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; Verná Goatley, in her official capacity as Executive Director of the Louisville Metro Human Relations Commission–Enforcement; and **Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Leslie Faust, William Sutter, Ibrahim Syed,** and **Leonard Thomas,** in their official capacities as members of the Louisville Metro Human Relations Commission–Enforcement,

Defendants.

Case No. 3:19-cv-00851-BJB-CHL

Plaintiffs' Motion to Exclude Testimony of Netta Barak-Corren

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Introduction

Louisville proposes to offer testimony from Professor Netta Barak-Corren to show that a ruling for Plaintiffs Chelsey Nelson and her photography studio will cause public accommodations in Louisville to discriminate more. But this testimony should be excluded because her conclusions are speculative, her methods are unreliable, and her findings are irrelevant.

Barak-Corren's testimony includes a report, two articles, and an Appendix (collectively "*Masterpiece* Study").[1] The *Masterpiece* Study tried to prove that *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n (Masterpiece*), 138 S. Ct. 1719 (2018) caused creative professionals in Indiana, Iowa, North Carolina, and Texas to discriminate more against same-sex couples. But to get there, the study assumes that these professionals viewed positive media reports about *Masterpiece*, believed that *Masterpiece* granted a religious exemption, and then felt emboldened to begin discriminating. Then the study assumes that professionals in Louisville will respond the same way if this Court rules for Chelsey.

But problems abound. *Masterpiece* didn't grant a religious exemption, there's no evidence about anyone's exposure to *Masterpiece* or media about *Masterpiece*, Barak-Corren cannot measure pre-*Masterpiece* discrimination, and Indiana, Iowa, North Carolina, and Texas are not Louisville. On top of those fatal flaws, the *Masterpiece* Study depends on unreliable methodology, lacks any evidence about Louisville, and never gauges long-term attitude-changes that would make any conclusions reliable today.

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[1] The articles are A License to Discriminate? The Market Response to Masterpiece Cakeshop, 56(2) Harvard Civil Rights–Civil Liberties Law Review (forthcoming 2021) (HCRCL) and Religious Exemptions Increase Discrimination Towards Same–Sex Couples: Evidence from Masterpiece Cakeshop, Journal of Legal Studies (forthcoming 2021) (JLS). The report (NCB Report), HCRCL, JLS, and the Appendix are attached Exhibits A, B, C, and D respectively.

For these reasons and more, Barak-Corren's testimony is speculative, unreliable, and irrelevant. Her testimony and the study should be excluded.

Statement of Facts

The *Masterpiece* Study tried to evaluate the effects of religious exemptions on creative professionals' willingness to provide services for same-sex weddings. HCRCL 1, 24. Barak-Corren focused on the *Masterpiece* decision because she thought the Supreme Court "would grant an exemption" and anticipated "extensive" media "coverage and discussion." *Id.* at 24.

But *Masterpiece* found "government hostility and did not reach the question of whether Phillips had a right to an exemption …." *Id.* at 18 n.56. So Barak-Corren had to pivot. She tweaked her planned study to evaluate *how the media communicated about Masterpiece* to the public. HCRCL 25–27; JLS 8–9; Transcript of Deposition of Netta Barak-Corren (Tr.) 189:4–16. Barak-Corren cites "conservative," "mainstream," and "progressive" media. HCRCL 25–27.

For her study, Barak-Corren evaluated photographers, bakers, and florists in Iowa, Indiana, North Carolina, and Texas. *Id.* at 29; JLS 14–16. She selected these states because they had "comparable … overall characteristics" but "differed in legal regime." *Id.* at 29. "Legal regime" describes jurisdictions with or without (+/–) state religious freedom restoration act (RFRA) laws and jurisdictions with or without (+/–) state or local antidiscrimination (AD) laws. JLS 12–14. Selecting different legal regimes was "necessary" to uncover "real-world variation." *See* HCRCL 32.

About a month before *Masterpiece*, Barak-Corren emailed 906 creative professionals from fictitious same-sex couples (Wave 1) and then from fictitious opposite-sex couples (Wave 2) asking about wedding services. HCRCL 39; JLS 3, 17–18; Appendix (App.) 1–4. Many more professionals responded to the same-sex couples (70.8% response rate) compared to the opposite-sex couples (58.7% response

rate). HCRCL 36; JLS 21. Because of this "attrition" between Waves 1 and 2, Barak-Corren admits that she cannot know the "the extent of discrimination towards same-sex couples … before *Masterpiece*." Tr. 147:12–21, 156:7–23.

After *Masterpiece*, Barak-Corren changed her email content and emailing strategy. HCRCL 34; App. 1–10. Rather than send the emails in block waves (a wave from same-sex couples and another wave from opposite-sex couples), she randomized inquiries in each wave so that half of the professionals in wave 3 received inquiries for a same-sex wedding and the other half received inquiries for an opposite-sex wedding. In the final wave (Wave 4), each professional then "received an email from the opposite–orientation couple" than they received in Wave 3. HCRCL 34. Barak-Corren also called dozens of creative professionals in between Waves 3 and 4. App. 11–14.

After collecting this data, Barak-Corren tried to study *Masterpiece*'s effect by evaluating whether "businesses that agreed to serve same-sex couples before the decision" agreed to provide the service after the decision. HCRCL 38; JLS 19. She did this by coding positive and negative responses. The upshot is that she considered non-responses as negative responses. *See* JLS 19 n.25; App. 29.

Barak-Corren sent over 3,600 emails. App. 19 (noting "N" as 906 times four waves). No professional explicitly declined an email request from a same-sex couple because they "don't do same-sex weddings." Tr. 199:4–10. She also spoke with seventy-three professionals. App. 14. Only one professional declined a phone inquiry from a same-sex couple because he or she "only d[id] traditional weddings." *Id.*

Non-responses were "[t]he most common form of declining service." HCRCL 38. Because the number of explicitly negative responses or negative responses with referrals were so "small," Barak-Corren didn't "base any … statistical inference only on those numbers." Tr. 128:3–5 So non-responses were the "driver" in measuring pre-and-post *Masterpiece* responses. Tr. 131:6–14.

From that, Barak-Corren found that *Masterpiece* had a "negative effect … on the willingness to provide services to same-sex couples." HCRCL 39. This effect occurred in all legal regime types, except in areas with a state RFRA and a local AD law (+RFRA/+AD). *Id.* at 41–42.

Taking all this together, Barak-Corren believes that a finding for Chelsey will "significantly increase the likelihood" that wedding professionals in Louisville will decline to provide services for same-sex weddings. NCB Report ¶ 12. George Yancey, Ph.D. wrote a rebuttal report (GY Report, attached as Exhibit E). For the reasons explained below, Barak-Corren's testimony should be excluded.

Argument

Courts act in "a gatekeeping role" over expert testimony. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). In this role, courts evaluate whether the testimony is reliable, is relevant, and comes from a qualified expert. *In re Scrap Metal Antitrust Litig.* (*Scrap Metal*), 527 F.3d 517, 528 (6th Cir. 2008) (citing Fed. R. Evid. 702). This evaluation can be made with or without a hearing. A hearing is unnecessary here because this brief and the record form "an adequate basis" on which to decide this motion. *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 249 (6th Cir. 2001).

Louisville must establish that Barak-Corren's testimony is admissible "by a preponderance of proof." *Id.* at 251. Louisville cannot do so. Barak-Corren's testimony is (I) unreliable because it rests on speculation and flawed methodology and (II) irrelevant to Chelsey's constitutional and statutory claims.

I. Barak-Corren's testimony should be excluded as unreliable.

Barak-Corren's testimony should be excluded because it is unreliable. Federal Rule of Evidence 702 gives three reliability requirements. *Scrap Metal*, 527 F.3d at 529. *Daubert* provides more guidance. *Kumho*, 526 U.S. at 150. Expert

testimony must be (A) based on "reliable principles and methods"; (B) "based on sufficient facts or data"; and (C) applied in a reliable way. Fed. R. Evid. 702(b)–(d); *Scrap Metal*, 527 F.3d at 529. Barak-Corren's testimony fails these requirements.

A. Barak-Corren's testimony rests on unreliable principles and methods because she relies on speculation and flawed methodology.

Barak-Corren's testimony is not reliable because it depends on (1) unverified assumptions about professionals' knowledge of *Masterpiece*; (2) inaccurate characterizations of legal regimes; (3) unknown rates of pre-*Masterpiece* same-sex discrimination; and (4) problematic auditing techniques.

1. Barak-Corren speculates about media consumption without any defined methodology.

The *Masterpiece* Study was designed to measure "the effects of religious exemptions on discrimination towards same-sex couples." HCRCL 24. But to measure this, Barak-Corren relies on *what the media said* about the *Masterpiece* decision and *what people understood* the opinion to say based on those media reports. *Id.* at 24–27, 47–48 n.150 (relying on media for "expressive theory of law"); Tr. 189:4–14. This approach contains many errors: Barak-Corren never measures creative professionals' exposure to media or to the *Masterpiece* decision itself, never characterizes the media creative professionals saw (if any), and never explains how she selected the media to exemplify reporting on the opinion.

For starters, Barak-Corren never investigated "whether the vendors [she] contacted … had any knowledge of, appreciation for, or understanding of the *Masterpiece* decision after it was rendered." Tr. 93:23–94:11. Even so, Barak-Corren concludes that *Masterpiece* caused creative professionals to become less willing to provide services for same-sex weddings. *See, e.g.*, NCB Report ¶ 14; HCRCL 2; *id.* at 47 (arguing *Masterpiece* changed professionals' "perceptions of the social norms

regarding service refusal"); JLS 4. But *Masterpiece* could only cause this outcome if creative professionals knew about the opinion. That's common sense.

But Barak-Corren cannot measure this causation because she cannot verify anyone's exposure to *Masterpiece*. *See* GY Report ¶¶ 30–32. Her study cannot decipher what professionals understood about *Masterpiece* or whether media they followed described this decision as granting a religious exemption. *Id.* If anything, most media likely reported on the decision narrowly or critically. *Id.* at ¶ 31; HCRCL 25–27 (citing "mainstream" and "progressive" media). Because Barak-Corren cannot know anyone's exposure to *Masterpiece*, she can only speculate that professionals declined to provide services for same-sex weddings *because of* the decision. This speculation is unreliable. *Cf. Nelson*, 243 F.3d at 252–53 (concluding expert's "reasoning and methodology … [was] not scientifically valid" because he determined causation by speculating about plaintiff's exposure to toxins).

Barak-Corren relies on four studies to fill her knowledge gap.[2] Two of these studies prove Barak-Corren's causation problem. The first (Linos and Twist) said subjects must know about Supreme Court decisions to be influenced by them.[3] And

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[2] These studies are (1) Katerina Linos & Kimberly Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods* (Linos & Twist), 45 J. Legal Stud. 223 (2016) (attached as Exhibit G); (2) Margaret E. Tankard & Elizabeth Levy Paluck, *The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitudes* (Tankard & Paluck), 28 Psych. Sci. 1334 (2017) (attached as Exhibit H); (3) Emily Kazyak & Mathew Stange, *Backlash or a Positive Response?: Public Opinion of LGB Issues After Obergefell v. Hodges* (Kazyak & Stange), 65 J. Homosexuality 2028 (2018) (attached as Exhibit I); and (4) Eugene K. Ofosu et al., *Same-Sex Marriage Legalization Associated With Reduced Implicit And Explicit Antigay Bias* (Ofosu), 116 Proc. Nat'l Acad. Sci. U.S. 8846 (2019) (attached as Exhibit J). *See* HCRCL 27-28 nn. 96–99 (citing these studies); Tr. 95:1–96:22 (same).

[3] 45 J. Legal Stud. at 231 (connecting "individuals' opinion shifts to" media "which they were (or were not) exposed to"); *id.* at 239 ("It is, therefore, important to not only measure aggregate opinion change but distinguish people who heard and understood the decisions from those who did not.").

the second (Kazyak's and Stange's study on *Oberfell*) asked "whether respondents heard or read about the [ruling]" and confirmed "the vast majority of respondents were aware of the ruling." 65 J. Homosexuality at 17.

The other two studies are irrelevant. Tankard and Paluck measured "perceived (present and future) social norms in support of gay marriage," not "personal attitudes toward gay marriage or in ratings of gay people," which would affect behavior. 28 Psych. Sci. at 1339. And Ofosu measured how legislation legalizing same-sex marriage changed attitudes towards same-sex marriage over a twelve-year period, not how judicial opinions changed personal decision-making in two weeks. 116 Proc. Nat'l Acad. Sci. U.S. at 4-5. Ultimately, Barak-Corren offers no evidence about creative professional's exposure to the *Masterpiece* decision.

But even if Barak-Corren measured media exposure (she did not), she missed another step by not isolating what media professionals actually saw. Barak-Corren identifies "mainstream outlets," "conservative leaders and religious liberty advocates," and "progressive commentators" as media sources. HCRCL 25–27. "[M]ainstream" and "progressive" outlets classified Masterpiece narrowly or critically. HCRCL 25–27. "[C]onservative" media "hailed the decision as a victory" and "express[ed] significantly less reservations about its scope." HCRCL 25.

These broad strokes gloss over important nuances that would dictate what professionals could have learned about the case. For example, "mainstream," "conservative," and "progressive" media presented *Masterpiece* differently. *Id.* 25–27. News coverage like this—with both "supportive and critical information"—is known as "two–sided coverage." Linos & Twist, 45 J. Legal Stud. at 225–26. And two–sided coverage "reduce[s] the impact of the Court decision on opinion change." *Id.* So creative professionals that saw mainstream *and* conservative coverage (or nuanced coverage) about *Masterpiece* would be less likely to change their opinion about providing services for same-sex weddings. *See id.*

Similarly, even professionals that only viewed "conservative" media wouldn't come to the same conclusions about the decision. The truth is that most of the "conservative" articles either reported the decision as a religious hostility case,[4] never mentioned a religious exemption,[5] or included information criticizing the opinion.[6] HCRCL 25–26 nn.89–92 (citing most articles in footnotes 4–6 below).

Finally, even if Barak-Corren measured media exposure (she does not) or isolated what media reports professionals were exposed to (she does not), Barak-Corren's reliance on the media to communicate about *Masterpiece* would still be unreliable because her study is not replicable. *See, e.g.*, *Zenith Electronics Corp. v. WH-TV Broadcasting Corp.*, 395 F.3d 416, 419 (7th Cir. 2005) (reliability requires "[s]omeone else using the same data and methods … to replicate the result").

For example, Barak-Corren never explains why she selected certain media as exemplifying how the media in general communicated about *Masterpiece*. *Cf.* JLS 11–20 (describing methods but omitting media selection). Why did she pick the New York Times over the Washington Post? *Id.* at 25. Or how did she determine that press releases from the U.S. Conference of Catholic Bishops, Liberty Counsel, or the Family Research Council qualified as media reports at all? HCRCL 25–26 (citing

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[4] *Victory for Colorado Cake Case*, Liberty Couns. (June 4, 2018), https://perma.cc/9M8L-QZ23 "[T]he Court focused on the explicit hostility ….").

[5] *Colorado Baker Reacts to 'Big Win' in Same-Sex Wedding Cake Case*, Fox News Insider (June 5, 2018), https://perma.cc/3Z2C-PDRP; Todd Starnes, *A win for Masterpiece Cakeshop but it ain't over yet*, Fox News (June 4, 2018), https://perma.cc/8STY-5Q5Z (noting "gay rights do not necessarily trump everyone else's rights"); *Religious freedom groups praise Supreme Court's Masterpiece ruling*, Cath. News Agency (June 4, 2018), https://perma.cc/NV9W-38UR ("'The Court's holding is narrow.' (quoting Brian Miller)).

[6] Bill Mears & Judson Berger, *Supreme Court sides with Colorado baker who refused to make wedding cake for same-sex couple*, Fox News Live (June 4, 2018), https://perma.cc/6YHF-XMS9 (calling ruling "narrow" and quoting David Mullins and dissenting justices).

sources as "conservative" media). We don't know. Barak-Corren doesn't explain why or how she selected the articles she relies on as exemplifying news reports about *Masterpiece*. This lack of any explained method for selecting media makes Barak-Corren's testimony unreliable because it cannot be repeated.

Likewise, Barak-Corren never explains why she categorized some media as "mainstream outlets," "conservative leaders and religious liberty advocates," and "progressive commentators" as media sources. HCRCL 25–27. *Cf.* JLS 11–20.

This lack of explanation contradicts the generally accepted practice of studying the media, the Supreme Court, and public opinion. *See Daubert*, 509 U.S. at 593 (general acceptance relevant to reliability). For example, Linos & Twist evaluated the Supreme Court's ability to shape public opinion. 45 J. Legal Stud. at 223; HCRCL 25 n.86 (citing this study). In their study, they followed the "six major television networks" coverage of several Supreme Court decisions because "television remains the main source of news for most Americans." Linos & Twist, 45 J. Legal Stud. at 223, 229. They also coded "evening news transcripts, sentence by sentence, classifying each sentence, or portion thereof in two ways" to determine whether the coverage was positive or negative. *Id.* at 233 n.5.

In contrast, Barak-Corren relies on "conservative" online articles from one major outlet (Fox News), one news website (Daily Signal), one religious news company (Catholic News Agency) and a smattering of unrelated press releases. HCRCL 25–26 nn.89–92.[7] Barak-Corren never codes the content of these articles—she just selectively quotes from them. *Id.*; JLS 9 n.10 ("survey[ing] key quotes").

In the end, Barak-Corren's causation analysis requires speculation because she has no evidence about what creative professionals knew or saw about the

[7] Only the "conservative" outlets are potentially relevant to professionals' exposure to *Masterpiece* as a religious liberty case. That's because "mainstream" and "progressive" outlets classified *Masterpiece* narrowly or critically. HCRCL 25–27.

opinion. Her speculation about causation is unreliable. *See Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 669–72 (6th Cir. 2010) (causation testimony with speculation was unreliable); *Rodrigues v. Baxter Healthcare Corp.*, 567 F. App'x 359, 361 (6th Cir. 2014) (testimony unreliable without "causal link"); *Rose v. Truck Centers, Inc.*, 388 F. App'x 528, 535 (6th Cir. 2010) (testimony "must have an established factual basis" and not reliable when "premised on mere suppositions").

2. Barak-Corren's legal regimes undermine her conclusions.

Barak-Corren's findings about +RFRA/+AD jurisdictions also completely undermine her conclusions about creative professionals in Louisville.

Barak-Corren found that *Masterpiece* caused no change in professionals' willingness to provide services for same-sex weddings in +RFRA/+AD jurisdictions in Texas (and Indiana). HCRCL 41–42, 54–56; JLS 31–32. Professionals in these jurisdictions "were not merely more consistent in their behavior; *they were also the least discriminatory of same-sex couples post*-Masterpiece Cakeshop." HCRCL 54 (emphasis added). Barak-Corren suggests "the tension built into these hybrid regimes led businesses to reflect and contemplate their positions" before *Masterpiece*. *Id.* So "[h]aving already formed a position, businesses in hybrid regimes were possibly more resistant to the influence of" *Masterpiece*. *Id.*

But Louisville is a +RFRA/+ AD jurisdiction. *Compare* § K.R.S. 446.350 *with* Metro Ord. § 92.05. So Barak-Corren's study indicates that a decision like *Masterpiece* would not affect the willingness of Louisville professionals to provide services for same-sex weddings.

To be sure, Barak-Corren denies this conclusion, saying that Kentucky and Texas's RFRAs differ because Texas's does not provide a civil defense to local antidiscrimination laws, while Kentucky's does. NCB Report ¶¶ 15–16. But that's wrong. True, Texas's RFRA cannot be used as a defense "to a civil action … under a

federal or state civil rights law." Tex. Civ. Prac. & Rem. Code § 110.011(a). But this exemption doesn't apply to *local* civil rights laws. So Texas's RFRA provides a defense to local anti-discriminations laws (just like Kentucky's RFRA does). *See* Tex. Civ. Prac. & Rem. Code § 110.001(a)(2) (defining "government agency" to include "a municipality," including any "commission."). In fact, Texas federal and state courts apply Texas's RFRA against local laws. *See Merced v. Kasson*, 577 F.3d 578, 588–95 (5th Cir. 2009) (applying law to animal slaughter statute); *Barr v. City of Sinton*, 295 S.W.3d 287, 297–308 (Tex. 2009) (applying law to zoning ordinance). And when a group of churches sued Austin, Texas over its local antidiscrimination law for violating Texas's RFRA, Austin didn't even raise § 110.011(a) as a defense. *See* Defs.' Mot. to Dismiss Pls.' Compl., *U.S. Pastor Council v. City of Austin*, Case No. 18-cv-849-RP (W.D. Tex. Jan. 8, 2019), ECF No. 6 (attached as Exhibit O). If that provision made the RFRA inapplicable, Austin would have argued so.

Barak-Corren even admitted that her conclusions would be different if Chelsey lived in Austin (a +RFRA/+AD jurisdiction). Tr. 172:15–172:2; JLS 14 n.13 (classifying Austin). But Louisville and Austin have more in common than the "keep it weird" slogan. Tr. 173:3–14. The legal regimes are the same too. So Barak-Corren's admission is decisive. Her testimony proves that *Masterpiece* or a similar ruling would not affect creative professionals in Louisville.[8]

[8] Barak-Corren misclassified other jurisdictions too. For example, she labels Iowa as -RFRA/+AD. HCRCL 42. But Iowa's law requires public accommodations to have "a spatial dimension" or physical place. *See U.S. Jaycees v. Iowa C.R. Comm'n*, 427 N.W.2d 450, 454 (Iowa 1988). So creative professionals in Iowa who run online businesses aren't subject to Iowa's public accommodations law; they effectively operate in a -RFRA/-AD regime. Likewise, Barak-Corren labels Indiana as a +RFRA and +/- AD depending on the local jurisdiction. HCRCL 30. But Indiana's RFRA isn't a defense to a civil rights complaint. *See* HCRCL 19 n.64. So professionals in Indiana effectively operate in a -RFRA and + or – AD regime. Barak-Corren never accounts for these nuances.

3. Barak-Corren cannot measure pre-*Masterpiece* discrimination.

Barak-Corren's testimony should also be excluded because she concedes she cannot measure pre-*Masterpiece* discrimination.

Barak-Corren's study got off on the wrong foot. In Wave 1, 70.8% of professionals responded to same-sex inquiries. HCRCL 36. But in Wave 2, 58.7% of professionals responded to opposite-sex inquiries. *Id.* So before *Masterpiece*, more professionals responded to same-sex inquiries (Wave 1) than opposite-sex inquiries (Wave 2). This decline (the attrition rate) skews the entire study.

As Barak-Corren admits, the different response rates in Waves 1 and 2 "hindered the [study's] ability to detect discrimination in the pre-*Masterpiece Cakeshop* period." HCRCL 36-37. *See also* JLS 21, 23 n.29; Tr. 147:12–21. That alone shows the *Masterpiece* Study is unreliable.[9] Despite this admission, Barak-Corren tries to compare discrimination pre-and-post *Masterpiece* anyway. For example, Barak-Corren concludes that, after *Masterpiece*, "inquiries from a same-sex couple had a 66.3% chance of receiving a positive response" while "inquiries from an opposite-sex couple have a 75.5% chance of being answered positively." HCRCL 38. She attributes this change to *Masterpiece*. *Id.* But these statistics are meaningless without knowing the comparable rates of positive responses for same-sex and opposite-sex couples *before Masterpiece*. In other words, if positive response rates were the same (or worse) before *Masterpiece* (e.g., 66.3% for same-sex couples and 75.5% for opposite-sex couples) then *Masterpiece* had no effect (or a positive

[9] *See* Tankard & Paluck, at 1335 ("Understanding causal effects of [a Supreme Court] decision is difficult without the ability to randomize exposure … or without prospective time-series data testing how individuals change prior to and following" such a decision."); *id.* at 1338 (following "the same individuals prior to and following the June 2015 U.S. Supreme Court ruling on same-sex marriage"); Kazyak & Stange, 21 Homosexuality at *15-16 (containing pre-and-post *Obergefell* data to measure attitudes on same-sex marriage).

effect) on the different response rates. But Barak-Corren cannot know this information because of the attrition between Waves 1 and 2. There simply is no statistical baseline that can show that *Masterpiece* caused a decline in response rates from Waves 1 and 2 (pre-*Masterpiece*) to Waves 3 and 4 (post-*Masterpiece*).

Barak-Corren backpedals from this error by measuring businesses that "agreed to serve same-sex couples before the decision." JLS 23. But this workaround creates a "regression fallacy." James E. Ciecka, *The First Use of the Term Regression in Statistics* (Ciecka), 17 J. Legal Econ. 31, 38 (2010). Regression to the mean "describes a tendency of extreme measurements to move closer to the mean when they are repeated." Christy Chuang-Stein, *The Regression Fallacy* (Chuang-Stein), 27 Drug Information J. 1213, 1213 (1993) (attached as Exhibit P). So "in a test-retest situation, the bottom group on the first test will on average show some improvement on the second test while the top group will on average fall back." *Id.*; Colleen Kelly & Trevor Price, *Correcting for Regression to the Mean in Behavior and Ecology* (Kelly & Price), 166(6) Am. Nat. 700, *1 (2005) (attached as Exhibit Q) (explaining test-retest similarly). "Regression to the mean" is "present whenever individuals … are measured two different times." Kelly & Price at *2.

Here's how the fallacy applies. Barak-Corren relied on the "576 businesses that agreed to serve same-sex couples before the decision" in Wave 1 to measure post-*Masterpiece* discrimination. HCRCL 38. In other words, Barak-Corren pins the pre-and-post *Masterpiece* comparator on professionals who responded positively 100% of the time to same-sex inquiries in Wave 1. But these responses were not representative; by definition they were atypical in their positive responsiveness to same-sex inquiries. So the post-*Masterpiece* same-sex response rate from the professionals who responded positively to same-sex inquiries in Wave 1 likely underwent "regression to the mean" and moved closer to those professionals' average same-sex responsiveness. Stated differently, by starting with 100% positive

responses to same-sex inquiries pre-*Masterpiece*, professionals' responsiveness to same-sex inquiries had nowhere to go but down. So the post-*Masterpiece* move to non-responsiveness to same-sex inquiries was contaminated by the expected statistical corrections in that direction, i.e. regression to the mean.[10]

This contamination dooms the claim that the non-responsiveness was due to any intervening event. Kelly & Price, 166(6) Am. Nat. at *1 (noting fallacy "arises when a researcher attributes a decrease to an intervention"); Ciecka, 17 J. Legal Econ. at 38 (fallacy "is compounded when a cause is ascribed to something that is simply due to regression to the mean."). Without accounting for this regression to the mean, Barak-Corren's conclusions are "greatly exaggerated," Chuang-Stein, 27 Drug Information J. at 1213, and likely wrong.

The attrition conundrum also requires Barak-Corren to inconsistently code non-responses. Barak-Corren attributes non-responses in Waves 2 to "attrition." HCRCL 37; GY Report ¶ 29. She does this to avoid the conclusion that opposite-sex couples were discriminated against more than same-sex couples before *Masterpiece*. HCRCL 37 n.131 (admitting this point). But in Waves 3 and 4, Barak-Corren codes non-responses as negative responses. *See* App. 29. This raises the question: Why are non-responses before *Masterpiece* attrition and non-responses after *Masterpiece* discrimination? Barak-Corren never answers.

4. Barak-Corren codes non-responses as negative responses, producing unreliable results.

Barak-Corren's decision to code non-responses as negative responses causes trouble too. Barak-Corren admits that she relies on non-responses as the pre-and-

[10] For example, perhaps an event occurred in early May that increased the likelihood of a response. Or professionals may have been uniquely eager to respond to requests in May. The point is that whatever accounted for the high same-sex response rate in Wave 1 naturally dissipated over time under a regression theory.

post-*Masterpiece* comparator because there were too few explicitly negative responses or negative responses. Tr. 128:2–25. But a creative professional may not respond to an inquiry for many reasons.

Barak-Corren lists some of them in her phone survey of seventy-three professionals. App. 13–14. Of those professionals, four said they never received the email, two thought the email was a scam, and other professionals "provided various reasons for not responding" including "having intended to respond or being unable to provide the service." *Id.* at 14. Of course, some professionals "did not explain 3rd Wave non-response." *Id.* But the point is that many of the contacted professionals had legitimate reasons for not responding to the emails.

For example, creative professionals could have not responded because Barak-Corren used multiple emails to contact them multiple times. This causes fatigue and raises suspicion. GY Report ¶¶ 11–12. And it required Barrak-Corren to change the content of the emails. *Id.* ¶ 13. Barak-Corren ignores these changes. *Cf. Davis v. Landscape Forms, Inc.*, 640 F. App'x 445, 455 (6th Cir. 2016) (A "statistical report's failure to account for explanatory variables may make admissibility an uphill battle."). But these changes effected professionals' responses in several ways.

First, emails to professionals in Waves 1 and 2 asked about their availability in a general month while emails in Waves 3 and 4 asked for a specific date. App. 1–10. The fact that post-*Masterpiece* inquiries asked for exact dates likely depressed response rates compared to the pre-*Masterpiece* inquiries asking for a monthlong range. *See* GY Report ¶ 13. After all, if a professional was available for the requested month in Waves 1 and 2, she may have replied positively; if she wasn't available for the exact date in Waves 3 and 4, she would've responded negatively.

Second, emails in Waves 3 and 4 asked professionals for services on Friday *and* Saturday. Appendix 4–10. Barak-Corren never claims requests for two-day services are normal in the wedding industry.

Third, the same-sex couples' emails in Waves 3 and 4 asked for in–person meetings, while same-sex couples' emails in Wave 1 didn't. *Compare id.* at 1–4 *with id.* at 4–5, 7–9. Professionals may have been uncomfortable with an initial in-person meeting. These three changes "introduce[] the potential problem that professionals react differently to the contrasting ways the emails are worded" and "make it difficult to have any confidence in the report's findings." GY Report ¶ 13–14.

Next, the change in email content halfway through the study also forced Barak-Corren to change her response coding. Barak-Corren first coded referrals and suggestions of alternative dates as a positive response in Waves 1 and 2. App. 29 n.16. But she coded those same behaviors as negative responses in Waves 3 and 4. *Id.* The altered email content prompted the need to flip the coding of these behaviors. *Id.* (suggesting alternative dates in Waves 3 and 4 was "a negative response because it is common knowledge that a wedding date will not be changed for any single provider …"). But this change created a bias towards finding increased negative responses after *Masterpiece* because the same behavior is measured differently. And this bias has a disproportionate effect on inquiries for same-sex weddings because of the comparatively high response rate in Wave 1.

Finally, non-responses could be because of the timing of the email waves. Barak-Corren sent emails in Waves 1 and 2 in May and emails in Waves 3 and 4 in June. HCRCL 29. But many more Americans vacation in June than May.[11] And June is busier for wedding professionals than May; so professionals' comparatively busy calendars could explain their non-response.[12]

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[11] Keeneth Kiesnoski, *Here's where Americans are planning to go for that summer vacation*, CNBC (Apr. 21, 2021), https://cnb.cx/3AX1YHr (explaining 67% of Americans travel from June to August compared to 17% from March to May).

[12] The Knot, *What to Know About Wedding Season and the Off-Season* (Nov. 18, 2020), https://bit.ly/3ms0rFp (June is the third most popular wedding month).

Barak-Corren never teases out any of these legitimate reasons for non-responses. *See Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 680 (6th Cir. 2011) (testimony excluded where expert failed to rule out alternative causes). She just lumps them into her general conclusion that "previously 'gay friendly' businesses … responded less favorably to same-sex couples than opposite-sex couples … after the decision was rendered." HCRCL 6–7, 38; JLS 24.

Instead, Barak-Corren counters that even though "non-responses may have had other causes … we would expect such errors to distribute randomly." HCRCL 38. Responses were not randomized, Barak-Corren says, because opposite-sex couples had a higher chance of receiving a response than same-sex couples. *Id.* Here the regression fallacy surfaces again. *See* § I.A.3. This comparison is reliable only if Barak-Corren knew pre-*Masterpiece* discrimination rates. She does not.

These issues contaminate Barak-Corren's testimony and make it unreliable.

B. Barak-Corren's testimony is not based on sufficient facts or data because she gives no evidence about how her study would apply in Louisville.

Next, Barak-Corren's testimony that granting a religious exemption for Chelsey in this case will increase discrimination in Louisville is unreliable without "facts or data" about Louisville's creative professionals. Fed. R. Evid. 702(b). Barak-Corren has none.

Barak-Corren stresses specific evidence. She claims efforts to balance religious liberty and same-sex marriage "should rely on … empirical evidence," counsels parties to "present *directly relevant data,*" and urges those reading her study to rest arguments "on relevant empirical evidence." HCRCL 55, 59, 63.

But Barak-Corren ignores this advice here. For example, Barak-Corren never measures the public's exposure to district court decisions or claims those opinions

receive the same media attention as Supreme Court decisions. *See supra* § I.A.1. That alone exiles the *Masterpiece* Study in this case before the district court.

She hypothesizes about how the *Masterpiece* Study might apply in Louisville based on outcomes in Iowa, Indiana, North Carolina, and Texas with no evidence from Louisville. *See* NCB Report ¶¶ 12–23. *See, e.g.*, *Newell Rubbermaid, Inc. v. Raymond Corp.*, 676 F.3d 521, 528–29 (6th Cir. 2012) (excluding testimony due to improper extrapolation of data from non-comparable forklifts); *Powell v. Tosh*, 942 F. Supp. 2d 678, 692 (W.D. Ky. 2013) (excluding expert evidence based on "extrapolation of the data" from neighboring farm). With no evidence from Louisville, Barak-Corren cannot determine how the *Masterpiece* Study applies to Louisville nor can she reliably compare Louisville to the studied states.[13] GY Report ¶ 20. This is especially true because of how few variables the *Masterpiece* Study measures and the "nested dataset" of the study. *Id.* ¶¶ 16-20.

Barak-Corren didn't audit professionals in Louisville. And Barak-Corren didn't research the attitudes of those in Louisville towards "homosexuals" or same-sex marriage or the percentage of "Conservatives" or "Evangelicals" in Louisville. NCB Report ¶ 22. She did those comparisons for Kentucky. But Louisville is not Kentucky. It is an "'apples and oranges' comparison." *Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 208 (2d Cir. 1984).

Louisville residents oppose same-sex marriage less often than Kentuckians. *Compare* PRRI, *The American Values Atlas*, https://bit.ly/3xSvpbL (last visited Aug. 30, 2021) (38% oppose in Louisville) *with* NCB Report ¶ 22 (52% oppose in Kentucky). And while more than half of Kentucky residents consider themselves to

[13] *See, e.g.*, *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 262 (4th Cir. 2005) (excluding study in discrimination case that "failed to compare similarly situated workers"); *Raskin v. Wyatt Co.*, 125 F.3d 55, 67 (2d Cir. 1997) (excluding expert report based on "an unrepresentative sample for his comparison").

be conservatives, less than a third of Louisville residents are registered Republicans. *Compare* Jefferson County Clerk's Office, *KY Voter Registration Statistics*, https://bit.ly/3AX6Nk1 (last visited Aug. 30, 2021) *with* NCB Report ¶ 22.

Religiosity is the only "evidence" Barak-Corren offers to compare Louisville to the four studied states. NCB Report ¶ 20. She "observed" that Louisville "is home to the Southern Baptist Theological Seminary and some of the largest evangelical megachurches in the country." *Id.* She claims this observation proves "the high degree of religiosity in" Louisville, which causes her to "expect to observe the *Masterpiece* effect in Louisville." *Id.* ¶ 23.

But the observation appears to depend on a Wikipedia page as the only information she relies on to support her religiosity conclusions. *Compare* Wikipedia, *Religion in Louisville, Kentucky*, https://bit.ly/3srenjE (last visited Aug. 30, 2021) *with* NCB Report ¶ 20. Wikipedia is not reliable. *Advanced Mech. Servs., Inc. v. Auto-Owners Ins. Co.*, 2017 WL 3381366, at *5 (W.D. Ky. Aug. 4, 2017) (excluding expert who relied on "Wikipedia entry"). *Cf. Desai v. Charter Commc'ns, LLC*, 2018 WL 10215724, at *4 (W.D. Ky. Apr. 9, 2018) (collecting cases recognizing Wikipedia as unreliable). Anyway, if a seminary and two megachurches predicted a county's religiosity, then Los Angeles County would be as devout as Texas.[14] That just shows that Barak-Corren's testimony lacks sufficient facts and data about Louisville. *See, e.g.*, GY Report ¶¶ 16–20. Website domains don't determine devoutness.

Besides demographics, Barak-Corren has no evidence about how the *Masterpiece* Study might apply to present-day Louisville. Barak-Corren conducted her study between May and June 2018. JLS 3. She admitted that she is not an

[14] Fuller Seminary, *About Fuller*, https://bit.ly/37V9y92 (last visited Aug. 30, 2021) (describing "Fuller Seminary" in Pasadena, California as "an evangelical, multidenominational graduate institution"); Los Angeles Almanac, *Largest Protestant Christian Churches Los Angeles County*, https://bit.ly/37Va2fm (listing largest Protestant churches in Los Angeles County).

expert in wedding planning in 2021. Tr. 113:9–13. The *Masterpiece* Study also "does not measure long-term effects." GY Report ¶ 21; Tr. 176:19–24. Barak-Corren tries to extend the life of the *Masterpiece* Study by citing several other studies measuring long-term attitudinal change. Tr. 176:19–181:5. But none of those studies addressed wedding professionals. *Id.* at 181:6–12, 183:15–25. On-the-ground evidence proves the point—officials in Louisville are unaware of an increase in sexual-orientation discrimination after this Court granted Chelsey's preliminary injunction motion. *See* Exs. L, M 22:1–15, N 137:2–9.

C. Barak-Corren's testimony does not reliably apply her study's conclusions to this case.

Finally, Barak-Corren's testimony is not reliable because her conclusions rely on speculation rather than factual application. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."). Indeed, Barak-Corren's conclusions "contain[] not just one speculation, but a string of them, whose numerosity will not permit the string to hold." *Siegel v. Fisher & Paykel Appliances Holdings Ltd.*, 746 F. Supp. 2d 845, 849 (W.D. Ky. 2010) (cleaned up).

Barak-Corren can only travel from the *Masterpiece* Study's conclusions to her conclusion here—that "granting Chelsey Nelson a religious exemption … could significantly increase the likelihood that same-sex couples … will experience discrimination" when hiring wedding professionals—by traveling a road full of inferences. NCB Report ¶ 12. But the inferences make the road impassable. The road has too many holes. The *Masterpiece* Study relies on at least eight inferences.

First, creative professionals must have been aware of the *Masterpiece* decision. *See infra* § I.A.1. *Second*, professionals must have understood the decision as granting a religious exemption. *Id.* But Barak-Corren has no evidence about professionals' exposure or understanding of *Masterpiece*. Even Barak-Corren

thinks the *Masterpiece* holding is "vague." Tr. 89:3. If the S.J.D., law professor, and author of the *Masterpiece* Study believes *Masterpiece* unclear, then it is unlikely that professionals without legal training can decipher the opinion.

Third, *Masterpiece* must have caused social norms to change. HCRCL at 46–49; JLS 37. *Fourth*, social-norm changes must have equated to non-responses. Tr. 131:6–13 (identifying non-responses as the "driver"); *infra* § I.A.4. But non-responses aren't reliable indicators of changed social norms. *See infra* § I.A.4.

Fifth, creative professionals in Louisville must have reacted the same as the *Masterpiece* Study professionals in the four other states. There's no supporting evidence. *See, e.g.*, *infra* § I.B; GY Report ¶ 20 (making this point).

Sixth, Louisville must have a different legal regime than +RFRA/+AD jurisdictions in Texas. NCB Report ¶¶ 15–16. It doesn't. *See infra* § I.A.2.

Seventh, Louisville residents must react the same to U.S. Supreme Court decisions as federal district court decisions. There's no evidence on this point.

Finally, any change in social norms must have persisted from 2018 to the present—i.e., creative professionals' attitudes towards providing services for same-sex weddings must be eternally sustainable. But the *Masterpiece* Study's "research design does not measure long-term effects." GY Report ¶ 21. *See infra* § I.B (making this point about longitudinal attitude changes) And assuming long-term attitudinal change conflicts with Barak-Corren's research on religious person's ability to reconcile conflicts between their internal beliefs and external pressure.[15]

[15] *See* Netta Barak-Corren, *Taking Conflicting Rights Seriously*, 65 Vill. L. Rev. 259, 299 (2020) (finding religious leaders "attempt to find accommodations on the ground, drawing on distinctions of sphere and role in an attempt to square traditional and liberal norms"); Netta Barak-Corren, *Beyond Dissent and Compliance: Religious Decision Makers and Secular Law*, 6 Oxford J. of L. and Religion 293, 295 (2017) (attached as Exhibit K) (summarizing how religious leaders limit conflicts between religion and law by redefining the conflict, withdrawing religious normativity from the conflict, and restraining the conflict); Netta Barak-Corren, *Does Antidiscrimination Law Influence Religious Behavior? An Empirical*

Ultimately, Barak-Corren's testimony is more speculative than testimony saying "A suggests by analogy the possibility of B, which might also apply to C, which, if we speculate about D, could eventually trigger E, so perhaps that happened here." *Tamraz*, 620 F.3d at 672. For this reason, it should be excluded.

II. Barak-Corren's testimony should be excluded as irrelevant.

Barak-Corren's testimony should also be excluded because it is irrelevant to Chelsey's constitutional or statutory claims. Expert testimony must "help the trier of fact" understand evidence or determine a fact. Fed. R. Evid. 702(a). This condition "goes primarily to relevance." *Daubert*, 509 U.S. at 591. Testimony that "does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Id.*

Barak-Corren's testimony is not relevant because (A) she assumes creative professionals declined or did not respond to same-sex inquiries because of discrimination and (B) fails to show Louisville has a compelling interest in forcing Chelsey to create photographs and blogs celebrating same-sex weddings.

A. Barak-Corren's testimony is irrelevant because she assumes that all declines and non-responses are discriminatory.

Barak-Corren's testimony is irrelevant because she assumes her conclusion—that all declines or non-responses are discriminatory. But she does not consider nondiscriminatory reasons for declines, such as a creative professional's message-based objection to declining the requested service.

Take Chelsey as an example. Chelsey cannot create photographs for, write blogs about, or participate in same-sex weddings because she objects to promoting or participating in same-sex marriage. *See* Pls.' Br. in Supp. of Prelim. Inj. Mot. (MPI Br.) 4–21, ECF No. 3–1. In short, she objects to promoting certain messages,

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Examination, 67 Hastings L.J. 957, 1011 (2016) (noting "that religious people might have various ways to deal with conflicts of values other than defy the law or seek accommodations--ways that are substantially more inclusive").

not to serving certain people. *Id.* at 14–15 (making this message/status distinction). And this Court held that Chelsey's photographs and blogs are speech protected by the First Amendment. *See* Order 3–4, ECF No. 47.

Barak-Corren acknowledges that photographers "spend many hours with the couple," "take an active part in the event and are present throughout the wedding," "create the couple's wedding album," and have a "continued relationship with the couple." JLS 15. For these reasons, she found that photographers were "pickier in general about their customers …." App. 17 n.11. So like Chelsey, other photographers exercise editorial discretion over their artwork. *See* Order 14–18.

But Barak-Corren brushes all of this aside. She never explains how a message-based objection to creating photographs is like a religious exemption. *Cf.* Tr. 188:7–24 (admitting *Masterpiece* was not decided on "free speech grounds"). She also never explains how a message-based objection is equivalent to discrimination. In fact, she said the opposite at her deposition—that a cake artist "intending to provide shelf products but having a First Amendment objection to providing a custom product" would be coded as a "positive baker," i.e. non-discriminatory. *Id.* at 194:11–25. That alone proves Barak-Corren's testimony is either irrelevant or supports Chelsey's freedoms to create and participate consistent with her beliefs.

Still, Barak-Corren assumes that all negative responses were discriminatory. If this Court continues to hold that the First Amendment protects Chelsey's discretion to create photographs, write blogs, and participate in events consistent with her beliefs, then Barak-Corren's claim that *religious* exemptions lead to discrimination becomes irrelevant. *See Munoz v. Orr*, 200 F.3d 291, 301 (5th Cir. 2000) (excluding expert who assumed "promotion system discriminated against Hispanic males"); *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 450 (2d Cir. 1999) (excluding report that "ma[de] *no effort* to account for nondiscriminatory explanations for the dispar[ate]" treatment); *Raskin*, 125 F.3d at 67 (excluding age

discrimination report that "ma[de] no attempt to account for other [non-discriminatory] possible causes"). Barak-Corren cannot transform constitutional freedoms into illegal discrimination.

B. Barak-Corren's testimony is irrelevant because she fails to identify a specific problem in Louisville.

Barak-Corren's testimony should also be excluded because it is irrelevant to strict scrutiny, an element of Chelsey's claims. *Madej v. Maiden*, 951 F.3d 364, 370 (6th Cir. 2020) (courts "should consider the elements" of claim to decide relevance).

Chelsey claims that the Accommodations and Publication Provisions violate her rights guaranteed under the First Amendment and Kentucky's RFRA. Compl. ¶¶ 326–81, ECF No. 1 So Louisville must show that these provisions pass strict scrutiny—i.e., serve a compelling interest and are narrowly tailored to further that interest. MPI Br. 21–23. To show a compelling interest, Louisville must perform a "precise analysis" and justify its "interest in denying an exception" to just Chelsey. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021). Barak-Corren's testimony is irrelevant to that showing because she offers no evidence that protecting Chelsey will increase sexual-orientation discrimination in Louisville.

For example, one could read the *Masterpiece* Study as justifying a need to regulate how the media reports on court decisions. As previously discussed, Barak-Corren had to evaluate how creative professionals responded to how the *media* communicated about the *Masterpiece* decision. *See* § I.A.1; HCRCL 25–27; Tr. 189:4–16. In other words, any *Masterpiece* effect comes from media portrayal, not religious exemptions. But Louisville cannot control how the media reports court cases. So Louisville has no compelling interest in refusing to recognize Chelsey's freedoms here, where any effect would be caused by the media.

And the *Masterpiece* Study cannot deny Chelsey's constitutional and statutory freedoms because it contains no relevant evidence. Barak-Corren did not

audit any professionals in Louisville. *See infra* § I.B–C. She has no evidence about how district court decisions affect social norms as compared to Supreme Court decisions. *See infra* § I.B-C. Indeed, Louisville officials are unaware of an uptick in sexual-orientation complaints since this Court granted Chelsey's preliminary injunction. *See* Exs. L, M 22:1–15, N 37:2–9. She has no evidence about how often *photographers* explicitly declined or declined by referral. GY Report ¶ 25. And she admits she is not an expert in wedding vendor behavior today. Tr. 113:9–13.

The *Masterpiece* Study did not even establish there are widespread objections to celebrating same-sex weddings. Barak-Corren sent over 1,800 emails to creative professionals inquiring about same-sex wedding services. App. 19 (noting 906 emails multiplied by two waves). She also called 177 professionals and spoke with seventy-three of them. *Id.* at 13. In almost 2,000 contacts, only one professional explicitly declined a same-sex wedding request because the professional "'only does traditional weddings.'" *Id.* at 14; Tr. 198:20–199:9. One professional also declined such a request because he or she was training to become an astronaut. Tr. 75:22–76:13. So a same-sex couple has the same chance of being declined by an astronaut preparing for launch as by someone who objects to same-sex marriage. Chelsey's fundamental rights should not be overridden by galactically unlikely events measured in unreliable ways.

Conclusion

Professor Netta Barak-Corren's testimony, including her report, her written articles, and any additional testimony she may provide should be excluded because it is speculative, unreliable, and irrelevant.

Respectfully submitted this 30th day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August, 2021, I electronically filed the foregoing document with the Clerk of Court using the ECF system which will send notification of such filing to all counsel of record who are registered users of the ECF system.

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