Nos. 22-5884 / 22-5912

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHELSEY NELSON PHOTOGRAPHY LLC, ET AL.,
Plaintiffs-Appellees/Cross-Appellants,

v.

LOUISVILLE-JEFFERSON COUNTY, KY METRO GOVERNMENT, ET AL.
Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Western District of Kentucky
No. 3:19-cv-851-BJB
Hon. Benjamin Beaton

BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY IN SUPPORT OF DEFENDANTS-APPELLANTS/CROSS-APPELLEES AND REVERSAL

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Disclosure of Corporate Affiliations and Financial Interest

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Name of counsel: Aditi Fruitwala, Corey Shapiro

Pursuant to 6th Cir. R. 26.1, amici ACLU and ACLU of Kentucky
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

N/A

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

N/A

CERTIFICATE OF SERVICE

I certify that on January 30, 2023 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Aditi Fruitwala

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately two million members dedicated to defending the principles of liberty and equality embodied in the Constitution. The ACLU of Kentucky is one of the ACLU's statewide affiliates with more than 8,000 members. As organizations that advocate for First Amendment liberties as well as equal rights for lesbian, gay, bisexual, transgender, and queer ("LGBTQ") people, the ACLU, the ACLU of Kentucky, and their members have a strong interest in the application of proper standards when evaluating constitutional challenges to civil rights laws. The ACLU and the ACLU of Kentucky have appeared as either counsel-of-record or *amicus curiae* in a number of cases in which businesses providing wedding-related services challenge public accommodations laws on First Amendment grounds, as well as cases implicating related issues in Kentucky. *See e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado*

[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No person, other than the *amici*, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief.

C.R. Comm'n, 138 S. Ct. 1719 (2018) (counsel for Respondents Charlie Craig and David Mullins); *303 Creative LLC v. Elenis*, —— U.S. —— (2023) (*amicus*); *Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019) (*amicus*); *Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cnty. Metro Gov't,* No. 3:19-CV-851-BJB (W.D. Ky. Aug. 30, 2022) *(amicus*); *Emilee Carpenter, LLC v. James*, 575 F. Supp. 3d 353 (W.D.N.Y. 2021) (*amicus*); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019) (*amicus*); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (*amicus*).

SUMMARY OF ARGUMENT

Louisville-Jefferson County's Metro Ordinance § 92.05 (hereinafter "the Antidiscrimination Ordinance" or "the Ordinance") bars businesses that are open to the public from refusing service to customers based on certain aspects of the customers' identities—including their sexual orientation. Louisville/Jefferson Cty. Metro Gov't, Ky., Ordinance § 92.05(A), (B). Such laws help ensure LGBTQ individuals have equal opportunity to participate in the "transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Chelsey Nelson Photography

and Chelsey Nelson (together, "the Photography Studio") seek a constitutional right to operate a business open to the public that denies equal service to same-sex couples, in violation of the Antidiscrimination Ordinance.

Louisville unquestionably has the authority to prohibit businesses within its borders from discriminating against LGBTQ people in the sales of goods and services to the general public. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995). The Photography Studio argues, however, that because the services it sells are creative and because Ms. Nelson objects to marriage for same-sex couples on religious grounds, the First Amendment entitles the Photography Studio to discriminate based on sexual orientation. Moreover, the Photography Studio seeks a right to post on its website and tell prospective customers that it will not provide the same services to same-sex couples that it offers straight couples, in violation of Louisville law.

The Supreme Court has never accepted arguments by businesses open to the public that the First Amendment allows them to avoid complying with antidiscrimination laws. *See Hishon v. King &*

Spalding, 467 U.S. 69, 78 (1984); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (citing *Katzenbach v. McClung*, 379 U.S. 294 (1964)); *cf. Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1723-24 (2018) (declining to recognize free speech or religion claims as authorizing a right to discriminate). Nor can businesses evade antidiscrimination laws and trigger heightened scrutiny by characterizing their services as "expressive conduct." The Antidiscrimination Ordinance is content- and viewpoint-neutral; it does not restrain or alter the exchange of ideas; and it does not compel businesses to speak a state-selected message.

The implications of the Photography Studio's arguments are far-reaching. If the Free Speech Clause were to bar a state from applying an antidiscrimination law to the provision of wedding photography because it involves expression, then photography companies could refuse to serve interracial or interfaith couples, women, Muslims, Black people, or any other group of people the company's owner objects to serving. *See Brush & Nib Studio, LC v. City of Phoenix* ("*B&N*"), 448 P.3d 890, 938–39 (Ariz. 2019) (Timmer, J., dissenting). And under the Photography Studio's proposed rule, because numerous sellers provide

goods or services that involve expression (including stationers, printers, and other producers of custom products), a wide range of businesses could claim a First Amendment exemption from generally applicable regulations of commercial conduct. *See 303 Creative LLC v. Elenis*, 6 F.4th 1160, 1181 (10th Cir. 2021), *petition for cert. granted* (Feb. 22, 2022) (No. 21-476). Indeed, "unique goods and services are where public accommodation laws are most necessary to ensuring equal access." *Id.*

Finally, even if the Antidiscrimination Ordinance substantially burdens Ms. Nelson's sincerely held religious beliefs, thereby triggering Kentucky's Religious Freedom Restoration Act ("KRFRA"), and if strict scrutiny applied to the Photography Studio's free speech and free exercise claims, applying the Ordinance to the Photography Studio's provision of commercial services would still be constitutional. The Antidiscrimination Ordinance furthers Louisville's compelling interest in eradicating invidious discrimination and is the least restrictive means of achieving that goal. *See 303 Creative*, 6 F.4th at 1178–82. As the Supreme Court of Nebraska explained in one of the earliest public accommodation decisions, a barber opening a shop to the public cannot say, "You are a slave, or a son of a slave; therefore I will not shave you."

Messenger v. State, 41 N.W. 638, 639 (Neb. 1889) (internal quotation marks omitted). The Photography Studio's asserted First Amendment objections run counter to the basic principle, reflected in over a century of public accommodation laws, that all people should receive equal service in American commercial life.

We agree with Defendants-Appellants/Cross-Appellees Louisville-Jefferson County Metro Government that the District Court erred in finding that the Free Speech Clause of the First Amendment and the Kentucky Religious Freedom Restoration Act shield Ms. Nelson's photography business from complying with the Antidiscrimination Ordinance. Here, *amici* separately expand on how the District Court's decision departs from antidiscrimination principles, making it too easy for a broad class of businesses to evade civil rights laws and inviting a far-reaching range of harm.

ARGUMENT

I. REFUSING TO PROVIDE PHOTOGRAPHY SERVICES TO SAME-SEX COUPLES THAT ARE OFFERED TO THE PUBLIC AT LARGE IS DISCRIMINATION BASED ON SEXUAL ORIENTATION AND VIOLATES THE ANTIDISCRIMINATION ORDINANCE.

Although framed as a constitutional challenge to the

Antidiscrimination Ordinance, the Photography Studio argues its refusal to wedding photography services to certain couples is not based on sexual orientation because it will provide *other* services to same-sex couples; it just will not photograph their weddings. Plaintiff's Motion for Summary Judgment, RE 92-1, Page ID # 2806-2807, 2809. But the Antidiscrimination Ordinance—like other public accommodation laws—does not merely prohibit a complete denial of *all* services to a customer. Rather, the Ordinance prohibits businesses from denying "the *full* and *equal* enjoyment" of "goods, services, . . . and accommodations" made available to the general public to a customer because of their sexual orientation or other protected characteristic. Metro Ord. § 92.05(A). As the Supreme Court of New Mexico explained in a virtually identical case, "[I]f a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013).

It is undisputed that the Photography Studio objects to providing a *service* to an entire class of customers: same-sex couples seeking photography services for their weddings. The Photography Studio asserts that it is denying services because of the message of a same-sex

couples' wedding, but the so-called "message" they object to is in fact the identity of the couple being served. If a business needs to know *who* the service is for to decide whether it will provide those services, that is identity-based discrimination. A company that refuses to provide wedding photography for interracial or Jewish couples would be discriminating based on race or religion, regardless of any "message" inherent in the product or the refusal, even if the company said it did so because it disapproved of those unions. *See Telescope Media Grp. v. Lucero* ("*TMG*"), 936 F.3d 740, 769 (8th Cir. 2019) (Kelly, J., concurring in part and dissenting in part); *B&N*, 448 P.3d at 938 (Timmer, J., dissenting); *Elane Photography*, 309 P.3d at 78 (Bosson, J., concurring). "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 390 (1992).

The Photography Studio's hypotheticals about what will follow from permitting Louisville to enforce its Antidiscrimination Ordinance, *see* Plaintiff's Motion for Summary Judgment, RE 92-1, Page ID # 2817, either do not actually implicate the Ordinance or misrepresent the

relevant case law. A baker does not need to include homophobic text on a cake, and a print company is not required to produce signs with a particular message, if they would not write that text for any customer, regardless of identity. Further, the Antidiscrimination Ordinance does not make "political belief" a protected class, so the Ordinance does not require environmentalists or Democratic speechwriters to write speeches for "climate change deniers" or Republican politicians if they would refuse to publish such messages regardless of the requester's identity.[2]

II. THE FREE SPEECH CLAUSE DOES NOT AUTHORIZE A BUSINESS TO ENGAGE IN DISCRIMINATION PROHIBITED BY A REGULATION OF CONDUCT THAT INCIDENTALLY AFFECTS EXPRESSION.

[2] Likewise, the Photography Studio misconstrues the holding in *Apilado v. North American Gay Amateur Athletic All.*, 792 F. Supp. 2d 1151 (W.D. Wash. 2011) to argue gay softball leagues would be forced to admit heterosexuals, but overlooks that there, the court recognized a right to associate for *expressive associations*, *id.* at 1160, which simply does not apply to a commercial business open to the public—nor does the Photography Studio claim such a right. Additionally, the Photography Studio's hypothetical about newspaper ads ignores that it is well established that it does not violate the First Amendment to prohibit discrimination in personal ads in a newspaper. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Relations*, 413 U.S. 376, 389 (1973).

A. The Antidiscrimination Ordinance Regulates Commercial Conduct and Affects Expression Only Incidentally.

When confronted with First Amendment challenges to neutral laws that regulate commercial conduct and affect speech only incidentally, the Supreme Court has applied minimal scrutiny and upheld the law.[3]

1. Generally applicable laws that regulate commercial conduct and do not target speech receive minimal First Amendment scrutiny.

"[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). The First Amendment is not infringed when the government enforces a generally applicable regulation of commercial

[3] Even outside the commercial context, the Supreme Court has applied the deferential test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) to determine whether regulation of expressive conduct violates the Constitution. Whether the Antidiscrimination Ordinance is evaluated under the commercial conduct cases or *O'Brien*, the result is the same: The Ordinance is a permissible regulation of conduct that does not violate the First Amendment.

conduct against an "expressive" business. Even newspaper publishers, whose very product is protected speech, can be subject "to generally applicable economic regulations" without implicating the First Amendment. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983). "The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating . . . business practices." *Associated Press v. United States*, 326 U.S. 1, 7 (1945); *Associated Press v. Nat'l Labor Relations Bd.*, 301 U.S. 103, 132 (1937). In contrast, a law specifically requiring a newspaper to print particular content (or forbidding the same) directly intrudes on the First Amendment. *See, e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Accordingly, the Supreme Court has uniformly rejected expressive businesses' challenges to laws against discrimination. *See TMG*, 936 F.3d at 762–63 (Kelly, J., concurring in part and dissenting in part) (citing *Norwood v. Harrison*, 413 U.S. 455, 469–70 (1973)); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). For example, in *Hishon*, a law firm argued that applying Title VII to require it to consider a woman for

partnership "would infringe [its] constitutional rights of expression or association." 467 U.S. at 78. Although a law firm's work product is speech, *see, e.g.*, *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001), the *Hishon* Court dismissed the law firm's First Amendment defense, holding that there is "no constitutional right . . . to discriminate." 467 U.S. at 78 (citations omitted). By contrast, a law specifically targeting a law firm's speech by, for example, preventing it from bringing cases that "challenge existing welfare laws," would "implicat[e] central First Amendment concerns." *See, e.g.*, *Velazquez*, 531 U.S. at 547–48.

The District Court's decision below erred in concluding that the Photography Studio's business services are protected speech. The Court identifies certain artistic decisions in photography that would be protected speech if targeted directly, such as making technical decisions regarding framing and light and editing photos to emphasize particular images and qualities. Order on Motion for Summary Judgment, RE 130, Page ID # 5367-68 (citing Nelson Declaration, RE 92-2, Page ID # 2859-61). But the Antidiscrimination Ordinance does not regulate any of these artistic decisions. The Ordinance does not tell the company how to

frame its shots, edit its photographs, which moments to capture, or what to include on its blog; it regulates only the sale of services to the public.

Businesses that provide photography services to the public are just as subject to generally applicable regulations of their commercial conduct as newspapers and law firms. As the Supreme Court of New Mexico held, where "[a photography studio] is a public accommodation, its provision of services can be regulated" consistent with the First Amendment, "even though those services include artistic and creative work." *Elane Photography*, 309 P.3d at 66; *see also id.* at 59, 71 ("[T]here is no precedent to suggest that First Amendment protections allow such individuals or businesses to violate antidiscrimination laws."). A video game business, though producing artistic expressions, is not exempt from the Fair Labor Standards Act's prohibition against hiring child laborers. Nor is a tattoo parlor exempt from a health code regulation governing the disposal of needles. No artist is compelled to sell their services or products to the public at large, and an artist may not claim the benefit of doing business with the general public while refusing to abide by commercial regulations barring discrimination in

sales that apply to all businesses open to the public.

Thus, even though the Photography Studio's commercial work product involves creativity, that "hardly means" that any regulation of its business operations "should be analyzed as one regulating [its] speech rather than conduct." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 62 (2006). The relevant question is not the nature of a business's product, but whether the Antidiscrimination Ordinance targets expression or whether it prohibits a course of conduct. Here, it prohibits conduct: discrimination in the provision of goods and services. *See id.* (finding no "abridgment of freedom of speech" when a law "make[s] a course of conduct illegal" even where "the conduct was in part initiated, evidenced, or carried out by means of language" (internal quotation marks omitted)).

2. The Antidiscrimination Ordinance is content- and viewpoint-neutral, so there is no reason to apply strict scrutiny.

"[F]ederal and state antidiscrimination laws" are "an example of a permissible content-neutral regulation of conduct." *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993). Public accommodation laws do not "target speech or discriminate on the basis of its content"; they prohibit "the act of discriminating against individuals in the provision of

publicly available goods, privileges, and services." *Hurley*, 515 U.S. at 572; *see also Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 694–95 (2010) (antidiscrimination policies are "textbook viewpoint neutral"); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987).

The District Court erred in finding that the regulation was content-based because it forces the speaker to "celebrate" a same-sex couple's marriage. Order on Motion for Summary Judgment, RE 130, Page ID # 5374-76. The Ordinance would *also* prohibit a photography studio from selling wedding photography services to *same-sex* couples while denying those same services to *heterosexual* couples. The Ordinance prohibits businesses from refusing to provide goods and services on grounds of customers' sexual orientation, regardless of the business's views on marriage or any other subject. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984); *see also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) (reasoning that "the fact that [an] injunction cover[s] people with a particular viewpoint does not . . . render the injunction content or viewpoint based"). A company may not refuse to provide photography services for a Black customer if the

company would provide the same for a white customer. That is, the Antidiscrimination Ordinance requires a company to provide a service only to the extent that it would provide the same service to similarly situated customers without regard to sexual orientation (or race or religion). The relevant inquiry is not whether *application* of a law would cause businesses to create products reflecting content to which they object. The question is whether the *law itself* draws distinctions based on content. The Ordinance does not "target speech or discriminate on [that] basis." *Hurley*, 515 U.S. at 572.

The Photography Studio ignores the unanimous decision in *Elane Photography*, 309 P.3d at 62–63, and relies on the sharply divided rulings in *TMG*, 936 F.3d 740, and *B&N*, 448 P.3d 890. *See* Plaintiff's Motion for Summary Judgment, RE 92-1, Page ID # 2815-16, 2818. Those cases wrongly reasoned that antidiscrimination laws as applied to commercial wedding services were content-based because they required the creation of products related to the topic of same-sex weddings. But as the dissent correctly notes in *TMG*, "just because the [videographers] want to sell services that are in some manner 'expressive' does not mean that [the State's] content-neutral regulation

of those services suddenly becomes content based." 936 F.3d at 775–76. Content-neutral regulations of even pure speech are common and uncontroversial. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 797–98 (1989) (holding municipal noise regulation did not violate free speech rights of music performers).

B. Any "Compelled Expression" Is Incidental to the Law's Regulation of the Conduct of Sales and Does Not Alter the First Amendment Analysis.

The District Court's conclusion that the Antidiscrimination Ordinance compels the business to express a message with which it disagrees, Order on Motion for Summary Judgment, RE 130, Page ID #5377, does not alter the analysis. The Ordinance requires no state-mandated messages. Just as it would not impermissibly "compel speech" for a state to prohibit a photography studio that offers corporate headshots to the public from refusing to provide the same portraits for female employees that it provides for male employees, Louisville does not impermissibly "compel speech" by requiring that the Photography Studio offer same-sex couples the same services it offers heterosexual couples. The Ordinance does not compel the creation of any content, let alone content on a particular topic.

The District Court's and Photography Studio's reliance on *Hurley* is also misplaced. Order on Motion for Summary Judgment, RE 130, Page ID # 5368, 5371-73, 5378; Plaintiff's Motion for Summary Judgment, RE 92-1, Page ID # 2811, 2814. *Hurley* involved a "peculiar" application of a public accommodation law to a *privately* organized and "inherent[ly] expressive[]" parade. 515 U.S. at 568, 572. The Supreme Court found this application impermissible because, instead of regulating conduct with only an incidental effect on expression, it regulated nothing *but* expression—the content of the private parade sponsor's speech. *Id.* at 573. Here, the Photography Studio is a business providing services to the public, not a private expressive association. *Hurley* itself distinguished the standard application of public accommodation laws to such businesses as constitutional. *See id.* at 578. To expand *Hurley*'s holding would put courts in the impossible "business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws." *Elane Photography*, 309 P.3d at 71. Such a result would be contrary to Supreme Court precedent and create an unworkable standard. Indeed, characterizing the Antidiscrimination Ordinance as compelling speech based only on

the service provided by the business would create the very "limitless principle" that the Photography Business claims to be concerned about. Plaintiff's Motion for Summary Judgment, RE 92-1, Page ID # 2817.[4]

This case is also dramatically different from cases in which the Supreme Court struck down content-based laws that required businesses to publish particular messages. In *Tornillo*, a statute required newspapers that published attacks on political candidates to allow the candidates free space for a written reply in the newspaper itself. 418 U.S. 241. And in *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986), a state agency ordered a utility company to mail the newsletter of an environmental group to its customers. Both the challenged laws favored opposing speech in a content-based way: The right of reply was triggered by certain content, and the regulation imposed a content-based penalty. Here, the Antidiscrimination Ordinance requires just that businesses open to the public offer the

[4] The decisions in *TMG*, 936 F.3d 740, *B&N*, 448 P.3d 890, and *Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metro Government*, 479 F. Supp. 3d 543 (W.D. Ky. 2020), mistakenly invite courts to apply different First Amendment standards based on the nature of the services sold. Such a shifting standard is neither consistent with precedent nor susceptible to clear or uniform application.

same goods and services to same-sex couples as they do to heterosexual couples. Any effect on speech is entirely incidental and does not compel the creation of content. *See TMG*, 936 F.3d at 772–73 (Kelly, J., concurring in part and dissenting in part); *B&N*, 448 P.3d at 932 (Bales, J., dissenting); *Elane Photography*, 309 P.3d at 63–70.

Even where, unlike here, a law requires entities to speak particular words or provide access for third-party speakers, the Supreme Court has rejected First Amendment challenges if the law regulates conduct and any compulsion to speak is incidental. In *FAIR*, a coalition of law schools argued that a law requiring them to provide equal access both to military and non-military recruiters compelled them to endorse military recruiters' message of discrimination embodied in the Don't Ask, Don't Tell policy; the schools particularly objected on First Amendment grounds that they would have to send e-mails and post bulletin board messages on those recruiters' behalf. 547 U.S. at 52–54, 61–62. The Supreme Court rejected the claim, reasoning that "[a]s a general matter, the [law] regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* at 60; *cf.*

Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1150–51 (2017) (explaining that a law requiring a restaurant to charge $10 for sandwiches would not unconstitutionally compel speech despite the fact that the restaurant will "have to put '$10' on its menus or have its employees tell customers that price").

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

Ms. Nelson's cross-appeal requests that this Court enjoin or declare facially unconstitutional the Publication Clause of the Ordinance, which makes it unlawful for a business to publish that a customer will be denied on account of their protected identity. Civil Appeal Statement of Ms. Nelson, RE 12, PAGE #1; see Louisville Metro Ordinance § 92.05(A) & (B).

Just as there is no constitutional right to discriminate, there is no concomitant right to publish a policy of discrimination. The Supreme Court has explicitly disapproved of businesses posting signs saying "no goods or services will be sold if they will be used for gay marriages," as they would "impose a serious stigma on gay persons." *Masterpiece Cakeshop*, 138 S. Ct. at 1728–29. In *FAIR*, the Court explained that the

government "can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." 547 U.S. at 62. Otherwise, longstanding bans on discriminatory advertisements in employment, housing, and public accommodations would have to be struck down on free speech grounds. *See, e.g.*, 42 U.S.C. § 3604(c) (1988); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973) ("Any First Amendment interest . . . is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."). Accordingly, the Free Speech Clause does not authorize the Photography Studio to publish a notice on its website of its intent to discriminate.

III. THE ANTIDISCRIMINATION ORDINANCE SATISFIES EVEN STRICT SCRUTINY.

Although, as shown above, application of the Antidiscrimination Ordinance fails to trigger strict scrutiny, application of the Ordinance would be constitutional even if strict scrutiny applied. Likewise, even assuming the Antidiscrimination Ordinance substantially burdens the

Photography Studio owner's sincerely held religious beliefs, the Ordinance survives strict scrutiny, and therefore does not violate Kentucky Religious Freedom Restoration Act. K.R.S. § 446.350.

The District Court's decision followed long-standing precedent in finding that eradicating discrimination is a compelling state interest and that no reason exists to doubt the legitimacy of Louisville's interest in equal treatment. Order on Motion for Summary Judgment, RE 130, Page ID # 5377. Accordingly, it focused its discussion, as *amici* do here, on whether the Ordinance is narrowly tailored to meet that interest.

Louisville's compelling interest in eradicating discrimination in the provision of goods and services justifies any attendant restrictions on a business's conduct. Because the most carefully tailored way to ensure equal treatment in commercial services is to prohibit discrimination, the Antidiscrimination Ordinance is "precisely tailored" to achieve its interest. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988).

"The argument that victims of discrimination are free to go elsewhere carries little force. Antidiscrimination laws . . . were passed to guarantee equal access to *all* goods and services otherwise available

to the public." *TMG*, 936 F.3d at 777 (Kelly, J., concurring in part and dissenting in part). "Discrimination itself . . . can cause serious non-economic injuries." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984). Denial of services at places of public accommodation expends an emotional toll that can have mental and physical impact, including depression, anxiety and cardiovascular disease.[5]

As Justice Goldberg observed in his concurrence in *Heart of Atlanta Motel*:

> Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public[.] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (internal quotation marks omitted).

Such harm can impact people not merely at the moment of the denial but well into their future. According to the American

[5] Institute of Medicine of the National Academies, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (2011), https://www.ncbi.nlm.nih.gov/books/NBK64806/pdf/Bookshelf_NBK64806.pdf; David J. Lick, Laura E. Durso, and Kerri L. Johnson, *Minority Stress and Physical Health Among Sexual Minorities*, *8 Perspectives on Pyschol. Sci.* 5, 521-45 (2013), http://journals.sagepub.com/doi/abs/10.1177/1745691613497965.

Psychological Association, "Dealing with discrimination results in a state of heightened vigilance and changes in behavior, which in itself can trigger stress responses – that is, even the anticipation of discrimination can cause stress."[6]

Contrary to the Photography Studio's suggestion, the harm of being refused service because of one's identity is not erased just because a customer might be able to obtain goods elsewhere. *Heart of Atlanta Motel, Inc.*, 379 U.S. at 250 (reasoning antidiscrimination laws "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments" (internal quotation marks omitted)). Every instance of discrimination "causes grave harm to its victims." *United States v. Burke*, 504 U.S. 229, 238 (1992). Just one denial of service undermines the promise of equality. Even if same-sex couples are able to find another photographer, Ms. Nelson's denial itself – and the government's permission of the denial – communicates that LGBTQ people are not fully welcome in the public marketplace.

[6] Am. Psychol. Ass'n, *Stress in America: The Impact of Discrimination* (2016), https://www.apa.org/news/press/releases/stress/2015/impact-of-discrimination.pdf.

Because of the harms associated with each instance of discrimination, there is simply no "numerical cutoff below which the harm is insignificant." *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994). "The government views acts of discrimination as independent social evils even if the prospective [customers] ultimately find" the goods or services they sought. *Id.* at 282.

Exemptions to *other* provisions of the law do not undermine Louisville's compelling interest in prohibiting discrimination in public accommodations, particularly as the Antidiscrimination Ordinance contains *no* exemptions. The question is not whether there is a compelling governmental interest in denying the Photography Studio an exemption, *see Fulton v. City of Phila., Pa.*, 141 S. Ct. 1868, 14–15 (2021), because the Ordinance has no existing, discretionary exemptions that are available to others that Louisville has refused to extend to the Photography Studio.

The District Court's decision heavily leans on exemptions provided in other contexts, such as housing, to establish that the government *could* provide exemptions in public accommodations. Order on Motion

for Summary Judgment, RE 130, Page ID # 5379. But as Louisville explained, exempting single-room housing rentals and family groups from housing ordinances merely reflects "inherent differences in housing, employment, and public accommodations and the historical discrimination sought to be eradicated in those different areas." Defendants' Response to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment, RE 97, Page ID #4516. The Photography Studio is not a rental property and does not seek to discriminate on that basis, but if they did, the same coverage would apply to it as all rental properties. While there are exceptions to other provisions of the law, they are neither applicable to this situation, given the public accommodation provisions contain no exemptions, nor comparable to the exemption sought here.

The Antidiscrimination Ordinance is uniformly enforced and contains no mechanism for offering individualized, discretionary exemptions (or any exemptions at all), *Fulton*, 141 S. Ct. at 1878, nor does it "treat *any* comparable secular activity more favorably," *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). It is tailored to *Louisville's* interest, which it achieves by applying the Ordinance to the extent that

businesses offer goods and services to the general public. And the existence of unrelated exceptions does not undermine the compelling governmental interest in uniform enforcement of the Ordinance here, where there are no applicable exemptions.

If businesses like the Photography Studio are not required to comply with Louisville's Ordinance, same-sex couples will likely face discrimination in the marketplace when they seek services. The Photography Studio's assertion that there is no "actual problem" of businesses discriminating against same-sex couples seeking wedding services, Plaintiff's Motion for Summary Judgment, RE 92-1, Page ID # 2826, is belied by the many businesses in recent years seeking court approval to do just that. *See generally Masterpiece Cakeshop*, 138 S. Ct. 1719; *State of Washington v. Arlene's Flowers*, 441 P.3d 1203 (2019); *303 Creative*, 6 F.4th 1160; *Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metro Government*, 479 F. Supp. 3d 543 (W.D. Ky. 2020); *Updegrove v. Herring*, No. 20-cv-1141, slip op. (E.D. Va. Mar. 30, 2021), *appeal docketed*, No. 21-1506 (4th Cir. Apr. 30, 2021); *B&N*, 448 P.3d 890; *Elane Photography*, 309 P.3d 53; *see also Telescope Media Grp. v. Lucero*, No. 16-cv-04094, 2021 WL 2525412, at

*3 (D. Minn. Apr. 21, 2021) (describing the case as "a smoke and mirrors case or controversy from the beginning, likely conjured up by Plaintiffs to establish binding First Amendment precedent rather than to allow them to craft wedding videos, of which they have made exactly two").

Because it is narrowly tailored to serve a compelling interest in eradicating discrimination in the commercial market, the Antidiscrimination Ordinance would satisfy strict scrutiny review.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's judgment.

Dated: January 30, 2023

Respectfully submitted,

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I hereby certify that:

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Dated: January 30, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

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Date:January 30, 2023

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