denied an individual on account of" his/her sexual orientation).

As such, Nelson lacks standing to bring a facial constitutional challenge. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151-52 (2017) ("[A] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim." (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010)); *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1189-90 (10th Cir. 2021) (rejecting overbreadth and vagueness challenges to unwelcome provision in antidiscrimination law because plaintiff's intended conduct would plainly violate prohibition on statements indicating refusal of services); *United States v. Kernell*, 667 F.3d 746, 750 (6th Cir. 2012) ("Even if a statute might be vague as it relates to other, hypothetical [individuals], courts will not entertain vagueness challenges on behalf of [an individual] whose conduct clearly falls within the ambit of the statute."); *McKay*, 823 F.3d at 871 (dismissing facial challenge to order because the prohibitions in the order were not vague with respect to plaintiff's proposed conduct); *see also Emilee Carpenter*, 575 F. Supp. 3d at 385 (rejecting facial

vagueness challenge to unwelcome clause in public accommodations law because plaintiff's intended conduct was clearly proscribed by the statute).

Even if the Court reaches the merits of Nelson's facial challenge to the Unwelcome Clause, Nelson's claim must fail. Invalidating a statute based on a facial challenge is "strong medicine that is not to be casually employed." *United States v. Williams*, 553 U.S. 285, 293 (2008) (internal quotation omitted). Nelson's claim implicates the reasons facial challenges are generally "disfavored," i.e. because they "often rest on speculation" and "raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation omitted). "Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* (internal quotation omitted). Facial challenges also threaten the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. *Id.* at 451. The Sixth Circuit applies these principles even in free speech cases. *Connection Distributing Co. v. Holder*, 557 F.3d 321, 336 (6th Cir. 2009).

A plaintiff asserting a facial challenge must prove that a statute's overbreadth is "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. *Williams*, 553 U.S. at 292; *Virginia v. Hicks*, 539 U.S. 113, 120 (2003); *Parker v. Levy*, 417 U.S. 733, 760 (1974) ("This Court has repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct." (internal quotations omitted)). Nelson has not and cannot carry this substantial burden.

Nelson argues that the plain terms of the Unwelcome Clause are "hopelessly oppressive." Second Brief, p. 87. Not so. The U.S. Supreme Court has recognized that states and municipalities may prohibit advertisements of an intent to engage in illegal discrimination without running afoul of the First Amendment. *See Masterpiece Cakeshop*, 138 S. Ct. at 1728-29 (signs saying "no goods or services will be sold if they will be used for gay marriages" may be prohibited as such signs would "impose a serious stigma on gay persons"); *FAIR*, 547 U.S. at 62 (law may prohibit "a sign reading 'White Applicants Only'").

In the context of the Publication Provision, the Unwelcome Clause plainly prohibits advertising or signs which, although they do not explicitly state that goods and services will be denied to members of a protected class, convey that patrons within the protected class are not welcome to purchase the goods or services offered by the public accommodation.[8] For example, a sign that says "we don't want any blacks in our store" violates the Unwelcome Clause even though it does not expressly state that the store will refuse to sell to black patrons. One could easily imagine hundreds of scenarios where the Unwelcome Clause could be enforced without running afoul of the First Amendment, e.g., "Jews are not accepted here," "gay people get out," "no wheelchairs allowed."[9] Nelson has not and cannot establish that the Unwelcome Clause is unconstitutional in a "substantial" number

[8] The Unwelcome Clause is easily distinguishable from the laws at issue in the cases cited by Nelson, which regulated speech itself rather than access to goods and services. *See*, *e.g.*, *Gooding v. Wilson*, 405 U.S. 518 (1972) (challenge to statute making it a misdemeanor to utter "opprobrious words or abusive language, tending to cause a breach of the peace"); *Saxe v. State College Area School Dist.*, 240 F.3d 200 (3d Cir. 2001) (challenge to school's anti-harassment policy, which prohibited harassment on the basis of a broad range of characteristics, including the student's values).

[9] Nelson makes a straw man argument based on the bald assertion that a pro-Israel sign, an All Lives Matter window decal, or a physician's op-ed criticizing cross-sex hormones would violate the Unwelcome Clause. There is no evidentiary basis to suggest that Louisville Metro would interpret those examples as violations of the Unwelcome Clause.

of applications relative to the law's "plainly legitimate sweep." *Williams*, 553 U.S. at 292.

Nelson argues that the Unwelcome Clause is unconstitutionally vague and grants "unbridled enforcement discretion." The standard is not linguistic perfection, but whether a "person of ordinary intelligence" has "fair notice of what is prohibited." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (quoting *Williams*, 553 U.S. at 304). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). A statute is impermissibly vague only where it is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 U.S. at 304.

The Unwelcome Clause is not impermissibly vague. Each of the words challenged by Nelson—objectionable, unwelcome, unacceptable, or undesirable—have a plain and ordinary meaning that, particularly in the context of the Ordinance read as a whole, provide ample notice to public accommodations of what is prohibited, and guidance to enforcement authorities regarding what constitutes a violation. "Objectionable" means "undesirable, offensive." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary. "Unwelcome" means "not wanted or welcome." *Id.* "Unacceptable" means "not acceptable; not pleasing or welcome." *Id.* "Undesirable" means "not desirable; unwanted." *Id.* Considering

those terms within the Ordinance, read as a whole, which contains multiple references to commerce and its trappings (i.e., goods, services, patronage), the Unwelcome Clause is clearly intended to prohibit a public accommodation from "placing limits based on membership in a protected class on who may use or purchase their goods and services." *Fort Des Moines Church of Christ v. Jackson*, 215 F. Supp. 3d 776, 797 (S.D. Iowa 2016) (holding, at preliminary injunction stage, that a nearly identical public accommodations law would likely survive facial challenge).

That enforcement authorities may exercise discretion does not render the Unwelcome Clause "so standardless" that it is unconstitutionally vague. *See Ward*, 491 U.S. at 794 (rejecting facial challenge to statute even though standards were "undoubtedly flexible, and the officials implementing them w[ould] exercise considerable discretion"). Nelson's facial challenge to the Unwelcome Clause must be rejected.

VIII. The District Court's Dismissal of Nelson's Request for Damages Must Be Affirmed.

The District Court dismissed Nelson's claim for compensatory and nominal damages in the same ruling in which the Court granted Nelson's motion for a preliminary injunction. Opinion & Order, RE 47, PageID # 1211-12. Nelson seeks compensatory damages for business opportunities allegedly lost due to her decision

to "chill" her speech based on an alleged fear that she would be the target of enforcement action.

An injury sufficient to satisfy Article III must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Moreover, an alleged injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (internal quotation omitted).

Nelson has never identified even a single specific business opportunity she lost due to the Ordinance. She merely alleged that she voluntarily limited the promotion of her photography business and refused to respond to requests posted in an online forum out of fear that she may be asked to provide photography services for a same-sex wedding. *See* Complaint, RE 1, PageID # 30. These allegations are wildly speculative and insufficient, even at the pleading stage, to state a plausible claim.

Nelson's allegations regarding lost business opportunities are also flatly refuted by the subsequent record in this case. The District Court's issuance of an injunction in August 2020 preventing enforcement of the Ordinance against Nelson during the pendency of this litigation created a real-world experiment which serves as a test of Nelson's allegations. After the Court issued the injunction, Nelson

immediately posted her preferred advertising statement, which expressly states that she would refuse services to same-sex couples. In the nearly three years that followed, Nelson has not experienced any growth whatsoever in her business. She has photographed just one wedding. It therefore appears that Nelson's inability to grow her business has nothing to do with the Ordinance. Nelson has failed to credibly allege—and the actual facts that have occurred subsequent to the Court granting Nelson injunctive relief conclusively refute—Nelson's allegation that the Ordinance caused her to lose any business opportunities. There is no basis to reverse the District Court's dismissal of Nelson's claim for compensatory damages.[10] Moreover, Nelson would have no hope of proving entitlement to any compensatory damages on remand.

Nelson invokes *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), to argue that she is entitled to pursue a claim for nominal damages as a remedy for the brief period when she allegedly refrained from marketing her photography business before obtaining injunctive relief from the District Court. However, unlike Nelson, the plaintiff for whom the Court determined nominal damages were appropriate in *Uzuegbunam* had actually been the target of enforcement action. *Id.* at 796-97

[10] Dismissal of Nelson's request for damages arising from her claim under KRFRA must also be affirmed based on principles of sovereign immunity. *Ruplinger v. Louisville/Jefferson Cnty. Metro Government*, 607 S.W.3d 583, 585 (Ky. 2020) (sovereign immunity as to monetary damages is not waived as to KRFRA).

(student was in the midst of speaking about his religion when he was asked by campus police officers to stop speaking). By contrast, Nelson's decision to refrain from advertising her business or pursue business opportunities through an internet forum was just that—her own choice. Louisville Metro did nothing to enforce the Ordinance against Nelson; indeed, Louisville Metro had not heard of Nelson before she initiated this litigation. As such, *Uzuegbunam* provides no authority for an award of nominal damages to Nelson. The District Court correctly relied on *Morrison v. Board of Educ. of Boyd Cnty.*, 521 F.3d 602, 610 (6th Cir. 2008) to hold that nominal damages cannot be used to redress past chill that is self-imposed, without any enforcement action by the defendant.

The District Court's dismissal of Nelson's claim for damages must be affirmed because she failed to plausibly allege that the Ordinance caused her any compensable harm.

CONCLUSION

For the foregoing reasons and those set forth in Louisville Metro's First Brief, this Court should reverse the District Court's grant of summary of judgment to Chelsey Nelson, affirm the District Court's holdings that are the subject of Nelson's cross-appeal, vacate the injunction entered by the District Court, and remand the case to District Court with a direction to enter judgment in favor of Louisville Metro, dismissing Nelson's claims with prejudice.

Respectfully submitted,

/s/ Casey L. Hinkle

Casey L. Hinkle
KAPLAN JOHNSON ABATE & BIRD LLP
710 W. Main Street, 4th Floor
Louisville, KY 40202
(502)-416-1636
chinkle@kaplanjohnsonlaw.com

John F. Carroll, Jr.
ASSISTANT JEFFERSON COUNTY ATTORNEY
MICHAEL J. O'CONNELL
JEFFERSON COUNTY ATTORNEY
200 South 5th Street, Suite 300N
Louisville, KY 40202
(502) 574-6321
john.carroll2@louisvilleky.gov

Counsel for Defendants-Appellants and Cross-Appellees

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set in the Court's December 14, 2022 briefing letter, because it contains 9,200 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Casey L. Hinkle
Counsel for Defendants-Appellants and Cross-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2023, I filed the foregoing with the Court and served it upon opposing counsel by submitting it through the Court's CM/ECF system. All counsel of record are registered ECF users.

/s/ Casey L. Hinkle
Counsel for Defendants-Appellants and Cross-Appellees

ADDENDUM

The following are hereby designated as relevant documents from the trial court record:

Docket No.	Description	Page ID #
1	Verified Complaint	1-53
1-2	Exhibit 1 to Verified Complaint, Same Sex Wedding Statement	57-58
1-3	Exhibit 2 to Verified Complaint, Same Sex Editing Statement	59-60
47	Memorandum Opinion & Order	1202-1228
63	Motion to Compel	1449-1472
64	Motion for Protective Order	1608-1623
64-3	US Dep't of Housing and Urban Dev't Funding Agreement	1712-1725
88	Order	2185
89	Opinion & Order	2186-2219
90	Motion to Exclude	2220-2252
92	Plaintiffs' Motion for Summary Judgment	2793-2798
92-1	Plaintiffs' Brief in Support of Motion for Summary Judgment	2799-2832
92-2	Nelson Declaration	2833-2895
92-7	Kendall Boyd Deposition	3647-3650
96	Defendants' Motion for Summary Judgment	3809-3810
97-1	Louisville Metro Ordinance § 92.01, *et seq.*	3848-3860
97-2	Excerpts from HRC Annual Reports from 1985-1993	3861-3879
97-3	Excerpts of Citizen Testimony	3880-3891
97-4	Jefferson Fiscal Court Ordinance No. 36, Series 1999	3892-3918

Docket No.	Description	Page ID #
97-5	Louisville Metro Ordinance §§ 32.760-761	3919-3921
97-6	HRC Annual Reports from 2012-2014	3922-3965
97-7	Excerpts from Deposition of Chelsey Nelson	3966-4002
97-8	Wedding Celebration Services Agreement	4003-4010
97-9	Affidavit of Kendall Boyd	4011-4015
97-10	Excerpts from Transcript of Preliminary Injunction Hearing (Aug. 7, 2020)	4016-4023
97-11	Professor Barak-Corren's Expert Report	4024-4153
99-1	Professor Barak-Corren's Curriculum Vitae	4213-4223
99-2	Professor Barak-Corren's Deposition Transcript	4224-4275
99-3	JLS Paper	4381-4382
99-4	Margaret E. Tankard & Elizabeth Levy Paluck, The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitudes, 28 PSYCH. SCI. 1334, 1340 (2017)	4406-4417
104	Nelson's Response to Louisville Metro's Motion for Summary Judgment	4536-4582
119	Nelson's Motion to Supplement Summary Judgment Record	4920-4944
120	Louisville Metro's Response to Nelson's Motion to Supplement Summary Judgment Record	5124-5129
130	Opinion & Order	5353-5396
131	Text Order	
132	Judgment	5397
134	Notice of Appeal	5403-5405
137	Notice of Cross-Appeal	5409-5411