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' Response to Brief of Amici Curiae American Civil Liberties Union of Kentucky and American Civil Liberties Union Supporting Defendants

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Introduction

Louisville's law violates the First Amendment by preventing Plaintiffs Chelsey Nelson and her studio from photographing, editing, and blogging consistent with her faith and artistic discretion. *Amici* disagree.

But *Amici* largely agree with Chelsey about the way Louisville's law applies to her studio. They agree Chelsey's policy and practice of only photographing, blogging about, and participating in opposite-sex weddings violates Louisville's law. Doc. 108–1, PageID.4759 (this "*is* discrimination"). They agree the law bans Chelsey's desired statement. *Id.* at 4753–54. They agree Louisville's "same services" rule requires Chelsey to create photographs and blogs celebrating same-sex weddings because she does so for opposite-sex weddings. *Id.* at 4751. And they agree that Louisville does not force businesses (except Chelsey) to create items they wouldn't create for anyone under Louisville's "prior-goods" exception. *Id.* at 4745.[1]

Even so, *Amici* see no problem here. They argue that the law somehow regulates Chelsey's conduct yet is justified because Chelsey's photographs and blogs are so expressive they are "inherently not fungible." *Id.* at 4746–48, 4759. They also claim that Louisville's same-service rule compels Chelsey's photographs and blogs but not her participation in religious events. *Id.* at 4751, 4755. And they selectively apply Louisville's prior-goods exception—exempting some speakers (like cake designers and print shops) from printing messages they wouldn't create for anyone, but not exempting Chelsey. *Id.* at 4745.

In *Amici*'s world, some speech wins, but Chelsey's speech always loses. That selectivity is "wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 49 (1976). The First Amendment offers a better approach with a workable standard. All speakers—no matter their views—may decline to create and promote messages

[1] *Amici* do not dispute—and these agreements highlight—the credible threat Louisville's law poses to Chelsey, her standing, and the ripeness of her claims. Chelsey reserves the right to supplement the factual record.

that violate their conscience. Meanwhile, antidiscrimination laws may prohibit discriminatory conduct that have nothing to do with speech (renting rooms, selling tuxedos, etc.). Doc. 47, PageID.1218n.118, 1226–27nn.165–68 (making this point). This Court should follow the First Amendment's approach again.

Argument

Louisville's law violates Chelsey's First Amendment freedoms because it (I) compels her to speak messages she disagrees with; (II–III) compels and restricts her speech based on content and viewpoint; (IV) is not neutral or generally applicable; (V) forces her to participate in religious events; and (VI) and fails strict scrutiny.

I. The Accommodations Provision compels Chelsey's speech.

Louisville's law (A) unconstitutionally compels Chelsey's speech, (B) even though Chelsey declines to speak based on the message requested, not the status of the requestor, and (C) *Hurley* proves this and controls.

A. The Accommodations Provision compels Chelsey's speech, despite *Amici*'s attempt to re-label her speech as conduct.

The Accommodations Provision compels Chelsey to speak and infringes on her artistic discretion by forcing her to create photographs and blogs promoting messages that violate her religious beliefs. *E.g.*, Doc. 92–1, PageID.2813–17.

Amici claim the law just regulates "the sale of services to the public"—i.e., Chelsey's conduct—because it doesn't dictate how she "frame[s]" or "edit[s] her photographs, "which moments to capture, or what to include on" her blog. Doc. 108–1, PageID.4747. Courts reject this argument. Doc. 104, PageID.4565 (collecting cases); *infra* n.2. And for good reason. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the law was silent "[o]n its face" about the parade's content, float colors, and acceptable banners, but the law still applied "in a peculiar way" to the parade organizer's speech. 515 U.S. 572, 557, 578 (1995).

Amici add further that the "relevant inquiry is not whether *application* of a law" causes speakers "to create products reflecting content to which they object" but whether "the *law itself* draws distinctions based on content." Doc. 108–1, PageID.4749–50. That misses Chelsey's facial versus as-applied argument. Doc. 104, PageID.4565. And it misses the law. *See, e.g.*, *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1177 (10th Cir. 2021) (law did not "regulate[] … conduct" when applied to "force" designer "to create websites"); *Telescope Media Grp. v. Lucero* (*TMG*), 936 F.3d 740, 753 (8th Cir. 2019) (similar); *Brush & Nib Studio, LC v. City of Phoenix* (*B&N*), 448 P.3d 890, 913–14 (2019) (similar).

Amici cast *TMG* and *B&N* as "sharply divided" and criticize them and this Court for focusing on the "nature of the services sold." Doc. 108–1, PageID.4750, 4752n.5. But that's the proper standard. Courts first analyze the regulated activity to evaluate free-speech claims. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 583 (2000) (*Hurley* found law violated discretion "to choose the content of" message "[a]fter noting that parades are expressive endeavors"); *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* (*FAIR*), 547 U.S. 47, 63–64 (2006) ("expressive nature of a parade was central" to *Hurley*).[2]

In this crowd, *Elane Photography, LLC v. Willock* stands alone. 309 P.3d 53 (N.M. 2013). *Elane* focused on how the law typically regulated the studio's "business

[2] *See also Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1254 (11th Cir. 2021) (focusing on "expressive conduct" of making charitable selections); *303 Creative LLC*, 6 F.4th at 1176 (focusing on "inherently expressive" website); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060–61 (9th Cir. 2010) (focusing on "tattoo *itself*"); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 442 (S.D.N.Y. 2014) (focusing on "expressive character of … search results"); *Claybrooks v. Am. Broad. Companies, Inc.*, 898 F. Supp. 2d 986, 999 (M.D. Tenn. 2012) (focusing on "show's creative content" as "the end product"); *New York Cnty. Bd. of Ancient Ord. of Hibernians v. Dinkins*, 814 F. Supp. 358, 366 (S.D.N.Y. 1993) (The "first question" should be "whether the Parade and its message constitutes speech."); Doc. 104, PageID.4565 (citing Sixth Circuit newspaper cases).

operation." *Id.* at 68. In doing so, *Elane* missed how the "expressive" nature of wedding photography "inevitably express the messages inherent in the event" and then overlooked how the law compelled speech by forcing a photographer to photograph same-sex *and* opposite-sex weddings. *Id.* at 65–66 (cleaned up).

Correctly focusing on the regulated work here—Chelsey's photographs and blogs—separates this case from those *Amici* cite regulating conduct. *See* Doc. 104, PageID.4567–68 (distinguishing cases cited by *Amici*). *Hishon v. King & Spalding*, 467 U.S. 69 (1984), provides a foil. That antidiscrimination law could apply to a law firm's employment decision because the decision wasn't expressive. And the firm never showed that its "expression" rights "would be inhibited." *Id.* at 78. This Court found Louisville's law compels Chelsey "to express herself in a manner contrary to her conscience." Doc. 47, PageID.1219. That's different. Laws can still regulate expressive businesses' conduct—tattoo parlors must follow health codes and labor laws—but they cannot regulate the business's expression.

Amici are wrong to suggest that this principle is not "susceptible to clear or uniform application." Doc. 108–1, PageID. 4752n.5. Courts already apply it. *Supra* n.2. This Court did when it distinguished restaurants and hotels from photographs and blogs. Doc. 47, PageID.1227. So this principle is workable and applies here.

B. *Amici* confuse Chelsey's message-based objections.

Chelsey objects to expressing and celebrating certain messages, not to serving certain people. Doc. 92–1, PageID.2816 (making this point); Doc. 92–2, PageID.2881–82, 2890–91 (giving examples). But Chelsey will not create some messages for anyone, no matter who asks. Doc. 92–1, PageID.2816; Doc. 92–2, PageID.2874–78 (giving examples).

The Supreme Court approved this same message/status distinction in *Hurley*. Doc. 92–1, PageID.2817 (explaining this). *Hurley* also explained that public

accommodation laws "could ensure equal access" generally for all persons (i.e., status) as long as that access does "not trespass on the organization's message itself" (i.e., message). 515 U.S. at 580. The Supreme Court has reaffirmed this. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653–54 (2000); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1736 (2018) (Gorsuch, J., concurring) (cake designer properly objected to "the kind of cake, not the kind of customer"). *See also World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 258 (Utah 1994) (newspaper could decline religious advertisement because "it was the message itself that [the newspaper] rejected, not its proponents").

Amici even approve this distinction. Selectively.[3] For example, to *Amici*, a baker could decline to create a custom cake with "homophobic text" if she "would not write that text for any customer." Doc. 108–1, PageID.4745. *Amici* say that a print company need not "produce signs" with text that it wouldn't make "for any customer." *Id.* And *Amici* allow a "black baker" to decline "a cake bearing a white-supremacist message" and "an Islamic baker" to refuse a cake for "Westboro Baptist Church" if they "wo[uldn't] write th[at] message for anyone." Br. of Resp. at *26 & n.2, *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (No.16-111) (U.S. Oct. 23, 2017), 2017 WL 4838415 (ACLU representing respondents).

That describes Chelsey. She will not create photographs or blogs promoting same-sex marriage *for anyone*, but she will create photographs for LGBT photographers, business owners, wedding-planners, and parents if the photographs themselves do not convey messages against her beliefs. Doc. 92–1, PageID.2816. Chelsey is not offering a limited "menu." *Contra* Doc. 108–1, PageID.4744. Rather,

[3] *Amici* take polar opposite positions for speech they favor—*Hurley* "protects business corporations," the First Amendment is "manifestly agnostic as to medium," and "market concentration alone" cannot "justify government interference in" speech. No. 21-12355 PageID.19–20, 23 (excerpted in Exhibit A).

like the hypothetical LGBT, African American, or Muslim cake artists or print shop, Chelsey offers and declines the same messages to everyone.

This explains why Chelsey need not "know *who* the service is for." *Contra id.* at 4745. Chelsey would accept a photography request from a groom's gay parent for a wedding between one man and one woman. Doc. 92–2, PageID.2881. So she need not know who makes the request; she just needs to know "the *message* conveyed by the requested services." *Id.* at 2882 (emphasis added).

Chelsey's practice contrasts with *Amici*'s hypotheticals of photographers refusing interracial marriages, "women, Muslims, [or] Black people," or corporate headshots for women. Doc. 108–1, PageID.4742, 4745, 4750–51. These involve per-se refusals to serve entire groups. Chelsey does no such thing. She would photograph or blog about opposite-sex weddings if her clients or the photographed spouses identified as gay, lesbian, or bisexual and she would photograph "staged" opposite-sex weddings whether the models identified as LGBT or not. Doc. 92–2, PageID.2880–81. There's no difference between Chelsey's message-based objections and those *Amici* approves. *Amici* just prefers some messages over Chelsey's. But all speakers have the freedom to choose what they say. That includes Chelsey.

C. *Hurley* controls here, not cases about conduct that *Amici* cites.

As *Hurley* held, governments may not use public-accommodation laws to compel someone to speak messages with which they disagree. 515 U.S. at 572–73. This principle controls here.

Amici say that *Hurley* only applies to "a private expressive association" not "businesses." Doc. 108–1, PageID.4751. The *Hurley* parade, however, was not "private"—it was "open to … the patronage of the general public." *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. v. City of Bos.*, 636 N.E.2d 1293, 1297–98 (Mass. 1994). The *Hurley* parade was business-like—parade participants could "pay to

enter the parade" or "make a contribution to the council." *Id.* at 1296, 1298 n.13. And *Hurley* rejected *Amici*'s non-commercial limitation by extending protections to "business corporations generally," like "professional publishers." 515 U.S. at 574.

That's why so many courts apply *Hurley* to protect business from compelled speech. *See, e.g.*, *Coral Ridge*, 6 F.4th at 1255 (Amazon); *TMG*, 936 F.3d at 752, 758 (film studio); *Washington Post v. McManus*, 944 F.3d 506, 518 (4th Cir. 2019) (newspaper); *B&N*, 448 P.3d at 913–14 (art studio); *Claybrooks*, 898 F. Supp. 2d at 1000 (television studio); *Baidu.com*, 10 F. Supp. 3d at 441–42 (internet company).

To be sure, *Amici* say *Coral Ridge* did not "extend[] *Hurley*'s holding to commercial businesses open to the public." Doc. 108–1, PageID.4751n.4. But that court assumed Amazon and its charitable foundation were public accommodations under Title II (which "serve[d] the public" by definition, 42 U.S.C. § 2000a(b)). 6 F.4th at 1256 n.12. With that assumption, the court compared "Amazon's choice of what charities are eligible to receive donations" to the *Hurley* parade organizer's "choice of parade units." *Id.* at 1255. So, *Hurley* protected Amazon, a for-profit public accommodation. *Amici* also distinguishes *Claybrooks* because the television studio wasn't acting as a public accommodation. Doc. 108–1, PageID.4751n.4. But that distinction is irrelevant. *Claybrooks* still applied *Hurley* to protect a for-profit business from an anti-discrimination law that compelled speech.[4]

Courts are also up to the task of "deciding which businesses are sufficiently" expressive to warrant First Amendment protection. *Contra* Doc. 108–1, PageID.4751 (citations omitted). Courts often do that—by, for example, comparing video games to "protected books, plays, and movies." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011). The "basic principles" of the First Amendment "do not

[4] *Amici* also claims that *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56 (N.D. Ohio 1995) dealt with "a public speech" "more akin to the expressive parade at issue in *Hurley*" than Chelsey's photographs and blogs. *Id.* But Chelsey's photographs and blogs are speech as this Court held. Doc. 47, PageID.1215–17.

vary when a new and different medium for communication appears." *Id.* (cleaned up). Chelsey's proposal is not "unworkable." *Contra* Doc. 108–1, PageID.4751–52. That's especially true here where the First Amendment "unquestionably" protects "photography." Doc. 47, PageID.1216–17. Meanwhile, *Amici*'s proposal allowing the government to regulate "work product [that] involves creativity" regardless of the "nature of a business's product"—would ruin free speech. Doc. 108–1, PageID.4748.

Unable to distinguish *Hurley*, *Amici* claim that *FAIR* controls because Louisville's law "regulates conduct" and only incidentally compels speech. *Id.* at 4753. But the law *directly* regulates Chelsey's *speech*—her photographs and blogs—by forcing her to create speech celebrating messages she disagrees with. *Supra* § I.A. *FAIR*'s "equal access" policy applied to schools hosting recruiters—an activity that was "not inherently expressive" because schools were "not speaking when they host[ed]." 547 U.S. at 64–65. For that reason, the policy could require schools to send logistical emails incidental to hosting—i.e., emails incidental to non-expressive conduct. *Id.* at 62. *FAIR* distinguished its policy from unconstitutional laws that change or "interfere[] with a speaker's desired message." *Id.* at 63–64. In that way, *FAIR* supports Chelsey. Because Chelsey's "own message [is] affected" by Louisville's law, the law is unconstitutional as applied to her. *Id.* at 63.

II. *Amici* confirm that the Accommodations Provision compels Chelsey to speak based on content and viewpoint.

The Accommodations Provision compels Chelsey to speak based on content and viewpoint, Doc. 92–1, PageID.2818–19, a fact *Amici* readily confirm. As *Amici* explain, public accommodations can turn down requests containing political content because "political belief" is not a protected class. Doc. 108–1, PageID.4745. And a baker may decline "to include homophobic text on a cake." *Id.* Put differently, the law lets bakers refuse to create cakes containing any political content or criticisms of same-sex marriage, but punishes Chelsey for declining to create photographs and

blogs celebrating same-sex marriage. "That is about as content-based as it gets." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020).

Amici further underscore this with their attempt to distinguish Chelsey's "pet photography" example. Doc. 108–1, PageID.4749. They are correct that pet photographers must offer the same pet photography to any customer. So "dogtographers" must capture the canines of "a Black customer" and "a white customer" alike.[5] *Id.* Chelsey does just that—she offers the same wedding services with the same content (opposite-sex wedding photographs and blogs) to anyone. *Supra* § I.B. But Louisville's law does not compel a dogtographer to photograph felines because she depicts dogs. But it does force Chelsey to create photographs and blogs celebrating same-sex weddings because she creates photographs and blogs celebrating opposite-sex weddings. That distinction turns on content.

For that reason, Louisville's law is content and viewpoint based because it treats Chelsey's "choice to talk about one topic—opposite-sex marriages—as a trigger" to compel her to celebrate same-sex weddings. *TMG*, 936 F.3d at 753; *303 Creative LLC*, 6 F.4th at 1178 (same). *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) (content-based law when "appeal for funds" triggered message on "contributions"); *Planet Aid v. City of St. Johns*, 782 F.3d 318, 328 (6th Cir. 2015) (similar). *Amici* are wrong to deny that the law is not content-based because it requires photographers to photograph both same-sex and opposite-sex weddings. Doc. 108–1, PageID.4749, 4752. That's the point—photographers may celebrate both same-sex and opposite-sex weddings, but Chelsey cannot only celebrate opposite-sex weddings because that speech triggers a requirement to speak a message to which she objects.

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[5] *See, e.g.*, *Meet Kaylee*, Dog Breath Photography, https://bit.ly/343QPte (Kaylee Greer "has dedicated her life to telling the stories of the dogs who have been forgotten and left behind.") (last visited January 23, 2022).

This squares up the right-of-reply statute in *Miami Herald Publishing Company v. Tornillo*. 418 U.S. 241, 244, 256–58 (1974). Newspapers triggered that statute by printing one candidate's particular viewpoint, *id.*, just like Chelsey triggers Louisville's law by celebrating a particular view of marriage. Likewise, Louisville's law awards access to Chelsey's speech only to those who have contrary views about marriage, as *Pacific Gas & Electric Company v. Public Utilities Commission of California* (*PG&E*), 475 U.S. 1, 12–16 (1986), prohibits.

To avoid this result, *Amici* cite cases about laws governing a private club and buffer zones. Doc. 108–1, PageID.4749 (citing *Roberts* and *Madsen*). But those laws were "content neutral in application" because they did not infringe on the expression of the club or the protestors while the laws in *Tornillo*, *PG&E*, and here unconstitutionally usurp "the editorial independence of the" speakers. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 653–55 (1994).

III. *Amici* do not dispute that the Publication Provision restricts Chelsey's speech based on content and viewpoint.

The Publication Provision also restricts Chelsey's speech based on content and viewpoint. Doc. 92–1, PageID.2819–20. Rather than disputing this, *Amici* claim that Louisville can restrict Chelsey's speech because her "policy" is illegal. Doc. 108–1, PageID.4753. Not so. The First Amendment protects Chelsey's activities; so she can explain them. *See* Doc. 104, PageID.4560–61 (discussing intertwinement). This doesn't jeopardize laws banning speech about *illegal* activities as *Amici* suggest. Doc. 108–1, PageID.4753. Those laws still stand. But laws cannot prohibit speech proposing activities involving the exercise of constitutionally protected rights. *Cf. TMG*, 936 F.3d at 757 n.5; *B&N*, 448 P.3d at 926; Doc. 47, PageID.1222.

IV. The exemptions to the Accommodations and Publication Provisions treat Chelsey worse than comparable secular businesses.

Louisville's law is not neutral or generally applicable because it treats Chelsey worse than comparable secular activities through unwritten and written exemptions. Doc. 92–1, PageID.2820–23; Doc. 104, PageID.4570–73.

Start with the unwritten exemptions. Louisville has a "formal mechanism" for granting exemptions, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1879 (2021), but doesn't offer one to Chelsey. Doc. 111, PageID.4799 (Louisville claims its "interest in denying an exception to Chelsey"). For example, Louisville uses a "prior-goods exception." Doc. 92–1, PageID.2821–22 (explaining this). *Amici* admits that under this exception, businesses "may decline service" they wouldn't provide "for any customer." Doc. 108–1, PageID.4754. So, to *Amici*, a baker may refuse to create a custom cake with "homophobic text" if she wouldn't create that cake for anyone. *Id.* at 4745. Meanwhile, Louisville does not extend its prior-goods exception to Chelsey even though she wouldn't create photographs or blogs celebrating same-sex marriage for anyone. Louisville cannot "refuse to extend that exemption system" to Chelsey without passing strict scrutiny. *Fulton*, 141 S. Ct. 1878 (cleaned up).

Louisville's written exemptions are just as bad. *Amici* claim that those exemptions are irrelevant because Chelsey "is not a boarding house and does not seek to discriminate on those bases." Doc. 108–1, PageID.4755. That misstates the law. Courts measure comparability "against the asserted government interest that justifies the regulation at issue." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Louisville's asserted interest here is in "rooting out *all forms* of discrimination." Doc. 92–7, PageID.3295 (emphasis added). So its failure to cover age, familial-status, or most sex discrimination is decisive.[6] Doc. 104, PageID.4570–71.

[6] *Amici* wrongly claim that sex discrimination in public accommodations is covered by "a separate provision." That provision only applies to "restaurant[s], hotel[s], motel[s]," and government-funded facilities. Metro Ord. § 92.05(C).

Monclova Christian Academy v. Toledo-Lucas County Health Department applies the comparability analysis correctly—free-exercise claims don't depend on identifying "similar forms of" religious and secular activity because they evaluate "different statutes or decrees" undermining the government's interests. 984 F.3d 477, 480–81 (6th Cir. 2020). *See Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) (law not generally applicable if it "exempts or does not reach a substantial category of conduct" undermining the law's purpose). *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* applied the same analysis to find that various exemptions harmed and undermined the city's public health and other interests. 508 U.S. 520, 543–44 (1993). So did *Tandon* when moviegoing and eating out undermined the state's interest in stopping COVID transmission. 141 S. Ct. at 1297. The cases *Amici* cite either were distinguished by *Monclova*, conflict with *Lukumi* and *Tandon*, were vacated, or all of the above. Doc. 108–1, PageID.4755n.7.

V. The Accommodations Provision's same-service rule compels Chelsey to participate in and celebrate religious ceremonies she objects to.

Louisville's same-service rule forces Chelsey to participate in religious ceremonies she objects to. Doc. 92–1, PageID.2823–24; Doc. 104, PageID.4573–74. *Amici* agree that this rule normally forces Chelsey to "offer … the same services" for same-sex and opposite-sex weddings. Doc. 108–1, PageID.4751. But *Amici* say the rule doesn't force her to participate in sex-same wedding ceremonies to the same extent she participates in opposite-sex wedding ceremonies. *Id.* at 4756. *Amici* never explains the rule's asymmetrical application. And it conflicts with the law's text which prohibits "[a]ny direct or indirect … differentiation." Metro Ord. § 92.02 (defining discrimination).

For this reason, Louisville's law also involves "coercion and mandatory participation in religious acts." *Contra* Doc. 108–1, PageID.4756n.9. If Chelsey were

forced to photograph same-sex weddings (as Louisville's law demands), she would "feel coerced" to participate in the ceremony. Doc. 92–2, PageID.2879–80.

And the constitutional rule against compelled participation in religious ceremonies isn't limited to the clergy, as *Amici* suggest. Doc. 108–1, PageID.4756. *Cf.* Doc. 104, PageID.4574 (citing case involving on-duty police officer). Applying these protections to Chelsey also would not require extending them to "a long list of persons." Doc. 108–1, PageID.4756. Few businesses participate in the wedding ceremony and even fewer are like Chelsey who "cannot practically leave the ceremony during any part of the ceremony." Doc. 92–2, PageID.2880.

VI. The Accommodations and Publication Provisions fail strict scrutiny.

Because Louisville's law violates Chelsey's First Amendment rights, strict scrutiny applies. *E.g.*, Doc. 92–1, PageID.2825. Louisville's law fails strict scrutiny because it does not further a compelling interest in a narrowly tailored way.

To avoid this, *Amici* first assert that an actual problem exists because several artists from other states have objected to creating custom artwork celebrating same-sex marriage. Doc. 108–1, PageID.4759. If anything, these few examples show how limited Chelsey's request is. And they disprove *Amici*'s fear that exempting Chelsey will lead "a wide range of businesses [to] claim a First Amendment exemption." *Id.* at 4742. What's more, *Amici* cite no Louisville examples (besides Chelsey) and there's no access-to-photography-problem for same-sex wedding photography in Louisville. Doc. 92–1, PageID.2826 (citing Louisville's admissions and examples). *Cf. McManus*, 944 F.3d at 521 (no compelling interest where state could not "identify so much as a single" example of asserted harm occurring).

Speaking of access, *Amici* claim that an "equal access" interest justifies regulating Chelsey's photographs and blogs because they're "unique" and "inherently not fungible." Doc. 108–1, PageID.4758–59. The Supreme Court has

never agreed that one-of-a-kind speech gets *less* First Amendment protection, especially when alternatives exist. *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 534 n.1 (1980) ("regulated monopoly" status did not "preclude … First Amendment rights"); *Hurley*, 515 U.S. at 577–78 (law did not allow access to parade's "enviable vehicle for the dissemination of GLIB's views" when "GLIB … had a fair shot" at its own parade); *Turner*, 512 U.S. at 656 (newspaper's "local monopoly" did not "obstruct readers' access to other competing publications"). *Amici* don't even agree. Ex. A at 13 (claiming "market power" doesn't void protection).

Amici's "uniqueness" argument also imperils the First Amendment. If adopted, Louisville could force any custom artist, publisher, or writer to open their medium to views they disfavor. After all, custom creators are inherently unique.

Amici next argue that seeking other photographers injures "personal dignity." Doc. 108–1, PageID.4757. That claimed interest does not justify interfering with Chelsey's protected speech. *303 Creative LLC*, 6 F.4th at 1179 (rejecting "dignitary harms"). And this interest cannot apply to Chelsey's boutique editing services—she never interacts "with the married couple." Doc. 92–2, PageID.2853.

In any event, the dignity and equal-access interests cannot be compelling because Louisville's law is underinclusive—it allows many forms of status-based discrimination. Doc. 92–1, PageID.2826–27 (explaining underinclusivity and citing examples). The law is underinclusive even under *Amici*'s "uniqueness" argument. Louisville's prior-goods exception allows custom cake artists and print shops to deny access to their unique speech. Doc. 108–1, PageID.4745. Louisville admits that Chelsey can deny access to couples marrying in "non religious" ceremonies. Doc. 92–7, PageID.3334. And Chelsey could deny access to anyone if she offered her custom works "exclusively to members of her church congregation." Doc. 111, PageID.4795.

It is also irrelevant if exemptions occur in *"other* provisions." Doc. 108–1, PageID.4759. *Lukumi*'s public health and animal mercy laws were underinclusive

when restaurants were "outside" their "scope" and *other* laws allowed euthanizing, poisoning, and testing animals. 508 U.S. at 544–45; *id.* at 547 (strict scrutiny).

As to narrow tailoring, that's meant to be "a difficult hill to climb." *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020). *Amici* say Louisville can do it because its law "is tailored to *Louisville*'s interest." Doc. 108–1, PageID.4760. But Louisville admitted that its law isn't tailored at all—Louisville has no "information" about "what alternative measures … legislators may have considered." Doc. 104–4, PageID.4647. That alone defeats strict scrutiny. *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1053 (6th Cir. 2015) (buffer zone not narrowly tailored when "legislature did not engage in factfinding and analysis" to justify size of the zone).

Plus, Louisville could tailor its law better. Doc. 92–1, PageID.2827–29 (giving examples). *Amici* argue that Louisville need not follow what "other jurisdictions have done." Doc. 108–1, PageID.4760. But Louisville must consider those options. *Holt v. Hobbs*, 574 U.S. 352, 368 (2015) (department "failed to show" it could not follow inmate beard policy of other jurisdictions); *McCullen v. Coakley*, 573 U.S. 464, 494 (2014) (state did not "consider[] different methods that other jurisdictions have found effective"). When a "plausible, less restrictive alternative" is "offered" governments must "prove"—"beyond anecdote and supposition"—that it "will be ineffective." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816, 822 (2000).

Courts don't "defer" to city decrees that "nothing less than a total ban would be effective." *Reno v. ACLU*, 521 U.S. 844, 875 (1997). If they did, Louisville would have no "incentive to draft a narrowly tailored law in the first place" and could redeem any law after-the-fact. *Osborne v. Ohio*, 495 U.S. 103, 121 (1990). Strict scrutiny demands evidence. Louisville has none. So its law fails strict scrutiny.

Conclusion

Amici cannot save Louisville's law. This Court should grant Chelsey's motion.

Respectfully submitted this 24th day of January, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2022 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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