

Nos. 22-5884, 22-5912

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

CHELSEY NELSON PHOTOGRAPHY, LLC; CHELSEY NELSON,

Plaintiffs-Appellees / Cross-Appellants,

v.

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

Defendants-Appellants / Cross-Appellees.

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

**APPELLEES'/CROSS-APPELLANTS' RESPONSE TO MOTION
TO REMAND TO DISTRICT COURT**

Jonathan A. Scruggs
Bryan D. Neihart
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
jscruggs@ADFlegal.org
bneihart@ADFlegal.org

John J. Bursch
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

Attorneys for Plaintiffs-Appellees / Cross-Appellants

INTRODUCTION

For almost four years, Louisville has doggedly proclaimed its compelling need to enforce its public-accommodations law to force Chelsey Nelson and her photography studio (together, “Nelson”) to speak Louisville’s messages about marriage. Louisville has declared that its law covers Nelson’s studio *and other online businesses*, Nelson’s actions categorically violate Louisville’s law, and allowing even a single exemption intolerably undermines that law. What’s more, Louisville aggressively enforces its law and argues that it can compel Nelson’s speech even after the Supreme Court rejected legal arguments identical to Louisville’s in *303 Creative v. Elenis*, 143 S. Ct. 2298 (2023). In the face of all this, Nelson reasonably chilled her speech in the past—causing a completed injury—and needs prospective relief because she continues to operate in Louisville and can be punished under its law.

Louisville’s motion to remand should be denied for three independent reasons. First, Nelson is entitled to nominal damages because Louisville’s law objectively caused her to self-censor in the past. That alone requires a merits ruling. Second, under the existing record, Nelson still faces a credible threat justifying injunctive and declaratory relief because she continues to operate in and direct her website to the Louisville market. Third, this Court should consider supplemental evidence that confirms this ongoing threat. Rather than remanding,

this Court should affirm the district court's merits and standing ruling, award damages, and rule for Nelson on the cross-appealed issues.

ARGUMENT

I. Nelson's damage request is not moot because she objectively chilled her speech in the past.

Louisville's law caused Nelson to chill her speech. As a result, she suffered a completed Article III injury for the time she kept silent when she otherwise would have spoken. Nominal damages redress that injury, meaning Nelson's appeal is not moot. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021).

Before Nelson knew about Louisville's law, she was actively trying to expand her photography business. Nelson Decl. ¶¶ 416–426, R.92–2, PageID#2883–2884. That changed in October 2018 when she learned that Louisville's law regulated her desired speech and threatened her with severe penalties. *Id.* at ¶¶ 415, 422–34, PageID#2883–2885. After that, Nelson limited her advertisements and refused to respond to certain photography requests posted in an online forum. *Id.*; Compl. ¶¶ 234–59, R.1, PageID#30–33.

What's more, Nelson wanted to, but did not, post statements explaining what photographs she could and could not create consistent with her beliefs. Nelson Decl. ¶¶ 440–54, R.92–2, PageID#2886–2887; Compl. ¶¶ 250–60, 282–83, R.1, PageID#32–33, 36; Exs. to Compl.,

RR.1–2, 1–3, PageID#57–60. Nelson finalized those exact statements around November 8, 2019. Nelson Dep., R.64–1, PageID#1627. But she didn’t post them until after she won a preliminary injunction in August 2020. Nelson Decl. ¶ 475, R.92–2, PageID#2890.

In these ways, the Accommodations and Publication Provisions harmed Nelson. They prohibited her from saying and posting what she wanted. Nelson.Br.53 (making this point). And she refrained from speaking—and limited her speech—to avoid prosecution under Louisville’s law. That’s a completed injury. Nelson.4th.Br.28.

Courts regularly award nominal damages in this pre-enforcement context, i.e., when speakers *objectively* chill their speech to avoid prosecution. *E.g.*, *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 804 (7th Cir. 2016) (awarding nominal damages for past chill after challenged law was changed because “the chilling effect of a statute that violates the First Amendment ... support[s] a [damages] claim.”); *Barilla v. City of Houston*, 13 F.4th 427, 430 (5th Cir. 2021) (reinstating pre-enforcement nominal damages); *Norton v. City of Springfield*, 324 F. Supp. 3d 994, 1000 (C.D. Ill. 2018) (finding pre-enforcement standing to seek nominal damages when plaintiff “did refrain from protected speech” for three months “because of the threat of enforcement of the Ordinance” even though ordinance later repealed); *Trewhella v. City of Lake Geneva*, 249 F. Supp. 2d 1057, 1062 (E.D. Wis. 2003) (similar and awarding nominal damages); *accord* Nelson.Supp.Br.7n.5.

And Nelson’s chill was objectively reasonable. Two district-court judges already said so when they awarded injunctive relief, holding that Nelson faced a credible threat under the Accommodations and Publication Provisions and had established an injury-in-fact. Orders, RR.47, 130, PageID#1209–1211, 5359–5364. The Supreme Court in *303 Creative* found a credible threat in a similar scenario. 143 S. Ct. at 2308–10. That same analysis proves that Nelson reasonably chilled her speech and deserves damages. If Nelson’s reasonable chill before filing the complaint justified standing to obtain injunctive relief, it also justifies standing for damages. The same harm (chilled speech) justifies both types of relief—injunction to stop the ongoing and future harm and damages to remedy that prior harm. *E.g.*, *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 609 n.7 (6th Cir. 2008) (refusing to differentiate injury-in-fact analysis for past or future injury).

Louisville says that Nelson lacks standing for any relief because Louisville has not yet prosecuted an identical comparator, e.g. another “wedding vendor.” Metro.Supp.Br.4. And Louisville demands that Nelson “experience some enforcement activity” before chilling her speech. Oral Arg. Audio at 34:00–34:34, <https://perma.cc/Z9NG-L3LJ>. But courts have repeatedly found standing for plaintiffs to challenge laws (a) before they take effect; (b) without any enforcement history against anyone; and (c) without any enforcement history against identical comparators. What matters—and what the caselaw requires—for

standing is a law that arguably regulates the plaintiff's speech and that the government refuses to disavow.

Start with (a). For over a century, the Supreme Court has allowed challenges to laws before they go into effect—i.e., before they can be or have been enforced against anyone. *E.g.*, *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988) (finding standing “before the statute became effective”); *McCabe v. Atchison, Topeka, & Sante Fe Ry. Co.*, 235 U.S. 151, 158 (1914) (considering challenge to coach law that segregated passengers based on race before it “be[came] effective”).

As for (b), courts often find a credible threat without any enforcement history. *See, e.g.*, *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1035 (6th Cir. 2022) (standing where no minister had ever been prosecuted); *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 696 (6th Cir. 2015) (standing without prior enforcement “against plaintiffs or any other political party”).

And under (c), plaintiffs need not identify previously prosecuted doppelgangers. In *Holder v. Humanitarian Law Project*, for example, a few groups could challenge a law before enforcement based on “several” prior prosecutions of the challenged terms involving “satellite-television services” and “martial arts training and instruction.” 561 U.S. 1, 16 (2010) (citing Br. of Resp. *5, *Holder v. Humanitarian L. Project*, Nos. 08-1498, 09-89, 2009 WL 4951303 (U.S. Dec. 22, 2009) (listing these examples)). The prior prosecutions were unlike the plaintiffs’ desired

activities—assisting through “monetary contributions, other tangible aid, legal training, and political advocacy.” *Id.* at 10. Even so, the Court found standing because of a general enforcement history and the government’s refusal to disavow. This Court applies the same logic. *E.g.*, *Block v. Canepa*, 74 F.4th 400, 406, 409–11 (6th Cir. 2023) (law’s general enforcement supported standing for wine merchant to challenge law despite no enforcement history against wine transportation); *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 546, 550 (6th Cir. 2021) (enforcement against gasoline companies supported hygiene supplier’s standing); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 766 (6th Cir. 2019) (general enforcement of school policy against 16 incidents of unprotected harassment justified student group’s standing to challenge law for chilling protected speech); *Kentucky v. Yellen*, 54 F.4th 325, 337 (6th Cir. 2022) (standing for states to challenge policy that did not specify exactly how it would apply to states because official’s letter said policy would generally be enforced).

This makes sense, especially in the speech context. Otherwise, a city could, for example, pass a law forbidding anyone to communicate about politics. The city could then enforce this law against politicians, and under Louisville’s theory, a leafletter could not challenge the law until the city enforced its law against another leafletter.

For this reason, courts merely require a *credible* threat, not prior prosecution of an identical speaker. And Nelson has shown a credible

threat many times over. Her studio is an object of Louisville’s law, the law arguably proscribes her desired activities, and Louisville never disavowed enforcing its law against her. Nelson.Br.23–27. Beyond that, Louisville actively enforces its law, has investigated 173 sexual-orientation complaints, has prosecuted other public accommodations for their public statements about gender identity and sexual orientation, has admitted its law forbids Nelson’s activities, and allows city officials, testers, and private parties to initiate enforcement easily. Nelson.Br.9, 27, 29, 31–33; Nelson.4th.Br.21–23. (In this respect, Nelson has identified past enforcement against similar comparators: many other public accommodations.)

Louisville tries to avoid this evidentiary iceberg by claiming its law does not “target” Nelson. Metro.3d.Br.5–7. But it does. Louisville has conceded that its law regulates Nelson’s studio and prevents her desired activities. Nelson.Br.21–23; Defs.’ Admissions, RR.92–7, 104–4, PageID#3258–3267, 4596. The law need not mention Nelson or “photographer” by name to create a credible threat. Indeed, at any time during this four-year litigation, Louisville could have disavowed applying its law against Nelson. It didn’t and hasn’t. Instead, Louisville has doubled down at every stage of the proceeding, including on this appeal and in supplemental briefing.

All of this proves that Nelson reasonably chilled her speech from October 2018—when she learned about the law and tried to avoid

prosecution (and surely from November 2019 when she finished drafting her statements)—until the injunction issued in August 2020. She deserves nominal damages for that self-censorship. Those damages mean her case is not moot. After all, “nothing so shows a continuing stake in a dispute’s outcome as a demand for dollars and cents.” *Mission Prod. Holdings, Inc. v. Tempnology*, 139 S. Ct. 1652, 1660 (2019); *Uzuegbunam*, 141 S. Ct. at 802.

Nor does this result open any litigation floodgates. To recover nominal damages for chilled speech at the end of a case, plaintiffs must prove they had standing at the beginning. So for nominal damages, a plaintiff must show that she (a) self-censored (b) in response to an *objectively* credible threat of prosecution. Those requirements prevent just anyone from walking into court and claiming harm. *E.g.*, *Uzuegbunam*, 141 S. Ct. at 802 (rejecting slippery-slope argument); *Six Star Holdings, LLC*, 821 F.3d at 804 (same).

The same guardrails that prevent pre-enforcement plaintiffs from obtaining injunctive relief based on subjective chill also prevent pre-enforcement plaintiffs from seeking damages based on subjective chill. For either injunctive relief or damages in the pre-enforcement context, litigants must meet all requirements for standing. *Cf. Carney v. Adams*, 141 S. Ct. 493, 501–02 (2020) (plaintiff lacked standing when he presented no evidence of his intent to engage in proscribed activity).

This point distinguishes *Morrison*. There, a student lacked standing when he self-censored due to “his own subjective apprehension.” 521 F.3d at 610. His chill was subjective—and therefore unreasonable—because he provided no evidence that the school would have enforced its revoked policy against his speech; quite the opposite, the policy’s text likely exempted his speech. *Id.* Since the student had no standing for any relief, he had no right to nominal damages. *Id.* at 610–11. *Cf. Davis v. Colerain Twp.*, 51 F.4th 164, 176 (6th Cir. 2022) (holding that nominal damages could not redress plaintiff’s non-injury). In contrast, Nelson’s chill was objective and reasonable.

For these reasons, the district court erred in dismissing Nelson’s nominal-damages request. *Uzuegbunam*, announced after that ruling, confirms that. This Court should thus affirm the district court’s ruling that Nelson had standing and reasonably chilled her speech, hold that Nelson’s damages claim is not moot, address the merits of Nelson’s challenge to Louisville’s law, and hold that the law violated her freedom of speech, which entitles her to nominal damages. Other courts follow a similar sequence in similar circumstances. *E.g.*, *Six Star Holdings, LLC*, 821 F.3d at 801–05 (addressing pre-enforcement standing and awarding nominal damages based on un-appealed merits decision); *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010) (addressing standing, mootness and nominal damages, and then merits); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005) (holding

damages claim not moot after graduation, and then addressing merits); *Brandywine, Inc. v. City of Richmond*, 359 F.3d 830, 836 (6th Cir. 2004) (addressing standing, mootness and nominal damages, and then the merits); *Murray v. Bd. of Trs., Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir. 1981) (holding nominal damages claim not moot and remanding to address merits); and *Barilla, Norton, and Trewhella, supra*.

Louisville’s motion to remand never mentions Nelson’s request for damages. The motion should be denied for that reason alone.

II. On the current record, Nelson’s request for prospective relief is not moot because she still faces a credible threat.

Nelson’s requests for declaratory relief and a permanent injunction are not moot on the existing record because Louisville’s law continues to threaten her.

Louisville bears a “heavy” burden to prove mootness. *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022). Louisville must show that “it is impossible for a court to grant” Nelson’s relief. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). Louisville cannot make that showing.

Though Nelson now lives in Florida, her business remains incorporated in Kentucky, organized under Kentucky law, and located in Louisville. Articles of Organization, R.92–5, PageID#2906; Operating Agreement, R.92–5, PageID#2907, 2913. Nelson’s website, blogs, and social media still direct her photography services into Louisville, solicit-

ing clients there. *E.g.*, Website, R.92–5, PageID#2914–2936 (describing self as “Louisville ... photographer and private photo editor); Blogs, RR.92–5, 92–6, PageID#2937–2993 (same); Instagram, R.92–6, PageID#2997, 2999, 3002, 3004. Nelson’s statements about creating photographs consistent with her beliefs remain on her website. Website, R.92–5, PageID#2929–2936. Nelson continues to receive requests through her website. Nelson Decl. ¶¶ 480–481, R.92–2, PageID#2890. And for almost seven years, Nelson grew her business in Louisville. *Id.* at ¶¶ 38–74, PageID#2837–2841. It is no surprise, then, that most of the weddings Nelson has photographed have taken place in Louisville. Decl. of Chelsey Nelson in Supp. of Mot. to Suppl. Record on Appeal (Nelson Supp. Decl.), Ex. A; Defs.’ MSJ, R.97, PageID#3819 (citing but not attaching same below).

At the same time, dissolving the injunction will cause Nelson “immediate and irreparable damage[s].” Nelson Decl. ¶ 491, R.92–2, PageID#2891. She would need to de-publish her studio’s Facebook page, remove her statements explaining her beliefs about marriage, and likely incur other mitigation costs. *Id.* at ¶¶ 492–503, PageID#2892–2893. So Nelson holds a personal stake in the requested equitable relief.

What’s more, Nelson’s activities still arguably violate the law, and she still faces a credible enforcement threat because Louisville has not disavowed enforcing its law against Nelson’s studio, even though she

lives in Florida. So her claims for injunctive and declaratory relief are not moot because relief isn't "impossible." *Chafin*, 568 U.S. at 172.

The reason is that laws like Louisville's regulate actions based not only on where a business *makes* a decision but on where complainants experience its *effects*. Public-accommodation laws often apply to regulate businesses outside a jurisdiction (including out of state) when the effects of a business's decision are felt inside that jurisdiction. *E.g.*, *Bowers v. Nat'l Collegiate Athletic Ass'n*, 151 F. Supp. 2d 526, 532, 536 (D.N.J. 2001) (applying New Jersey Law Against Discrimination for decisions NCAA made outside the state because the alleged discriminatory behavior "was intended or expected to cause injury" in the state). *Accord Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 504–06 (9th Cir. 2000) (applying Title VII's venue provision this way, allowing employee in Washington to sue New Jersey business in Washington); *E.M. v. Shady Grove Reprod. Sci. Ctr. P.C.*, 496 F. Supp. 3d 338, 367, 369–71 (D.D.C. 2020) (applying D.C. Human Rights Act because the "effects' of" a Maryland defendant's decision to terminate the patient relationship were "located in D.C.").

Kentucky's public-accommodation law operates the same way and has been applied to regulate online, out-of-state businesses that direct their services into the forum jurisdiction. In *Jude v. First National Bank of Williamson*, the plaintiff presented no evidence of a West Virginia bank regularly doing business in or deriving substantial

revenue from services in Kentucky. 259 F. Supp. 2d 586, 592–95 (E.D. Ky. 2003). But Kentucky’s law still applied because of the “targeted nature of the [bank’s] web site,” which “focused on conveying to area residents” that the bank “serve[d] the people in” the Kentucky “area, and encourage[d] local area residents to make further inquiry.” *Id.* Accord, e.g., *Romero v. 88 Acres Foods, Inc.*, 580 F. Supp. 3d 9, 13–17 (S.D.N.Y. 2022) (finding jurisdiction to apply New York law to out-of-state distributor that offered goods online); *Harrington v. Airbnb, Inc.*, 348 F. Supp. 3d 1085, 1087, 1092–93 (D. Or. 2018) (applying Oregon law to online platform headquartered in California).

Louisville’s law applies in this typical way too. Louisville admitted that Nelson’s *studio* is a public accommodation without ever qualifying that its status depended on where *Nelson* personally lives. Defs.’ Admissions, R.104–4, PageID#4596; Defs.’ MPI Resp., R.15–1, PageID#772. And its law covers virtual public accommodations. Louisville’s County Attorney—the office responsible for prosecuting discrimination complaints, 30(b)(6) Dep., R.92–7, PageID#3655—explained that:

[w]hile the earliest public accommodations laws reflected an expectation that covered businesses would interact with customers in a *single physical location*, modern realities of commerce in which businesses serve their customers by telephone or *Internet or from varying locations are covered....* Interpreting the subject Ordinance *to include a commercial photography business that provides services to the public and advertises on the Internet* is squarely in line with the modern understanding of ... “public accommodations”

Defs.’ MPI Resp., R.15–1, PageID#773 (emphasis added).

Louisville’s 30(b)(6) witness also never disavowed prosecuting an out-of-county respondent. 30(b)(6) Dep., R.92–7, PageID#3638. This out-of-jurisdiction situation would entail “a legal question” for the “county attorney.” *Id.* And the county attorney says the law regulates internet-based businesses like Nelson’s. Defs.’ MPI Resp., R.15–1, PageID#773.

All this fits Louisville’s espoused theory—oft repeated the past four years—that its law exists to “root[] out all forms of discrimination.” Defs.’ Interrogatory Resp., R.92–7, PageID#3295. To that end, Louisville bans every “single incident of discrimination” and cannot “make one exception.” 30(b)(6) Dep., R.92–7, PageID#3677–3678; Defs.’ Interrogatory Resp., R.92–7, PageID#3296, 3328. A “single” case of discrimination, Louisville said, undermines its “equal access” interest. Defs.’ MSJ, R.97, PageID#3840; Metro.Br.36.

So Louisville cannot logically disclaim its enforcement against businesses whose owners reside elsewhere. Doing so would undermine Louisville’s theory. Imagine if Amazon had no physical store in Louisville but set up a landing page on its website that advertised to Louisville residents and explicitly targeted the Louisville market. Then Amazon posted a statement on that page saying it would not ship or sell to women in Louisville. Louisville surely could enforce its law against Amazon in that scenario. *See Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1230 (9th Cir. 2011) (Florida company could sue Ohio

company in California for posting copyrighted photographs on website because “advertisements [on website] targeted California residents...”). The goal of Louisville’s law is “to safeguard all individuals within Jefferson County from discrimination” Metro Ord. § 92.01. To say Louisville could not regulate businesses specifically directing their websites and actions toward the Louisville market would undercut the ability of Louisville (and countless other jurisdictions) to enforce its laws.

Of course, Nelson does not discriminate against anyone and does not wish to post any statement like the hypothetical one from Amazon. Nelson chooses what to create based on the requested message, not on the requestor’s status. Nelson.Br.8–9, 56–60. But the relevant point for mootness is that Louisville *thinks* that Nelson discriminates and *thinks* her statement is like the one from Amazon. Louisville won’t disavow enforcing against Amazon or Nelson.

We know this because Louisville has already refused to disavow *after Nelson moved*. Three months after Nelson disclosed her move, Louisville’s mayor publicly reiterated the city’s intent to “continue to pursue th[e] case” against Nelson, “defend [its] Fairness Ordinance,” and “fight” the case. *1A Remaking America: The First Amendment and LGBTQ Rights* 3:59-4:41, 5:28-6:06, 8:30-51, NPR (July 13, 2023), <https://perma.cc/RDR5-64B6>. That ongoing defense supports an ongoing

credible threat. *See Speech First, Inc.*, 939 F.3d at 770 (continual defense of “challenged definitions” after repeal supported standing).

And at oral argument before this Court, Louisville conceded that its law applies to businesses residing outside—but doing business within—Louisville. Oral Arg. Audio at 2:30–3:20. Louisville reiterated that its law applies to websites, and it did not disavow enforcing its Publication Provision against Nelson for the published statements directed at Louisville on her website. *Id.* at 5:20–7:40. To be sure, Louisville says it won’t enforce its law against “Florida wedding photographers.” *Id.* at 7:57–8:27. But that evades the question and doesn’t describe Nelson’s situation. Her studio is based in Louisville and advertises and solicits clients there. Louisville never disavows *that*.

Louisville did claim that Nelson’s move lowered the risk of enforcement because she may not be asked to provide services for a same-sex wedding in Louisville. Oral Arg. Audio at 3:40–4:50. But that ignores the fact that Nelson operated in Louisville for almost seven years and established most of her contacts there. Just as important, an imminent request is not necessary for standing. *E.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 156 (2014) (finding standing for injunctive relief despite appellate court’s conclusion that future request was “speculative” based on prior complainant’s move to Africa). Nelson’s policies and statement arguably violate the law now, and Louisville

enforces its law absent requests. *See* Nelson.Br.30–32; *303 Creative LLC*, 143 S. Ct. at 2308 (finding standing without relying on a request).

Indeed, Louisville’s law forbids Nelson from posting her statements on her websites and Louisville could still prosecute Nelson for posting these statements since Nelson’s website intentionally mentions, targets, and advertises toward the Louisville market. After all, Louisville prosecuted Scooter’s Triple B’s and Teen Challenge based solely on *statements they made in public on the internet*. Nelson.Br.9–10; Nelson.4th.Br.6–8, 20–22. That explains why Nelson only asks that Kentucky’s Religious Freedom Restoration Act protect her activities *in Louisville*, not extraterritorially as Louisville claims. Metro.Mot.5–6.

Awarding injunctive relief here does not mean plaintiffs have “nationwide standing to challenge local ordinances.” *Contra* Metro.Mot.4. There is a clear difference between a business that has never operated in a jurisdiction and advertises generally on the internet to no specific location and a business that operates in and directs its activities, advertising, and website to a particular location. *E.g.*, *Maurix Photo*, 647 F.3d at 1231 (distinguishing website with targeted content from merely posting undirected content on website with “universal accessibility”).

Louisville’s own cited cases undercut its nationwide standing argument. For example, Louisville cites *Erickson v. City of Leavenworth*, where a non-resident lacked standing to challenge a city ordinance. 782 F. Supp. 2d 1163, 1168–70 (E.D. Wash. 2011). But that plaintiff never

attempted his proposed activity in the city, did not possess property in the city on which to run a flag to violate the challenged ordinance, and had never been warned that his desired activity violated that ordinance. *Id.* None of this is true of Nelson. All *Erickson* shows is that localities can easily fend off challenges from plaintiffs with no history or future intent of doing business in those localities.

In short, based on the existing record, Louisville’s motion to remand should be denied and the district court’s decision affirmed.

III. Alternatively, this Court should consider additional evidence confirming Nelson’s continued need for prospective relief.

This Court can consider supplemental evidence related to mootness in the first instance. Such evidence confirms Nelson’s continuing need for prospective relief.

When a party raises mootness on appeal, this Court and others allow supplemental evidence. *Davis*, 51 F.4th at 176 (rule change); *Frisch’s Rest., Inc. v. Shoney’s Inc.*, 759 F.2d 1261, 1270–71 (6th Cir. 1985) (agreement); Nelson.Mot.to.Supp.1–2 (collecting cases). Supplementation here tracks this practice.

Louisville’s only argument turns on Nelson’s move out-of-state. Metro.Mot.3–4, 6–7. On that basis, Louisville says Nelson lacks standing for prospective relief and her appeal is moot. *Id.* But as the supplemental evidence explains, Nelson’s *studio* is still based in Louis-

ville, and she has no present intention of reincorporating elsewhere. Nelson Supp. Decl., ¶¶ 2–5, 18–19. Consistent with the record below, Nelson continues to solicit business in Louisville. *Id.* at ¶¶ 16–23. Her website and social media sites target Louisville and will continue to do so. *Id.* at ¶¶ 9–16. And Nelson still receives requests for services from people in Louisville. *Id.* at ¶ 24.

Nelson contracted with a digital marketing specialist who lives in Louisville to develop a strategy to find clients there. *Id.* at ¶ 21; Ex. B. She did so to “attract Louisville-based leads that [Nelson] can convert into wedding celebration or boutique editing services clients.” Ex. B. Nelson spent almost seven years developing her business in Louisville, and she desires to maintain relationships there. Nelson Supp. Decl., ¶ 8. Nelson likewise intends to return to photograph Louisville weddings. *Id.* at ¶ 20.

Nelson’s studio remains active. She’s photographed a wedding in Mississippi and Florida in the last two months. *Id.* at ¶¶ 26–29. And Nelson remains under contract to provide boutique editing services for a wedding photographer client through the end of this year. *Id.* at ¶ 30. With that contract, Nelson will have edited about 40 weddings for that client alone. *Id.*

As this evidence confirms, Nelson still needs prospective relief to stop Louisville from enforcing its law against her studio because she continues to operate her studio in Louisville, advertise there, and solicit

business from Louisville residents. Even if this Court remanded for the district court to conduct limited discovery and determine whether injunctive and declaratory relief is appropriate, it should first decide Nelson's claim for damages, including the merits. (In that situation, discovery would only cover Nelson's policy and practice since moving and Louisville's enforcement policy, practice, and history in that context.) But a remand is unnecessary. The supplemental evidence comes under oath with supporting documentation. Louisville has been clear about how it interprets its law. More fact-finding won't change the material facts, which are not disputed.

CONCLUSION

Louisville has proudly proclaimed and doggedly defended its need to censor and compel Nelson's speech. When Louisville's law properly takes aim at discriminatory conduct, that effort is admirable. But here, Louisville targets Nelson's speech. That's unconstitutional, as *303 Creative* makes clear. And the City's aggressive stance backfires now because it underscores that Nelson reasonably chilled her speech in the past and still needs prospective relief going forward.

This Court should deny Louisville's motion to remand, affirm the district court's injunctive and declaratory relief, facially enjoin the Unwelcome Clause, award Nelson damages, and rule in her favor on the other cross-appealed issues.

Dated: August 25, 2023

Respectfully submitted,

s/John J. Bursch

JOHN J. BURSCH
440 First Street NW, Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

JONATHAN A. SCRUGGS
BRYAN D. NEIHART
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
jscruggs@ADFlegal.org
bneihart@ADFlegal.org

*Attorneys for Plaintiffs-
Appellees / Cross-Appellants*

CERTIFICATE OF COMPLIANCE

This response complies with the Court's Order dated August 1, 2023 because it does not exceed 20 pages, excluding parts of the brief exempted by Fed. R. App. P. 27(a)(2)(B) and 6 Cir. R. 27.

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 this brief has been prepared in Word 365 using a proportionally spaced typeface, 14-point Century Schoolbook.

Dated: August 25, 2023

s/John J. Bursch
John J. Bursch

Attorney for Plaintiffs-Appellees / Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2023, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/John J. Bursch

John J. Bursch

Attorney for Plaintiffs-Appellees / Cross-Appellants