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 a Final Judgment of the
United States District Court for the Western District of Kentucky
Case No. 3:19-cv-00851, Hon. Benjamin J. Beaton

BRIEF IN SUPPORT OF APPELLANTS AND REVERSAL OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ADL (ANTI-DEFAMATION LEAGUE); BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; CENTRAL CONFERENCE OF AMERICAN RABBIS; COVENANT NETWORK OF PRESBYTERIANS; GLOBAL JUSTICE INSTITUTE, METROPOLITAN COMMUNITY CHURCHES; HINDU AMERICAN FOUNDATION; INTERFAITH ALLIANCE FOUNDATION; MEN OF REFORM JUDAISM; METHODIST FEDERATION FOR SOCIAL ACTION; MUSLIMS FOR PROGRESSIVE VALUES; NATIONAL COUNCIL OF JEWISH WOMEN; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; UNION FOR REFORM JUDAISM; UNITARIAN UNIVERSALIST ASSOCIATION; AND WOMEN OF REFORM JUDAISM

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-5884/22-5912 Case Name: Chelsey Nelson Photography LLC, et al. v. Louisville-Jefferson County, KY Metro Government, et al.

Name of counsel: Alexander J. Luchenitser

Pursuant to 6th Cir. R. 26.1, see attachment
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:

No.

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:

No.

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/ Alexander J. Luchenitser

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.

ATTACHMENT TO DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST FORM

The disclosures on the previous page apply to all the *amici* filing this brief. The *amici* are:

- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- Bend the Arc: A Jewish Partnership for Justice.
- Central Conference of American Rabbis.
- Covenant Network of Presbyterians.
- Global Justice Institute, Metropolitan Community Churches.
- Hindu American Foundation.
- Interfaith Alliance Foundation.
- Men of Reform Judaism.
- Methodist Federation for Social Action.
- Muslims for Progressive Values.
- National Council of Jewish Women.
- Reconstructionist Rabbinical Association.
- Union for Reform Judaism.
- Unitarian Universalist Association.
- Women of Reform Judaism.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Ordinances

Other Authorities

INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations that are united in respecting the important but distinct roles of religion and government in our nation. *Amici* represent diverse faiths and beliefs while sharing a commitment to ensuring that LGBTQ people remain free from officially sanctioned discrimination. They believe that the right to exercise religion freely is precious and should never be misused to undermine that principle or otherwise cause harm. *Amici* also recognize and oppose the threat to religious freedom that would result if the Constitution were understood to require religious exemptions from antidiscrimination laws.

The *amici* are:

- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- Bend the Arc: A Jewish Partnership for Justice.
- Central Conference of American Rabbis.
- Covenant Network of Presbyterians.
- Global Justice Institute, Metropolitan Community Churches.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

- Hindu American Foundation.
- Interfaith Alliance Foundation.
- Men of Reform Judaism.
- Methodist Federation for Social Action.
- Muslims for Progressive Values.
- National Council of Jewish Women.
- Reconstructionist Rabbinical Association.
- Union for Reform Judaism.
- Unitarian Universalist Association.
- Women of Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

Louisville's Fairness Ordinance requires that public accommodations serve all people regardless of their sexual orientation. The Ordinance thereby ensures that when LGBTQ people seek to buy goods and services on the same terms as everyone else, they do not suffer the stigma and degradation associated with discrimination.

In a nation defined by its religious pluralism, the many and varied beliefs among our people make it inevitable that secular laws—including Louisville's Fairness Ordinance—will at times offend some people's religious sensibilities. But while religion and religious practices may not be specially disfavored, there is no Free Exercise Clause violation when a law that regulates conduct for valid secular purposes and in a nondiscriminatory manner incidentally burdens some religious exercise. That is exactly the kind of law the Fairness Ordinance is.

Exempting businesses from the law so that they may refuse service to LGBTQ people based on the businesses' religious views would undermine, not advance, religious freedom. The arguments that plaintiff-appellee Chelsey Nelson Photography LLC has made for such an exemption would also, if accepted, permit businesses to rely on their religious beliefs to deny service to people of the "wrong" religion—or race, or gender, or any other protected characteristic. Far from promoting

religious freedom, a ruling in Nelson's favor would thus hamstring Louisville's ability to ensure that its residents may live as equal members of their community regardless of faith or belief.

The district court, though it erred in ruling in Nelson's favor on other grounds, was thus correct in being skeptical of Nelson's Free Exercise Clause arguments (*see* Op. & Order, R. 130, PageID 5390–92), which Nelson has indicated it plans to reassert on appeal (*see* Pls.'-Appellees' Civil Appeal Statement of Parties & Issues, Doc. 12). This Court should reject those arguments, as well as Nelson's other contentions, and reverse the district court's judgment.

ARGUMENT

I. The Free Exercise Clause does not require the exemption that Nelson seeks.

Religious freedom is a value of the highest order. But the constitutional guarantee of religious freedom is not an entitlement to "general immunity from secular laws." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). The Free Exercise Clause is not, and never has been, a free pass to violate the law. And it in no way compels Louisville to exempt Nelson from the city's prohibition against sexual-orientation discrimination in public accommodations.

A. The public-accommodations law does not trigger strict scrutiny.

Though government cannot regulate a religious practice *because* it is religious (*see, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–33 (1993)), religion-based disagreement with the law does not excuse noncompliance. "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)). And that would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," from drug laws to traffic laws. *Id.* at 888–89.

The Supreme Court has therefore held that laws that apply generally and are neutral with respect to religion do not trigger heightened scrutiny, even if they "ha[ve] the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531; *accord Smith*, 494 U.S. at 879. Hence, "public authorities may enforce neutral and generally applicable rules . . . even if they burden faith-based conduct in the process." *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012). Accordingly, Nelson's religious motivations cannot excuse noncompliance

with the public-accommodations law's prohibition on sexual-orientation discrimination.

1. The neutrality requirement means that a law must not "restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. Discriminatory intent may be apparent on the face of a law, or it may be revealed through the law's practical effects, as when legal requirements have been "gerrymandered with care to proscribe" religious conduct *qua* religious conduct. *See id.* at 533–34, 542. But neutrality is not undermined just because a law *affects* a claimant's religious exercise. Rather, to trigger strict scrutiny the claimant must show that the government has targeted specific religious conduct or beliefs for maltreatment. *See id.*; *New Doe Child #1 v. Cong. of U.S.*, 891 F.3d 578, 592 (6th Cir. 2018).

General applicability is the closely related requirement that the "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. Government thus may not burden religious conduct while affording more favorable treatment to nonreligious conduct that is as detrimental to the underlying governmental interests. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). Nor may the government utilize "a mechanism for individualized exemptions" to favor requests for secular exceptions over religious ones. *See Fulton v. City*

of Philadelphia, 141 S. Ct. 1868, 1877 (2021) (quoting *Smith*, 494 U.S. at 884).

Louisville's public-accommodations law is neutral and generally applicable. Far from "intentional[ly] targeting . . . religious practices" for discriminatory treatment (*see New Doe Child*, 891 F.3d at 592), it bars sexual-orientation discrimination in all places of public accommodation. A business's motivations for denying service, religious or otherwise, are immaterial. And Nelson offers no evidence "that the law was enacted with the intent of discriminating against religion" (*Clark v. Stone*, 998 F.3d 287, 305 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 773 (2022)).

The fact that a law may affect some religiously motivated conduct is an unavoidable result of how law operates in a religiously diverse society. *See Smith*, 494 U.S. at 878–80, 888–90; *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988) ("[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires."). Such incidental effects do not amount to religious targeting or render a law non-neutral. *See Lukumi*, 508 U.S. at 535; *Clark*, 998 F.3d at 304–05.

Accordingly, Louisville may enact and enforce laws when, as here, it acts on "a legitimate concern of government for reasons quite apart from [religious] discrimination." *See Lukumi*, 508 U.S. at 535. That is true even

if the law disproportionately affects some religious exercise. *See, e.g.*, *id.* at 531; *New Doe Child*, 891 F.3d at 592. A law's "disparate impact" on religious objectors is not sufficient to demonstrate a free-exercise violation. *See Prater v. City of Burnside*, 289 F.3d 417, 429 (6th Cir. 2002).

2. Nor are the neutrality and general applicability of Louisville's prohibition against sexual-orientation discrimination in public accommodations undermined by any exemptions for secular activities. As the Supreme Court recently clarified in *Tandon*, 141 S. Ct. at 1296, a law may fail the requirements of neutrality and general applicability if it treats religious activity more harshly than comparable secular activities—that is, secular activities that equally conflict with the underlying governmental interests. The Covid-related public-health law at issue in *Tandon*, for example, was not neutral and generally applicable because it severely restricted in-home religious gatherings while exempting nonreligious gatherings that posed greater or equal risks of transmission of Covid. *See id.* at 1296–97. So if Louisville's Fairness Ordinance prohibited religiously motivated denials of service but permitted nonreligious denials that equally interfered with the law's purpose of eradicating discrimination in public accommodations against LGBTQ people, heightened scrutiny would apply.

But the Ordinance does no such thing. Indeed, Nelson has failed to identify *any* secular exemptions from Louisville's prohibition against sexual-orientation discrimination in public accommodations.

First, in the summary-judgment briefing below, Nelson pointed to scenarios that do not represent exemptions at all but instead are examples of conduct that does not constitute discrimination against a protected class. For example, Nelson noted that public accommodations might be unable to serve someone for reasons such as insufficient staff or losing a customer's contact information. (Pls.' Summ. J. Br., R. 92-1, PageID 2821.) But that is not discrimination against someone because of a protected characteristic. Likewise, Nelson pointed below to deposition testimony and oral argument that, in determining whether conduct is discriminatory under Louisville's public-accommodations law, a relevant factor is whether the vendor provides the product or service at issue in the first place. (*Id.*, PageID 2821–22 (citing Prelim. Inj. Hr'g Tr., R. 52, PageID 1403; Pls.' Summ. J. App., R. 92-7, PageID 3708, 3751).) Again, if the vendor does not, that just shows that there is no discrimination against a protected class, not that the vendor is being exempted from the prohibition against such discrimination. Nelson further noted below that the Fairness Ordinance would not bar photographers from refusing to serve polygamous wedding ceremonies. (*Id.*, PageID 2821 (citing Defs.' Opp'n to Prelim. Inj.

Mot., R. 15-1, PageID 774).) Being polygamous is not, however, a protected characteristic under the Fairness Ordinance; "sexual orientation" is defined in the Ordinance as "[a]n individual's actual or imputed heterosexuality, homosexuality or bisexuality." Louisville Metro Ord. § 92.02.

Nelson also relied below on conduct by entities that are not public accommodations. Citing an oral-argument colloquy that is far from clear, Nelson asserted that the Fairness Ordinance would not prohibit a private organization's parade from excluding an LGBTQ-pride unit. (Pls.' Summ. J. Br., R. 92-1, PageID 2821 (citing Prelim. Inj. Hr'g Tr., R. 52, PageID 1378).) But a private parade is not a "public accommodation" under the Ordinance, which defines "place of public accommodation, resort or amusement" as "[a]ny place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds." Metro Ord. § 92.02. Even if it were, the result concerning the LGBTQ-pride unit in a parade would be compelled by the Supreme Court's decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 566 (1995), and would not represent some sort of exception to the Fairness Ordinance.

Nelson further pointed out below (Pls.' Summ. J. Br., R. 92-1, PageID 2822) that the Fairness Ordinance's definition of "public accommodation" excludes "a rooming or boarding house containing not more than one room for rent or hire and which is within a building occupied by the proprietor as his or her residence" (Metro Ord. § 92.02). But such places are by nature not open to the public at large, so allowing their proprietors to be selective in determining who resides with them does not risk subjecting Louisville residents to the stigma and degradation of being denied equal access to goods and services in the public marketplace. And hence, it does not undermine the interests supporting the Fairness Ordinance.

Moreover, the Ordinance's inapplicability to those particular rooming arrangements does not result in any discrimination against *religion*, as proprietors are equally able to reject prospective boarders for religious or secular reasons. Demonstrating "religious discrimination" under the Free Exercise Clause "based upon disparate treatment requires evidence that a party was treated differently from a *similarly situated* party with a different religious affiliation." *Prater*, 289 F.3d at 429. Thus, in *Vandiver v. Hardin County Board of Education*, 925 F.2d 927, 934 (6th Cir. 1991), this Court held that a religiously homeschooled student's free-exercise challenge to a policy requiring him to pass a test to obtain

transfer credits for homeschool instruction failed because there was no "evidence that similarly situated transferees from nonreligious home schools were provided an 'exemption.'" Likewise, this Court ruled in *Kissinger v. Board of Trustees of Ohio State University*, 5 F.3d 177, 180 (6th Cir. 1993), that a veterinary-school student's free-exercise rights were not violated by a policy barring her from graduating without taking a particular course to which she apparently had a religious objection, even though the veterinary school allowed some other students to take other courses (but not graduate) before taking the class.

Nelson additionally relied below on the fact that the Fairness Ordinance's public-accommodations section does not prohibit discrimination against certain kinds of characteristics, such as age or familial status. (Pls.' Summ. J. Br., R. 92-1, PageID 2822.) But no antidiscrimination law covers all characteristics that could possibly serve as a basis for objectionable discrimination. If failing to prohibit discrimination based on every conceivable characteristic triggered strict scrutiny under the Free Exercise Clause, every antidiscrimination law in the country would be subject to that level of scrutiny. In any event, as with the boarding-house clause, the lack of coverage for age or familial discrimination does not disfavor religion because public accommodations

may discriminate on those grounds for both religious and nonreligious reasons.

Nelson further noted below (*id.*) that the Ordinance's prohibition against discrimination in public accommodations has a substantially narrower scope with respect to gender discrimination than it does for other protected characteristics, allowing (for instance) gender discrimination by "YMCA, YWCA, and similar type dormitory lodging facilities" (*see* Metro Ord. § 92.05(C)). Once more, this does not result in discrimination against religion because, to the extent that different treatment based on gender is not barred, it is permitted equally for religious and nonreligious reasons.

In addition, the Ordinance's limitations on its gender-discrimination provisions are not exemptions from the prohibition that Nelson actually challenges—Louisville's bar against sexual-orientation discrimination in public accommodations. These provisions therefore do not and cannot undermine Louisville's interest in preventing that type of discrimination. The pertinent legal question is whether the *challenged* prohibition is neutral and generally applicable, not whether some *other* prohibition falls short.

Thus, for example, the Supreme Court held in *Hernandez v. Commissioner*, 490 U.S. 680, 700 (1989), that the Free Exercise Clause did not entitle a religious group's members to an income-tax deduction for the

costs of spiritual-training sessions. The Court explained that the tax code contains a general prohibition against deducting from income money paid to nonprofits—secular or religious—in exchange for services. *See id.* at 689–90. It made no difference to the Court that *other* provisions of the tax code allow taxpayers to deduct charitable contributions to nonprofits when the taxpayer receives nothing in return. *See id.* at 683–84, 689–90, 699–700.

Likewise, in *Smith*, 494 U.S. at 874, 890, the Supreme Court held that Oregon's general criminal prohibition against use of the mind-altering drug peyote could be constitutionally applied to people who use peyote as a religious sacrament. The Court concluded that the Oregon law was neutral and generally applicable, as it prohibited both religious and nonreligious uses of peyote. *See id.* at 874, 879–82, 890. It did not matter to the Court that Oregon state law did not prohibit the use of another mind-altering substance—alcohol.

To the extent that this Court's decision in *Monclova Christian Academy v. Toledo-Lucas County Health Department*, 984 F.3d 477, 480–81 (6th Cir. 2020), could be construed as supporting the proposition that the scope of the Fairness Ordinance's prohibition against gender discrimination affects what level of scrutiny should be applied to its prohibition against sexual-orientation discrimination, that decision

conflicts not only with the foregoing Supreme Court cases but also with this Court's earlier decision in *Kentucky ex rel. Danville Christian Academy, Inc. v. Beshear*, 981 F.3d 505, 509 (6th Cir. 2020), and therefore is not binding precedent. *See Resurrection Sch. v. Hertel*, 11 F.4th 437, 456–57 (6th Cir.), *vacated on grant of reh'g en banc*, 16 F.4th 1215 (6th Cir. 2021), *and held moot on reh'g en banc*, 35 F.4th 524 (6th Cir.), *cert. denied*, 143 S. Ct. 372 (2022). In all events, different antidiscrimination provisions address and balance different considerations and interests (*see, e.g.*, *Smith v. City of Jackson*, 544 U.S. 228, 240–41 (2005)), so the narrower scope of the prohibition against gender discrimination by public accommodations does not undermine Louisville's antidiscrimination interests "in a similar way" (*Fulton*, 141 S. Ct. at 1877) as would a religious exemption from the prohibition against sexual-orientation discrimination.

3. Finally, Nelson has presented no evidence that Louisville has or employs "a mechanism for individualized exemptions" to favor requests for secular exemptions over religious ones. *See id.* (quoting *Smith*, 494 U.S. at 884). On this issue in the court below, Nelson pointed only to discussions in depositions, oral argument, and briefing about what the Fairness Ordinance does or does not prohibit. (*See* Pls.' Summ. J. Br., R. 92-1, PageID 2821–22 (citing Pls.' Summ. J. App., R. 92-7, PageID 3707–08,

3751; Prelim. Inj. Hr'g Tr., R. 52, PageID 1378, 1403; Defs.' Opp'n to Prelim. Inj. Mot., R. 15-1, PageID 774).) None of those discussions show that Louisville in fact "extends discretionary exemptions"—or even "retains discretion to extend exemptions"—for discriminatory conduct that the Ordinance actually bars. *Cf. Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 733 (6th Cir. 2021).

* * * * *

Louisville seeks to eradicate sexual-orientation discrimination in the marketplace by equally and absolutely prohibiting all public accommodations from engaging in it. Nelson does not plausibly allege that Louisville has singled out for unfavorable treatment those public accommodations that refuse to serve LGBTQ people for religious reasons while allowing others to refuse to serve them for nonreligious reasons. Neither does Nelson plausibly allege that Louisville has in any other respect treated it worse than similarly situated covered entities. Nor does Nelson identify any secular exemptions from the public-accommodations law's bar against sexual-orientation discrimination. And there is no whiff of religious animus, either on the law's face or in its application. Neither *Tandon*, nor *Fulton*, nor any other authority supports application of heightened scrutiny under these circumstances.

Because the Fairness Ordinance is neutral and generally applicable and evinces no disfavor or animus toward any religion, it is subject to rational-basis review only. *See Tree of Life Christian Sch. v. City of Upper Arlington*, 823 F.3d 365, 373 (6th Cir. 2016). And the statute more than satisfies this test—for, as we next explain, it would satisfy even strict scrutiny if that were the applicable test under the Free Exercise Clause (or any of Nelson's other claims).

B. The public-accommodations law would satisfy even strict scrutiny.

1. Free-exercise jurisprudence makes clear that while the rights to believe (or not) and to practice one's faith (or not) are sacrosanct, they do not entail a right to impose one's own beliefs on others.

Even before *Smith*, when strict scrutiny was the default test for free-exercise claims (*see Sherbert v. Verner*, 374 U.S. 398, 403–09 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215–19 (1972)), the Supreme Court repeatedly rejected claims for religious exemptions that would have imposed harms or burdens on others. In *United States v. Lee*, for example, the Court rejected an Amish employer's request for an exemption from paying social-security taxes partly because the exemption would have "operate[d] to impose the employer's religious faith on the employees." 455 U.S. 252, 261 (1982). In *Braunfeld v. Brown*, the Court declined to grant

an exemption from Sunday-closing laws partly because it would have provided Jewish businesses with "an economic advantage over their competitors who must remain closed on that day." 366 U.S. 599, 608–09 (1961) (plurality opinion). And in *Prince v. Massachusetts*, the Court denied an exemption from child-labor laws that would have allowed minors to distribute religious literature, because parents are not free "to make martyrs of their children." 321 U.S. 158, 170 (1944).

In contrast, the Court recognized a Seventh-Day Adventist's right to an exemption from a restriction on unemployment benefits in *Sherbert* because the exemption would not have "serve[d] to abridge any other person's religious liberties." 374 U.S. at 409. And the Court partially exempted Amish parents from state compulsory-education laws in *Yoder* only after the parents demonstrated the "adequacy of their alternative mode of continuing informal vocational education" to meet their children's educational needs. 406 U.S. at 235.

2. Turning to the first component of strict scrutiny, the Fairness Ordinance's prohibition against sexual-orientation discrimination by public accommodations serves not just a legitimate governmental interest but a compelling one, preventing the harms that would result from depriving LGBTQ Louisville residents and visitors of fair and free access to goods and services in the marketplace. The Supreme Court explained in

Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984), that "eliminating discrimination and assuring . . . citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order." Similarly, in *Fulton*, the Court recognized that the government's interest in preventing sexual-orientation discrimination "is a weighty one, for '[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.'" 141 S. Ct. at 1882 (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018)). To be sure, the Court ultimately concluded in *Fulton* that a city did not have a compelling interest in denying a foster-care agency a religious exemption from an antidiscrimination rule in a city contract because the contract permitted secular exemptions from the same rule on a discretionary basis. *See id.* at 1882. But Louisville's Fairness Ordinance does not allow any secular exemptions from its ban on sexual-orientation discrimination by public accommodations.

Instead, the Ordinance uniformly ensures that sexual orientation is not a barrier to "acquiring whatever products and services [one] choose[s] on the same terms and conditions as are offered to" everyone else. *See Masterpiece Cakeshop*, 138 S. Ct. at 1728. And it protects LGBTQ people "from a number of serious social and personal harms," including

deprivation "of their individual dignity." *See Roberts*, 468 U.S. at 625. Granting a religious exemption would license Nelson, and by extension all other public accommodations, to discriminate against customers because of their sexual orientation as long as the business asserts a religious reason for doing so. LGBTQ people would then suffer the social, psychological, and economic harms that the Fairness Ordinance was designed to prevent.

3. The Ordinance is narrowly tailored to achieving that end, because prohibiting the discrimination sought to be eradicated "abridges no more [activity] than is necessary to accomplish that purpose." *See id.* at 629; *accord EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 594 (6th Cir. 2018) ("[E]nforcing Title VII is itself the least restrictive way to further EEOC's interest in eradicating discrimination based on sex stereotypes from the workplace."), *aff'd sub nom. Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Louisville need not substitute the alternatives Nelson proposed below (*see* Pls.' Summ. J. Br., R. 92-1, PageID 2828), for they would "not be as effective" in achieving the city's objective to eradicate sexual-orientation discrimination. *See Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004).

Nelson insisted below that it refuses service based not on sexual orientation but on the same-sex character of marriages, contending that

Louisville could achieve its goals less restrictively by "apply[ing] its laws to stop actual status discrimination, not message-based objections." (Pls.' Summ. J. Br., R. 92-1, PageID 2828.) But the Supreme Court has "declined to distinguish between status and conduct in this context," because the two are so closely linked. *See Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010); *accord Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment); *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

And Nelson was wrong in suggesting below (Pls.' Summ. J. Br., R. 92-1, PageID 2826, 2828) that because other photographers in Louisville provide services to same-sex couples, Nelson could be exempted without undermining the goals served by the Fairness Ordinance. Even assuming that there are comparable wedding vendors elsewhere in Louisville, telling a couple suffering the pain and humiliation of discrimination to "just go someplace else" is no remedy for the grave stigmatic harms that discrimination inflicts. "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).

Antidiscrimination laws "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *See id.* at 250 (majority opinion) (quoting S. Rep. No. 88-872, at 16–17 (1964)).

That some (or even most) wedding vendors in Louisville might serve same-sex couples would do nothing to alleviate the "serious stigma" (*Masterpiece Cakeshop*, 138 S. Ct. at 1729) of living in a community in which businesses can publicly bar their doors to LGBTQ people. Were the requested exemption granted, same-sex couples would awaken each day knowing that, wherever they go, they might be turned away from public accommodations that deem them unfit and unworthy to be served, and that they would have no legal recourse as long as the denials were explained in religious terms.

Allowing discrimination by public accommodations also inflicts economic harms well beyond the standalone discriminatory event. *See* Christy Mallory et al., Williams Inst., *The Impact of Stigma and Discrimination Against LGBT People in Texas* 54–64 (2017), https://bit.ly/3LQWkfE (explaining that "state economies benefit from more inclusive legal and social environments"); *see also Heart of Atlanta*, 379 U.S. at 252–53, 257–58. Must LGBTQ people carry around a Green Book to find establishments that will serve them? *Cf.* Brent Staples,

Traveling While Black: The Green Book's Black History, N.Y. Times (Jan. 25, 2019), https://nyti.ms/3aaPiAB. And must Louisville allow businesses to force them to do so, at so great a cost to the city, its economy, and the dignity and well-being of its residents and visitors?

Put simply, "acts of invidious discrimination in the distribution of publicly available goods [and] services . . . cause unique evils" (*Roberts*, 468 U.S. at 628), which Louisville has chosen to exorcise. To accept Nelson's arguments would instead give official imprimatur to those acts. It would deny LGBTQ people the fundamental American promise of equality for all and diminish their standing in society. The Constitution does not require government to impose such grave harms in the name of religious accommodation.

II. The public-accommodations law does not coerce Nelson to participate in religious activity.

The contention that Nelson made below that Louisville's Fairness Ordinance is unconstitutionally coercive in violation of the Free Exercise and Establishment Clauses (*see* Pls.' Summ. J. Br., R. 92-1, PageID 2823–24) likewise fails.

"It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" *Town of Greece v. Galloway*, 572 U.S. 565, 586 (2014) (plurality

opinion) (quoting *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)). Whether governmental conduct coerces religious exercise is answered through an objective analysis "that considers both the setting in which the prayer arises and the audience to whom it is directed," not a subjective inquiry about the feelings of a particular plaintiff. *See id.* at 587, 589 (plurality opinion).

Chelsey Nelson has asserted that she "considers all weddings to be religious ceremonies" and that, when she photographs a wedding, she always "serve[s] as witness to the union, stand[s] to recognize the marriage, obey[s] the officiant, and bow[s] her head in prayer." (Pls.' Summ. J. Br., R. 92-1, PageID 2824.). But Louisville's Fairness Ordinance does not require her to do any of these things when she works a wedding. Rather, the Ordinance requires only that a business that chooses to offer a service to the public—here, wedding photography—must provide that service regardless of the sexual orientation of the marrying couple. The photographer is paid to memorialize the wedding, not to participate in it. Merely being present to do a job while invited guests celebrate a significant event in their lives does not constitute legal coercion to join any religious activity that may take place at the event. *See Fields v. City of Tulsa*, 753 F.3d 1000, 1010–12 (10th Cir. 2014) (no coercion where police

officer was ordered to attend community-outreach event at Islamic community center, when attending similar events hosted by secular and religious organizations was regular aspect of his duties); *see also Chaudhuri v. Tennessee*, 130 F.3d 232, 239 (6th Cir. 1997) (university faculty member was not coerced to take part in any prayers given at university's graduation ceremonies).

By contrast, in cases in which courts concluded that governmental practices were unconstitutionally coercive, the government's conduct directly placed coercive pressure on the plaintiffs to take part in religious activity. For example, in cases involving school prayer, public-school officials "creat[ed] a state-sponsored and state-directed religious exercise" at public-school events, and the prayers "bore the imprint of the state." *See Lee v. Weisman*, 505 U.S. 577, 587, 590 (1992); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305–08 (2000). Likewise, in cases holding that people on probation or parole were unconstitutionally placed in religious programs or facilities, the government required them to attend those facilities and participate in the religious activities, on penalty of imprisonment. *See, e.g.*, *Janny v. Gamez*, 8 F.4th 883, 908–09 (10th Cir. 2021), *petition for cert. dismissed*, 142 S. Ct. 878 (2022).

Unlike public-school students, probationers, or parolees, wedding photographers voluntarily select an occupation that necessarily results in

exposure to ceremonies and religious activity that might not align with the photographers' own religious beliefs. Chelsey Nelson is no more forced to participate in religious activity with which she disagrees when she is hired for a wedding of a same-sex couple than she is when she is hired for a wedding of a Jewish, Hindu, or interfaith couple. Accepting Nelson's coercion argument would permit her—and every other wedding-service provider—to discriminate against couples with any religious beliefs or practices that differ from the provider's own. As we explain more in the next section, that result would be devastating to religious freedom.

III. Antidiscrimination laws protect religious freedom.

This case entails more than the weighing of religious objections against secular rights and interests. For public-accommodations laws like Louisville's also protect religion and its exercise. Public-accommodations laws advance strong governmental interests in preventing discrimination of all kinds, including *religious* discrimination, in the provision of goods and services, thereby ensuring that all people may believe and worship according to their conscience, without fear that they will be denied equal treatment in the public marketplace. The religious freedom of all is therefore threatened, not served, by efforts to misuse the First Amendment to license discrimination.

Though Nelson may assert an objection solely to weddings of same-sex couples, the drastic revision of free-exercise law that this lawsuit seeks could not be so cabined. For in our pluralistic society, there is an almost limitless variety of religious motivations, interests, and potential objections. What is more, many religious adherents view themselves as guided by religion in everything they do. *See, e.g.*, *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001). Chelsey Nelson is a case in point: she asserts that her "religious beliefs shape every aspect of [her] life, including [her] identity, [her] relationships, and [her] understanding of the world, creation, truth, morality, purity, beauty, and excellence." (Nelson Decl., R. 92-2, PageID 2834.) Meanwhile, antidiscrimination laws "protect[ ] against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). If this Court were to interpret the First Amendment to license violations of these laws whenever one has a religion-based desire not to obey them, all manner of discrimination would become permissible: Anyone could be denied service in a restaurant, hotel, shop, or other public establishment, for no reason other than that they are LGBTQ, Black, Jewish, or have a disability, and the proprietor states a religious reason for barring the doors to them. *Cf., e.g.*, *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam) (restaurant owner's refusal

to serve Black patrons was based on belief that federal public-accommodations law "contravenes the will of God").

That these harms could extend to religious minorities is not merely theoretical. The case law shows—and the experiences of *amici* and our members confirm—that disfavor toward, unequal treatment of, and denials of service to members of minority faiths and nonbelievers are all too common. Moreover, religious minorities are also often members of other disfavored groups, such as the LGBTQ community. *See* Kerith J. Conron et al., Williams Inst., *Religiosity Among LGBT Adults in the US* 2 (2020), https://bit.ly/3HzlzUa. And religious discrimination in particular is often premised on the discriminator's religious views.

In *Paletz v. Adaya*, No. B247184, 2014 WL 7402324 (Cal. Ct. App. Dec. 29, 2014), for example, a hotel owner closed a poolside event after learning that it was hosted by a Jewish group. The hotelier told an employee, "I don't want any [f—ing] Jews in the pool" (*id.* at *2 (alteration in original)); said that her family would cut off funding to the hotel if they learned of the gathering (*id.* at *4); and directed hotel staff to remove the Jewish guests from the property (*id.* at *2). In *Khedr v. IHOP Restaurants, LLC*, 197 F. Supp. 3d 384 (D. Conn. 2016), a restaurant refused service to a Muslim family because of their faith. The father recounted: "The restaurant manager started to look at us up and down with anger, hate,

and dirty looks because my wife was wearing a veil, as per our religion of Islam." *Id.* at 385. In front of the family's twelve-year-old child, the manager told his staff "not to serve 'these people' any food." *Id.* And in *Fatihah v. Neal*, the owners of a gun range posted a sign declaring the facility a "MUSLIM FREE ESTABLISHMENT," armed themselves with handguns when a Muslim man wanted to use the range, and accused him of wanting to murder them because "'[his] Sharia law' required" it. *See* Compl. ¶¶ 24, 32, 34, No. 16-cv-58, ECF No. 3 (E.D. Okla. Feb. 17, 2016).

The context of employment discrimination further illuminates the danger. *See, e.g.*, *Huri v. Off. of Chief Judge*, 804 F.3d 826, 830, 834 (7th Cir. 2015) (supervisors called Muslim employee who wore hijab "evil," denied her time off for Islamic religious holidays, and engaged in "social shunning, implicit criticism of non-Christians, and uniquely bad treatment of [the employee] and her daughter"); *Nappi v. Holland Christian Home Ass'n*, No. 11-cv-2832, 2015 WL 5023007, at *1–3 (D.N.J. Aug. 21, 2015) (Catholic maintenance worker subjected to harassment by colleagues—who encouraged him to leave his church, put religious literature in his locker, "wanted to shoot [him]," and ultimately fired him "because, as a Roman Catholic, he was an 'outsider' who did not 'fit in'"); *Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 846–47 (Minn. 1985) (en banc) (gym excluded job applicants and employees not living

according to owners' faith, based on owners' "religious belief that they are forbidden by God, as set forth in the Bible, to work with 'unbelievers'").

It follows that if the First Amendment were construed to grant businesses a license to violate antidiscrimination laws whenever they profess a religious motivation, religious discrimination would receive governmental sanction and could become commonplace.

Suppose that an interfaith couple wished to marry, and in keeping with the religion of one partner, the couple planned to serve kosher or halal food. But the only kosher or halal caterer in town refused to prepare food for the wedding, based on its religious belief that interfaith marriages are sinful. Should the caterer have the right, in the face of public-accommodations protections against religious discrimination, to force the couple to choose between forgoing a catered reception, on the one hand, and violating one spouse's sincere religious beliefs, on the other?

What of children who are part of a family that, in the opinion of a business owner, should not exist because the parents are of different faiths or were married within a faith that the merchant's religion rejects? Might the children be denied a birthday cake or a party celebrating a bar or bat mitzvah or a first communion?

And more broadly, may a restaurant turn away a Muslim woman who wears a hijab, because the owner's religion forbids associating with

members of other faiths? May a grocer refuse to sell food to an unmarried pregnant woman because his religion tells him that he would be facilitating someone else's living in sin? And what about the recently widowed Catholic whose Protestant spouse wanted a Protestant funeral? May a Protestant funeral director bar the widow from the memorial, leaving her unable to say goodbye in a way that respects her beloved's faith?

If the First Amendment licenses religion-motivated denials of service to same-sex couples, as Nelson contends, then it also sanctions all other religion-motivated denials, including exclusions based on a customer's faith. One could be refused employment, thrown out of a hotel, or barred from purchasing a hamburger just for being of the "wrong" religion. And no state or local authority or law could do anything to remedy the situation. Such a system would devastate religious freedom, not protect it.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that:

(i) This brief complies with the type-volume limits of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f), it contains 6,468 words;

(ii) This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word and is set in Century Schoolbook font in a size measuring 14 points or larger.

s/ *Alex J. Luchenitser*

CERTIFICATE OF SERVICE

I certify that on January 30, 2023, the foregoing brief was filed using the Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served electronically via that system.

s/ *Alex J. Luchenitser*