IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Chelsey Nelson Photography LLC, and **Chelsey Nelson**,

Plaintiffs,

v.

Louisville/Jefferson County Metro Government; **Louisville Metro Human Relations Commission-Enforcement; Louisville Metro Human Relations Commission-Advocacy; Kendall Boyd**, in his official capacity as Executive Director of the Louisville Metro Human Relations Commission-Enforcement; and **Marie Dever**, **Kevin Delahanty**, **Charles Lanier**, **Sr.**, **Laila Ramey**, **William Sutter**, **Ibrahim Syed**, and **Leonard Thomas**, in their official capacities as members of the Louisville Metro Human Relations Commission-Enforcement,

Defendants.

Case No. 3:19-cv-00851-JRW

Honorable Justin R. Walker

Plaintiffs' Reply in Support of Their Preliminary Injunction Motion

TABLE OF CONTENTS

Index of Authorities

Cases

Statutes, Codes, and Ordinances

Other Authorities

Introduction

Chelsey Nelson seeks the freedom to decide what to say and which religious ceremonies to participate in.[1] But Louisville says it can compel Chelsey to speak messages against her core convictions, stop her from explaining her religious beliefs to others, and conscript her to participate in religious rituals that violate her faith.

Louisville does all this in the name of stopping discriminatory conduct.[2] But that rationale falls flat. Chelsey does not discriminate. She serves clients no matter who they are. She just declines to convey some messages for anyone, whether they are straight, gay, or anything else. Chelsey no more discriminates than a Muslim printer who serves Jews but cannot write tracts celebrating Judaism for anyone. What's more, Chelsey does not engage in conduct. Her photographs and blogs speak. So her choice to not create them is expressive—exercising her editorial freedom over what she does and does not say. To be sure, Louisville says it can compel this speech if it uses laws that facially regulate conduct. But even these laws can compel speech *as-applied*. The Supreme Court and Sixth Circuit have already said so.

In the end then, Louisville tries to play a labelling game with fundamental freedoms—calling communication conduct and disagreement discrimination. But Louisville "cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). And "[s]peech is not conduct just because the government says it is." *Telescope Media Grp. v. Lucero* (*TMG*), 936 F.3d 740, 752 (8th Cir. 2019). As the U.S. Supreme Court, Eighth Circuit, and Arizona Supreme Court have all held, officials may not use public accommodation laws to compel speech, no matter what labels they use. That principle resolves this case too.

---

[1] Plaintiffs are referenced collectively as "Chelsey."

[2] This brief also responds to amici curiae. *See* Br. of Amici Curiae Am. Civil Liberties Union of Ky. & Am. Civil Liberties Union Supporting Defs. ("ACLU"), ECF No. 18-1; Br. of Faith Leaders & Religious and Civil-Rights Orgs. as Amici Curiae Supporting Defs. Mot. to Dismiss ("AU"), ECF No. 19-1.

Argument

I. The Accommodations Provision compels Chelsey to speak and infringes her editorial freedom.

Beginning with agreements, Louisville does not dispute the three-part test for identifying compelled speech (Pls.' Br. in Supp. of Prelim. Inj. Mot. ("Pls.' Br.") 5, ECF No. 3-1) or any of Chelsey's facts. These facts should therefore "be taken as true." *Corning Glass Works v. Lady Cornella Inc.*, 305 F. Supp. 1229, 1231 (E.D. Mich. 1969) (accepting facts not disputed at preliminary injunction stage).

Louisville even admits that Chelsey's photographing, editing, and blogging are speech and that its law compels Chelsey to photograph same-sex weddings. Defs.' Resp. in Opp'n to Pls.' Mot. for Prelim. Inj. ("Defs.' Resp.") 11, ECF No. 15-1 (photographs may "constitute 'speech'"); *id.* at 10 (calling Chelsey's policy "discriminatory"); *id.* at 13 (Chelsey's photographs require "exercise of artistic judgment" and "editing of images"). And though Louisville never discusses Chelsey's blogging, Louisville's law compels this too. Louisville interprets its law to force Chelsey to provide *any service* for same-sex weddings that she provides for opposite-sex weddings. *Id.* at 15 (law "'compels' Plaintiffs to speak only if, and to the extent, it provides similar services to other clients"); *id.* at 19 (law requires Chelsey to make services "equally available to customers").[3]

So the only dispute is whether Louisville's law forces Chelsey to create photographs and write blogs conveying messages she disagrees with. It does.

---

[3] Amici pretend that Louisville's law excludes Chelsey's blogging by pretending Chelsey does not include blogging in her contracts or offer this service uniformly. ACLU 12. But that's factually wrong on both counts. Decl. of Chelsey Nelson in Supp. of Pls.' Prelim. Inj. Mot. ("Decl.") ¶ 156, ECF No. 3-2; Appendix ("App.") 30, ECF No. 3-4. Amici's factual mistake and Louisville's silence proves that Louisville's law compels Chelsey to create blogs celebrating same-sex weddings because she offers to create blogs celebrating opposite-sex weddings. *See* Defs.' Resp. 19 (Chelsey must make any service "equally available" once offered).

A. Chelsey declines to speak based on message, not status.

As Chelsey explained already, she does not object to serving LGBT clients but to conveying certain messages. Other courts have accepted this message/status distinction. Pls.' Br. 14-15. This Court should too.

But instead of grappling with this distinction or any of Chelsey's cases, Louisville accuses her of choosing clients based on their "conformance or nonconformance" to Chelsey's religious beliefs about marriage (i.e., their conduct). Defs.' Resp. 10. Not so. Chelsey does not decline based on her client's conduct or status or seek to distinguish the two. She declines based on the *message* she's asked to convey through *her* photographs and blogs. It's message/status, not conduct/status.

For example, Chelsey does not ask potential clients about any classification, including sexual orientation. Verified Complaint ("VC") ¶ 101, ECF No. 1. And she will gladly provide her boutique editing services for LGBT photographers and LGBT-owned businesses so long as the *photographs themselves* do not violate Chelsey's beliefs. VC ¶¶ 203-04.

Likewise, Chelsey would photograph or blog about opposite-sex weddings even if her clients or the photographed spouses identified as gay, lesbian, or bisexual. VC ¶¶ 201-02; Suppl. Decl. of Chelsey Nelson in Supp. of Pls.' Mot. for Prelim. Inj. ("Suppl. Decl.") ¶¶ 13-14.[4] *Contra* ACLU 2 (saying Chelsey "must know who a prospective customer is" to evaluate request). Meanwhile, Chelsey won't photograph or blog about some weddings for heterosexual persons or anyone else, like Game of Thrones themed weddings or weddings celebrating open marriages.

[4] Of adults who identify as gay or lesbian and currently raise children, about 18% have "a different-sex married spouse." Gary J. Gates, *LGB Families and Relationships: Analyses of the 2013 National Health Interview Survey*, The Williams Institute, at 6 (Oct. 2014), https://bit.ly/38bemWb.

VC ¶ 206; Decl. ¶¶ 201-15; Suppl. Decl. ¶ 15. For Chelsey, it's all about what her photographs and blogs convey (message), not who asks for them (status).

Chelsey's practice distinguishes her from hypotheticals Louisville and amici fear. Defs.' Resp. 23 (refusing to photograph African Americans); ACLU 3-4, 12 (refusing to photograph interracial couples or Muslims; refusing corporate headshots for women). These hypotheticals involve per-se refusals to serve entire groups or services that do not use artistic judgment like Chelsey's services do. *See Cressman v. Thompson*, 798 F.3d 938, 953 (10th Cir. 2015) (distinguishing mass-produced images from original creations reflecting artists' "self-expression"). And, of course, Chelsey is willing to photograph anyone, so long as the photograph does not communicate a message she opposes. VC ¶ 208.

Nor is Chelsey's policy "offering a limited set of services based on a customer's characteristics" like a restaurant offering appetizers, not entrees, to women. ACLU 5. Unlike appetizers and entrees, photographs and blogs speak. And they speak different messages depending on their content. Louisville and amici simply ignore that *all* of Chelsey's wedding celebration and boutique editing services portray the depicted marriages in positive, uplifting ways. VC ¶¶ 57, 66, 70-71, 150. Changing the wedding content in these photographs and blogs necessarily changes their message. Louisville and amici's "flawed assumption" is that Chelsey's blogs and photographs "are fungible products, like a hamburger or a pair of shoes. They are not." *Brush & Nib Studio, LC v. City of Phoenix (Brush & Nib)*, 448 P.3d 890, 910 (Ariz. 2019). Chelsey does "not sell 'identical' [blogs and photographs] to anyone; every custom [creation] is different and unique." *Id.*

So when Chelsey declines, it is no more a "blanket" status-based refusal (ACLU 5, 10-11) or "complete exclusion" (Defs.' Resp. 11) of services than an atheist writer who serves Christians generally but "blanketly" refuses to write tracts promoting Christianity. In menu terms, Chelsey's menu offers the same *messages* to

everyone and declines the same *messages* to everyone too. That's not "discriminatory" treatment. Defs.' Resp. 10. It's equal treatment. But Louisville wants to forcibly expand Chelsey's menu to include messages she otherwise would not create for anyone.

It's also why Louisville's case citations miss the mark. Defs.' Resp. 9-10. None of them involve speech or address Chelsey's message/status distinction. *Id.* (citing cases about regulating conduct like marriage, taxation, disability discrimination, and pension contributions). *Compare* ACLU 5 (citing cases rejecting status/conduct distinction) *with Brush & Nib*, 448 P.3d at 911, 916-17 (distinguishing these cases).

Rejecting this distinction, Louisville does not even try to address the problematic examples its interpretation would compel. Pls.' Br. 14-15. Not even amici can stomach that. ACLU 5-6 n.1. But amici avoid this result by adopting Chelsey's message/status distinction, which Louisville rejects. *Id*. Amici just do so selectively, saying progressive groups can decline to publish pro-Israeli statements yet people of faith like Chelsey must create photographs and blogs celebrating same-sex weddings. *Id*. Amici never explain the difference. Because none exists.[5] Whether speaking about marriage or the Middle East, speakers have the freedom to choose what they say. That's all Chelsey seeks here.

B. The Accommodations Provision compels Chelsey's speech, not conduct.

By threatening damages, injunctions, and administrative processes, Louisville's law forces Chelsey to create, edit, and publish photographs and blogs that convey messages she disagrees with. Pls.' Br. 3, 9-10. That compels speech.

[5] Louisville avoids this selective distinction for good reason. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* condemned it. 138 S. Ct. 1719, 1730 (2018) (Colorado could not force business to create cake celebrating same-sex marriage yet allow other bakers to decline cakes criticizing same-sex marriage).

In response, Louisville says its law does not force Chelsey to "offer … photography services" or "take particular photographs" but merely regulates "business conduct" and requires "equal access." Defs.' Resp. 12, 15, 19; *accord* ACLU 8-9, 12. But *Hurley*, *Telescope Media*, and *Brush & Nib* rejected the same argument, as Chelsey noted already. Pls.' Br. 11. Louisville has no response.

The law in *Hurley*, for example, did not require the parade organizers to throw parades or use particular float colors; it just required equal access. But the law still compelled speech when applied to "speech itself," thereby altering the parade's content. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 563, 572-73 (1995) (rejecting argument that "statute did not mandate inclusion of GLIB but only prohibited discrimination based on sexual orientation"). *See also Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (although law seemed to be "directed at conduct," it triggered scrutiny as applied because "the conduct triggering coverage under the statute consists of communicating a message").

This explains why governments cannot use anti-discrimination laws to compel newspapers to publish editorials, television shows to cast actors, or orators to alter their speeches, as courts in this circuit have held. Pls.' Br. 10-11. *See also Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 441-42 (S.D.N.Y. 2014) (public accommodation law could not force internet company to post material on search engine). Louisville just ignores these cases and amici misread them, saying they did not involve anti-discrimination laws. ACLU 13-14 n.3. Not so. They involved quintessential anti-discrimination laws—public accommodation laws or the 1866 Civil Rights Act. Louisville and amici's legal theory just cannot account for these decisions and their theory would require these cases be overturned.

These cases also undermine *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013). Like Louisville, *Elane* confuses what public accommodation laws textually say with what they do when applied to speech. *Id.* at 68 (law could compel

photographs because it "applies not to Elane Photography's photographs but to its business operation"). As such, *Elane* contradicts *Hurley* and the cases cited above and would allow officials to use anti-discrimination laws to compel paid speakers to speak any message, and therefore carries little force. Other courts agree. *Brush & Nib*, 448 P.3d at 916-17 (distinguishing *Elane*).

Nor does Chelsey's argument create "a roving exception to anti-discrimination" laws, immunizing everything expressive businesses do. Defs.' Resp. 13; ACLU 7-9 (same). Anti-discrimination and other generally applicable laws can still regulate businesses' *conduct* (i.e., hiring employees, paying wages, following health codes, forming monopolies); they just can't compel businesses to create and convey speech. *Brush & Nib*, 448 P.3d at 907-08 (explaining this distinction).

Next, Louisville justifies compelling Chelsey's blogs and photographs because they convey her clients' "expression," not Chelsey's "personal views," her "artistic discretion," or her "endorsement," at least as perceived by third parties. Defs.' Resp. 12, 16-18. But that's wrong legally. Chelsey reserves and exercises her own artistic control (Decl. ¶¶ 85-174, 328-29), as Louisville elsewhere concedes. Defs.' Resp. 13 (Chelsey's services "require the exercise of artistic judgment"). And this is common. "Protected artistic expression frequently encompasses a sequence of acts by different parties, often in relation to the same piece of work." *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015). Contrary to Louisville's assumptions, commissioned speakers deserve First Amendment protection. *See* Pls.' Br. 11-12.

As for third party perceptions, that's irrelevant too. No one thinks a company endorses newsletters written by someone else; a newspaper endorses editorials published under someone else's name; or drivers endorse mottos on state license plates. But the Supreme Court found compelled speech in each of these scenarios anyway. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.* (*PG&E*), 475 U.S. 1, 15 n.11 (1986); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *Wooley*

v. Maynard, 430 U.S. 705, 714-15 (1977). After all, the doctrine is compelled *speech*, not compelled endorsement. Otherwise, Louisville can compel Democratic freelance writers to ghost write biographies supporting Republican politicians.

Louisville's endorsement argument also fails factually. Chelsey posts wedding photographs *on her own blog* as a central part of her business and desire to promote her message. *See* VC ¶¶ 63-64, 108; Decl. ¶¶ 126-32. And Chelsey requires her clients to give her "attribution" each time they display her photographs publicly. App. 32. In so doing, Chelsey personally and publicly endorses the marriages she photographs and blogs about. *See id.* at 284-301 (blog examples). *Contra* Defs.' Resp. 17 (claiming photographs not "displayed to the public").

Louisville then says it can compel Chelsey to speak because she can oppose same-sex marriage elsewhere through "numerous channels." Defs.' Resp. 17. But this point "begs the core question." *Tornillo*, 418 U.S. at 256 (rejecting speak–elsewhere argument). Compelled speakers can always speak elsewhere. Louisville still cannot "require [them] to affirm in one breath that which they deny in the next." *PG&E*, 475 U.S. at 16. *See also Schneider v. New Jersey*, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

Finally, Louisville argues that Chelsey loses her First Amendment freedoms once she "opt[s] into providing a service," i.e., starts to create photographs and blogs for a living. Defs.' Resp. 12, 19. *See also* ACLU 11. But the First Amendment is not a switch Louisville can flip off when Chelsey accepts a commission. A "speaker's rights are not lost merely because compensation is received." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988); *TMG*, 936 F.3d at 751-52 (citing cases). Louisville does not fix the problem by pressuring Chelsey to opt out of her speaking profession. "After all, another way of saying 'opt out' is 'stop speaking.'" *Washington Post v. McManus*, 944 F.3d 506, 518 (4th Cir. 2019).

C. *Hurley* controls this case, not cases about regulating conduct.

As *Hurley* held, governments may not use public accommodation laws to compel someone to speak messages they disagree with. 515 U.S. at 572-75. This principle controls this case.

While Louisville and amici try to limit *Hurley*'s protection to non-profits (Defs.' Resp. 16, 18; ACLU 13-14), *Hurley* itself rejects that distinction, 515 U.S. at 574 (compelled speech protections "enjoyed by business corporations generally[,]" including "professional publishers").

Nor did *Hurley* contradict itself by noting that public accommodation laws at "common law" required serving meals at inns. *Id.* at 578. *Contra* Defs.' Resp. 16; ACLU 13 (pointing to this passage). This passing historical point did not announce a legal principle, limit the First Amendment's reach, or contradict *Hurley*'s logic. The historical point is not even true anymore. Today, public accommodation laws often apply to nonprofits. *Hurley*, 515 U.S. at 572, 580 (citing cases allowing these laws to apply to nonprofits). That application is not "peculiar"; what's peculiar (as *Hurley* said) is applying these laws to "speech itself," something both nonprofits and business can do. *Id.* at 558.

This explains why case after case has applied *Hurley* to protect businesses from compelled speech. *TMG*, 936 F.3d at 752, 758 (film studio); *McManus*, 944 F.3d at 518 (newspaper); *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 962 (9th Cir. 2010) (newspaper); *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986, 1000 (M.D. Tenn. 2012) (television studio); *Baidu.com*, 10 F. Supp. 3d at 441-42 (internet company); *Brush & Nib*, 448 P.3d at 913-14 (art studio).

None of Louisville's cited cases contradict this point. They either involved conduct (forcing venue to host wedding, club to admit members, law firm to hire lawyer, and school to admit students) or something the court (wrongly) considered

conduct (creating floral arrangements). Defs.' Resp. 12-13. *See also Brush & Nib*, 448 P.3d at 917 (distinguishing venue and florist cases).

And though some of these cases rejected expressive association claims, they did not consider compelled speech claims. In fact, the laws in these cases did not even burden expressive association. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (distinguishing club case); *TMG*, 936 F.3d at 756 (distinguishing law firm case). Or, as one of these cases notes, even when laws can force schools to admit certain students, the law cannot order them to change the messages they "promote." *Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

Finally, Louisville cites *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006), to say equal access laws do not compel speech. Defs.' Resp. 16-17; ACLU 14. But *FAIR* merely upheld a law forcing law schools to open their empty rooms to recruiters. And empty rooms (unlike photographs and blogs) don't say anything. So the law in *FAIR* (unlike Louisville's) didn't compel access to anything "inherently expressive." 547 U.S. at 64. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 n.10 (2008) (distinguishing *FAIR* because laws requiring "[f]acilitation of speech" different from laws forcing someone to actually speak); *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1745 (Thomas, J., concurring) (same); *TMG*, 936 F.3d at 758 (same).

To be fair, the *FAIR* law also forced schools to send some logistical emails. 547 U.S. at 61-62; ACLU 14-15. But the *FAIR* emails were incidental to hosting, i.e., speech necessary to effectuate some other conduct (hosting) the government could require. Unlike compelling schools to send emails with mere dates and times, Louisville's law forces Chelsey to participate in religious events and to personally create and communicate speech conveying celebratory messages she disagrees with. *TMG*, 936 F.3d at 758 (explaining this principle while distinguishing *FAIR*); *Brush & Nib*, 448 P.3d at 909 (distinguishing *FAIR* because art studio engaged in

"personal expression"); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 1011 (2016) ("It is not enough that the speech itself *be labeled* illegal conduct .... Rather, it must help cause or threaten *other* illegal conduct …" to be regulated.).

If anything, *FAIR* supports Chelsey. While Louisville criticizes *Telescope Media* and *Brush & Nib* for "focus[ing] on the nature of the product" instead of what a law facially regulates (Defs.' Resp. 19; ACLU 9, 14 n.4), *FAIR* did exactly that. 547 U.S. at 63-64 (the "expressive nature of a parade was central" to *Hurley* while "law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper"). So, far from being an "unworkable" test (Defs.' Resp. 19), analyzing the product's expressive nature is how the test works.

II. The Accommodations Provision compels Chelsey's speech based on content and viewpoint.

The Accommodations Provision compels Chelsey to speak based on content and viewpoint because it alters Chelsey's photography and blog content, is triggered by what she says elsewhere, and requires access only to certain viewpoints. Pls.' Br. 17-19.

Rather than engage this logic though, Louisville repeats its argument that its law regulates conduct. Defs.' Resp. 11-14. Chelsey has refuted that. *See supra* § I.B.

Amici try to fill this gap but make Louisville's mistake: focusing on what Louisville's law facially regulates. ACLU 10-11 (law forbids "refusals of service based on identity"; relevant inquiry "is whether the *law* draws distinctions based on content"; asking court to analyze law's "focal point"). That misses Chelsey's point about how Louisville's law regulates based on content and viewpoint *when applied* to Chelsey's photographs and blogs. *Holder*, 561 U.S. at 26-27 (law facially regulating conduct still content-based as-applied).

Nor does this analysis invalidate all anti-discrimination laws. *Contra* ACLU 11-12 (citing *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) and *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994)). Laws can still target and be triggered by discriminatory conduct or force people to engage in conduct, i.e., force restaurants to serve African Americans or stop people from congregating outside certain buildings. But laws cannot alter someone's speech content, apply because someone speaks certain messages elsewhere, or award access to people to speak particular views. And Louisville's law does all three, forcing Chelsey to open her blog and photographs to opposing views, because she celebrates opposite-sex weddings elsewhere, so that others can co-opt her expressive "means" to "celebrate" a same-sex wedding "commitment." Defs.' Resp. 18. That forces Chelsey "to reproduce another's speech against [her] will" and "co-opt[s] [her] own conduits for speech" she disagrees with. *Wash. State Grange*, 552 U.S. at 457 n.10. That's unconstitutional.

III. The Publication Provision restricts Chelsey's speech based on content and viewpoint as Louisville admits.

Chelsey wants to post statements explaining her religious beliefs about marriage and why she cannot photograph, edit photographs, and create blogs celebrating same-sex weddings. Louisville admits these statements are "speech" and its Publication Provision bans them because of their content. Defs.' Resp. 19. This content- and viewpoint-based ban triggers strict scrutiny. Pls.' Br. 17-19.

In defense, Louisville says its law does not "aim at the suppression of speech." Defs.' Resp. 19. But the law still restricts "communications" based on content and viewpoint, facially and as-applied. Pls.' Br. 17-19. The law's purpose does not matter. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) (rejecting same argument). So the law unconstitutionally restrains Chelsey's speech.

Louisville also defends restricting Chelsey's speech because of its "compelling interest … in protecting against discrimination." Defs.' Resp. 19. But Chelsey does

not discriminate. And unlike statements expressing an intent to do something illegal and constitutionally unprotected like employment discrimination (ACLU 16-17), Chelsey's statement expresses her intent to exercise her constitutional right not to speak. Louisville can no more ban this statement than a statement from parade organizers declining to accept banners in their parade. *See TMG*, 936 F.3d at 757 n.5 (state could not ban film studio's statement like Chelsey's); *Brush & Nib*, 448 P.3d at 926 (same as to art studio's statement).

IV. The Accommodations Provision compels Chelsey to participate in and celebrate religious ceremonies she disagrees with.

Not only does the Accommodations Provision violate Chelsey's right to speak, it also violates her right to religious exercise by compelling her to participate in and attend sacred ceremonies she objects to.

While Louisville tries to duck this problem by invoking *Employment Division v. Smith*'s standard for neutral and generally applicable laws (Defs.' Resp. 20), that rule is irrelevant here. It does not apply to Free Exercise Clause or Establishment Clause claims alleging forced participation in religious ceremonies. *See Masterpiece*, 138 S. Ct. at 1727 (requiring clergy to perform same-sex wedding ceremonies invalid); *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (invoking Establishment Clause and Free Exercise Clause to prohibit compelled attendance at event with prayer without invoking *Smith* rule).

Amici elsewhere even agree that *Smith*'s rule does not cover compelling a vendor's "physical participation in … a religious ceremony" like a same-sex wedding. Tr. of Oral Arg. at 77-78, *Masterpiece*, 138 S. Ct. 1719 (2018) (No. 16-111) (arguing on behalf of ACLU), https://bit.ly/2BKvORw.

Unable to hide behind *Smith*, Louisville counters that photographing weddings is not "analogous to attending a worship service." Defs.' Resp. 20. This, however, ignores the undisputed facts. Chelsey participates in wedding ceremonies

by attending, serving as a witness, greeting and encouraging guests, singing, bowing her head in prayer, and standing in recognition of the marriage. VC ¶¶ 114-29. Every wedding Chelsey has photographed involved prayers, homilies, and marriage pronouncements. *Id.* at ¶ 123. So Chelsey "feels subtle coercive peer pressure" to participate in the "rhythms" of these ceremonies. *Id.* at ¶ 195; Suppl. Decl. ¶¶ 16-25. And these facts distinguish Chelsey from other "commercial service" providers, like caterers or venue owners, not even "present at" the wedding ceremony. Defs.' Resp. 20; ACLU 18 (same slippery slope argument).

Louisville's objection also overlooks precedent. Wedding ceremonies are more like worship services than football games and school graduations with a single prayer. Like attendees at these events (and unlike those observing legislative prayers), Chelsey cannot practically "leav[e]" the ceremony or "arriv[e] late" or "later protest" the wedding during the reception. *Town of Greece v. Galloway*, 572 U.S. 565, 590 (2014); Suppl. Decl. ¶¶ 19-25. So if Louisville cannot compel attendance at games and graduations, it cannot compel attendance at or participation in same-sex weddings either. *Lee*, 505 U.S. at 587 (graduation); *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312-13 (2000) (football game). None of Louisville's or amici's cited cases prove otherwise. Louisville's cases never considered a compelled participation argument. Defs.' Resp. 20-21. And amici's added case involved government employees, not citizens acting in their private capacity. AU 8.

To be sure, courts objectively determine whether laws coerce attendance or participation. *Id.* at 8-9. But neither Louisville nor amici get to second guess which events Chelsey considers religious. *Compare id.* (asking court to decide if Chelsey's beliefs are "objective[ly]" reasonable) *with Haight v. Thompson*, 763 F.3d 554, 566 (6th Cir. 2014) (declining to "inquire into the centrality to a faith of certain religious practices—dignifying some, disapproving others"). Chelsey's belief is reasonable

anyway. Many cases, churches, and pastors acknowledge the sacredness of weddings and marriage. Pls.' Br. 20 (cases); Decl. ¶¶ 220-50 (beliefs).

And Louisville's law does indeed compel Chelsey to attend and participate in these ceremonies—by compelling her to attend, act as a witness, bow her head during prayers, stand, affirm agreement in silence, and encourage others. These are not "voluntary additional acts." AU 8. Chelsey typically or always does these for all her weddings; they are essential to how Chelsey performs her services. VC ¶¶ 127-28, 198; Decl. ¶¶ 237-38. And Louisville's law requires Chelsey to provide the same services for same-sex weddings that she would provide for opposite-sex weddings. *See supra* note 3 and accompanying text. So amici just misread what Chelsey does and what Louisville's law requires.[6]

As a last resort, Louisville says for-profit corporations lack Free Exercise rights. Defs.' Resp. 20. But that's wrong and irrelevant. Chelsey's business may assert her Free Exercise interests. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009) (holding that a corporation has standing to assert the free exercise rights of its owners); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 800-03 (E.D. Mich. 2013) (same). *Cf. Hobby Lobby*, 573 U.S. at 710 (invoking Free Exercise cases to reject this argument in RFRA context). And Chelsey has sued on her own behalf anyway.

V. The Accommodations and Publication Provisions fail strict scrutiny.

Because the Accommodations and Publication Provisions violate Chelsey's constitutional rights, strict scrutiny applies. So, Louisville must prove the application of its law is narrowly tailored to serve a compelling interest. Pls.' Br. 21.

---

[6] Amici also argue that protecting Chelsey violates the Establishment Clause by harming "nonbeneficiaries." AU 10-11. But *Burwell v. Hobby Lobby Stores, Inc.* rejected that argument. 573 U.S. 682, 729 n.37 (2014) (courts can protect religious activities by considering harm to nonbeneficiaries in strict scrutiny analysis).

As Chelsey anticipated, Louisville invokes stopping status-based discrimination as its interest. Defs.' Resp. 18, 21-25. But this interest is framed too generally, does not apply to Chelsey (who serves regardless of customers' status), does not justify compelling or restricting speech (as *Hurley* held), and does not justify compelling participation in objectionable religious ceremonies. Pls.' Br. 21-22. This point distinguishes all the cases Louisville and amici cite (Defs.' Resp. 21-25; ACLU 19-21) because they either involved actual discriminatory conduct (e.g., declining to provide food or education to African Americans, housing to unmarried couples, or club membership to women) or thought they had confronted discriminatory conduct (e.g., declining to photograph or create floral arrangements celebrating same-sex weddings). None of them addressed whether the government could compel speech or participation in religious ceremonies.

To save its asserted interests, Louisville only repeats itself: limit *Hurley* to non-profits, attribute Chelsey's speech to others, and accuse Chelsey of status discrimination. Defs.' Resp. 18-19, 22. Chelsey has refuted these arguments. *See supra* § I.[7]

Just as problematic, Louisville never proves any actual problem exists, i.e., that anyone in Louisville lacks access to photography or blogging services. Pls.' Br. 22. Louisville does not identify a single Louisville business that discriminates based on sexual orientation, much less photography studios that serve regardless of status yet decline to speak messages celebrating same-sex marriage for anyone.

Louisville therefore reframes its interest as protecting "equal dignity" and stopping "stigma[]" caused by any discriminatory denial. Defs.' Resp. 18, 22-23; ACLU 20. But this interest does not justify restricting speech, compelling speech, or

[7] Louisville also tries to satisfy strict scrutiny by labeling Chelsey's editorial judgment policy as "hypothetical." Defs.' Resp. 22. That's incorrect. Chelsey addresses this and Louisville's other standing arguments (Defs.' Resp. 6-8) in her response to Louisville's motion to dismiss.

forcing participation in religious ceremonies. *See Hurley*, 515 U.S. at 574, 578-79 (protecting content-based choices, including ones that others consider "misguided, or even hurtful"); *Boos v. Barry*, 485 U.S. 312, 322 (1988) (rejecting dignity concerns as basis for restricting speech); *Masterpiece*, 138 S. Ct. at 1727 (minister cannot be compelled to officiate same-sex wedding). Though everyone deserves dignity and respect, everyone includes Chelsey too. Louisville must protect Chelsey's dignity rather than compel her to speak, a result that "is always demeaning." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31,* 138 S. Ct. 2448, 2464 (2018).

Louisville's dignity interest is also under-inclusive. When businesses decline to serve women, that inflicts dignity harm. But Louisville allows that anyway (Pls.' Br. 23)—a point Louisville glosses over. To save Louisville, amici try to limit this exception to "single-sex facilities." ACLU 22 n.8. But the sex-based exemption covers *everything* done by every public accommodation except restaurants, hotels, motels, and government-funded facilities. Metro Ordinance §§ 92.05(A), (C).

Louisville's anti-discrimination law exempts many other dignity-harming behaviors. *See id.* at § 92.04 (housing exemption if owner lives in building or if sale done privately); § 92.07 (BFOQ employment exemption). Because Louisville allows private home sellers to reject African Americans wholesale and thereby inflict enormous dignity harm, Louisville cannot turn around and invoke dignity interests to compel or silence Chelsey who does not discriminate against anyone.

And this conclusion holds even though some of Louisville's exemptions appear in "*other* antidiscrimination provisions." AU 6. What matters is effect, not location: whether exemptions undermine the government's alleged *interests*, not where those exemptions appear. That's why mere failure to regulate something can show a law's under-inclusivity. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011) (failure to regulate booksellers, cartoonists, and movie producers undermined interest for law that only regulated video games); *Church of the*

Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 544-45 (1993) (failure to regulate restaurant garbage disposal undermined interest for laws that only regulated killing animals).

Moving from compelling interest to tailoring, Louisville fails here too. While Louisville declares no alternative exists except compelling Chelsey (Defs.' Resp. 23), Louisville never addresses Chelsey's proposed alternatives. Pls.' Br. 22-23. That silence speaks volumes.

Amici fare no better. Besides repeating the "Chelsey discriminates" mistake (ACLU 22-23), amici discount alternatives used by other jurisdictions because their interest in ending discrimination somehow differs from Louisville's interest in doing so. ACLU 22. But amici never explain why or how it differs or cite any case accepting this distinction. If other jurisdictions can stop discrimination without violating constitutional rights, then Louisville can too.

Left with nothing else, Louisville invokes fear over fact: the slippery slope argument that protecting Chelsey will lead to widespread sexual orientation discrimination. Defs.' Resp. 23-24. But Louisville bears the burden of proving this. It has not done so. And that's decisive. "[A]necdote and supposition" do not suffice; Louisville must prove an "actual problem … in this case." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000). *See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (*O Centro*), 546 U.S. 418, 435-36 (2006) (rejecting slippery slope argument). The record even undermines Louisville's fears: hundreds of Kentucky photographers are willing to photograph and participate in same-sex weddings. VC ¶¶ 312-14; Decl. ¶¶ 256-310.

In reality, Chelsey's argument protects very few: those declining to speak or to participate in wedding ceremonies. Courts around the country already protect these choices without problem. Pls.' Br. 22-23 (collecting cases). And few speakers will even want this protection. Economic and cultural pressures encourage

commissioned speakers to promote same-sex weddings. Those who decline suffer. *See* Defs.' Mem. in Supp. of Mot. to Dismiss 12, ECF No. 14-1 (Louisville admitting that Chelsey's decision "likely results in … economic loss"); Suppl. App. 1-3 (posts on Chelsey's blog attacking her and her beliefs). So few speakers will follow Chelsey's path. *See O Centro*, 546 U.S. at 435-36 (rejecting slippery slope argument where objectors lacked economic incentive to seek exemption).

It is Louisville that creates the real slippery slope—enabling governments to compel commissioned speakers to speak any message officials want. Louisville never disputes its theory would compel everyone from LGBT printers, to Muslim tattoo artists, to progressive legal groups to proclaim messages they disagree with. Pls.' Br. 15 (for these examples). Chelsey's approach strikes the better balance and applies fairly to all sides—let speakers choose what they say and what ceremonies they celebrate while stopping businesses from selecting who they serve.

VI. The Unwelcome Clause is overbroad, vague, and allows unbridled discretion.

Unlike other parts of Louisville's law, the Unwelcome Clause fails facially: it is vague, overbroad, and grants unbridled discretion. Pls.' Br. 24-25.

Although Chelsey explained this point and identified specific examples of the Clause's overbreadth and vagueness, Louisville never denies these examples. Defs.' Resp. 27-28. That's fatal. Louisville instead just asserts its law is clear and tailored without explanation. *Id*. But saying it does not make it so.

Louisville does not even address most of the cases Chelsey cites invalidating language the Unwelcome Clause uses. Louisville only distinguishes one case (*Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426 (Ariz. Ct. App. 2018)) because it was vacated. Defs.' Resp. 27-28. True, but not helpful. *Other parts* of that decision were vacated, not the parts invalidating the overbroad language used in Louisville's Unwelcome Clause. *Brush & Nib*, 448 P.3d at 899.

VII. Chelsey satisfies the four factors for a preliminary injunction.

According to the Sixth Circuit, likelihood of success on the merits is the crucial factor when someone seeks a preliminary injunction to stop First Amendment violations. Pls.' Br. 4. Louisville concedes this. Defs.' Resp. 6 (quoting Sixth Circuit cases). But Louisville still denies Chelsey's ability to satisfy the other preliminary injunction factors—calling Chelsey's irreparable harm a "hypothetical" "loss of business." Defs.' Resp. 26. That, however, misses Chelsey's point. Louisville's law makes it illegal for Chelsey to (a) hold a policy (that Chelsey currently holds) controlling what she says, (b) post statements she wants to post, (c) offer photography and blogging services only celebrating opposite-sex weddings, and (d) promote her business effectively. All this harms Chelsey's business, violates the Constitution, chills Chelsey's speech, and robs her of her rights. So the injury is real, irreparable, and ongoing. Chelsey explains this point more thoroughly in her response to Louisville's motion to dismiss where she refutes Louisville's standing arguments. Defs.' Resp. 6-8. Chelsey incorporates that response here.

Conclusion

Peeling off the labels, Louisville seeks one thing: the power to compel Chelsey to create speech and participate in religious ceremonies that violate her core convictions. Yet a government that can coerce Chelsey's speech can coerce anyone's. Everyone is better off when speakers on all sides get to decide what they say—and what they do not. That is all Chelsey respectfully asks for here.

Respectfully submitted this 13th day of February, 2020.

By: s/ Bryan Neihart

Jonathan A. Scruggs
AZ Bar No. 030505*
Katherine L. Anderson
AZ Bar No. 033104*
Bryan Neihart
CO Bar No. 47800*
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
jscruggs@ADFlegal.org
kanderson@ADFlegal.org
bneihart@ADFlegal.org

David A. Cortman
GA Bar No. 188810*
Alliance Defending Freedom
1000 Hurricane Shoals Rd. NE
Ste. D-1100
Lawrenceville, GA 30043
Telephone: (770) 339-0774
dcortman@ADFlegal.org

Joshua D. Hershberger
KY Bar No. 94421
Hershberger Law Office
P.O. Box 233
Hanover, IN 47243
Telephone: (812) 274-0441
josh@hlo.legal

ATTORNEYS FOR PLAINTIFFS

* Admitted *Pro Hac Vice*

Certificate of Service

I hereby certify that on February 13, 2020, I electronically filed the foregoing document with the Clerk of Court and that the foregoing document will be served via the CM/ECF system on all counsel of record.

By: s/ Bryan Neihart

Bryan Neihart
CO Bar No. 47800*
Alliance Defending Freedom
15100 N. 90th St.
Scottsdale, AZ 85260
Telephone: 480-444-0020
bneihart@ADFlegal.org

ATTORNEY FOR PLAINTIFFS

* Admitted *Pro Hac Vice*