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**; and **Louisville Metro Human Relations Commission-Enforcement**, Defendants.	**Case No. 3:19-cv-00851-BJB-CHL** **Plaintiffs' Combined Reply in Support of Their Supplemental Motion for Summary Judgment and Response to Defendants' Motion to Dissolve the Permanent Injunction and Dismiss Claims as Moot**

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INTRODUCTION

Plaintiff Chelsey Nelson started her photography studio in Louisville where she built a professional network, established a client base, cemented her reputation, and grew her business. But Louisville's public-accommodation law made it illegal for her to speak her views about marriage and explain her services. So Nelson chilled her speech for months, and this Court twice found that injury sufficiently credible and objective to merit an injunction. That same past injury justifies nominal damages, as both the Supreme Court and the Sixth Circuit have held. *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021); *Kareem v. Cuyahoga Cnty. Bd. of Elections*, 95 F.4th 1019 (6th Cir. 2024). That is decisive for nominal damages.

As for injunctive relief, Nelson still keeps her business in Louisville, directs advertisements there, explains her beliefs on marriage on her studio's website directed at Louisville, receives requests from persons in Louisville, and creates engagement and wedding photography and blogs in Louisville. She still needs protection to ensure she can keep doing this without fear of Louisville's law. For five years, Louisville has said that its law applies to Nelson, prohibits her from photographing and blogging about marriage according to her faith, bans her from explaining that choice on her website, and admits of zero exceptions. With that history, Louisville's eleventh-hour, post-deposition suggestion that it might not investigate Nelson based on "presently available" information rings hollow. That so-called assurance contradicts the city's enduring litigation position, conflicts with statements made by Louisville's mayor and 30(b)(6) witness, and provides no guarantee against future enforcement. Last minute gamesmanship can't wipe away years of enforcement and litigation history. For those reasons, Nelson's claims for prospective relief are not close to moot, and Louisville fails its burden to show otherwise. Her permanent injunction should remain in place.

STATEMENT OF FACTS

Nelson now lives in Florida, but she continues to create photographs and blogs promoting and celebrating her religious beliefs about marriage in Louisville. *See* Doc. 167–2, PageID.5912, 5914, 5933–5934, 5936, 5940, 5943–5944, 5982, 5984. This makes sense. It took her years to develop connections and a client base in Louisville. Nelson Decl. in Supp. of Pls.' Combined Reply (Nelson Decl.) ¶¶ 2–12. To that end, she pays taxes in Louisville, kept her primary business address there, and updated her website to reflect her eagerness to photograph in Louisville. *Id.* at ¶¶ 2–30, 73–74. She develops content to target and market to audiences in Louisville through search engine optimization, hashtags, and geo-tags, communicating with her existing network in Louisville, and filming content in Louisville. *Id.* at ¶¶ 14–31, 44–47. And when she first moved, Nelson contracted with a digital marketing specialist to help her direct advertisements into Louisville. *Id.* at ¶¶ 32–37.

Nelson's work has paid off. Nelson continues to receive online requests for her wedding celebration services from persons who live in Louisville. *Id.* at ¶¶ 39–57, 71–72. She recently photographed an engagement session in Louisville and a wedding in Lansdowne, Kentucky. *Id.* at ¶¶ 40–50. Next year, she will photograph an engagement session and wedding in Kentucky. *Id.* at ¶¶ 51–57. Because this Court's injunction protects Nelson, she states her religious beliefs on marriage—and same-sex marriage—on her studio's website. Doc. 159–4, PageID.5508–5519.

For the last five years, Louisville has consistently asserted that Nelson's policy of only photographing and blogging about weddings that reflect her religious beliefs violate its public-accommodations law. *See* Neihart Decl. in Supp. of Pls.' Combined Reply Decl. Ex. 1 (Table). Louisville has likewise admitted that Nelson's two statements—which she currently displays on her studio's website—violate its law. *Id.* And Louisville has claimed a compelling interest in applying its law to Nelson, and a firm commitment to allowing no exceptions to its law. *Id.*

After Nelson disclosed that she had moved, Louisville kept this position in place. *See id*. Louisville's mayor got on public radio to announce that Louisville was "going to continue to defend this" lawsuit and would "continue to fight." App. to Pls.' Suppl. Summ. J. Mot. (Suppl. App.) 309. Louisville's 30(b)(6) witness testified that Nelson's policy and statements still violated the law and confirmed that Louisville's "policy goal" remained to eliminate all forms of discrimination. Doc. 159–4, PageID.5550. The witness also discussed seven factors Louisville would consider about whether to prosecute a commercial photography business that advertises on the Internet—all of which apply to Nelson. *Id.* at PageID.5559–5565; Doc. 161–8, PageID.5674–5675 (listing factors). The witness even testified that it was "possible" that Louisville would investigate a complaint filed against Nelson, find jurisdiction, and find that Nelson violated Louisville's law. Doc. 159–4, PageID.5568–5571. The witness also explained that a complainant's location when he or she was denied a service was at least as important as the location of the public accommodation. *Id.* at PageID.5554, 5556–5557. For that reason, Louisville would consider complaints against public accommodations without a physical storefront in Louisville. *Id*. at PageID.5551–5552, 5568.

Louisville's witness testified on October 21, 2024, a week before the close of discovery. Doc. 149, PageID.5433. At that time, the witness knew that Nelson lived in Florida and was aware of other aspects of Nelson's business. Doc. 159–4, PageID.5567, 5571. But a week later, on October 28, 2024, on the last day of discovery, Louisville amended their written discovery responses. Now, for the first time in the history of this litigation, Louisville said it would not investigate or enforce a complaint against Nelson based on "presently available" information. *See* Doc. 161–9, PageID.5683–5686, 5692–5697, 5702–5704, 5716–5719. Louisville's new position is not based on any formal process. In fact, Louisville has no written policies related to enforcement. Doc. 159–4, PageID.5548.

ARGUMENT

Summary judgment for Nelson is appropriate because neither party disputes a material fact. As a matter of law, (I) Nelson is entitled to nominal damages; (II) Nelson's injunction should remain in place because Louisville failed to meet its burden to show mootness; and (III) the declaratory judgment should not be vacated and the permanent injunction should not be dissolved.

I. Nelson is entitled to nominal damages which redress the injury she sustained when she chilled her speech to avoid prosecution.

This Court held that Louisville's law caused Nelson to chill her speech by refraining from posting two statements on her studio's website which resulted in a past, completed injury that violated her constitutional rights. MSJ Order, Doc. 130, PageID.5360, 5364 ("Nelson's fear of prosecution amounts to a constitutional injury chilling her speech."); MPI Order, Doc. 47, PageID.1209, 1223 (holding law caused Nelson an "irreparable injury" (cleaned up)). Nominal damages redress that already-proven injury, as dictated by *Uzuegbunam* and *Kareem v. Cuyahoga County Board of Elections*, 95 F.4th 1019 (6th Cir. 2024). Following that logic, Nelson is entitled to nominal damages. Louisville disputes that outcome by claiming that (A) Nelson never sustained an injury; (B) nominal damages do not redress Nelson's injury; and (C) *Kareem* does not apply here. Louisville is wrong on all fronts.

A. Nelson has already established that she suffered a past, completed injury when she chilled her speech.

Louisville first rejects Nelson's entitlement to nominal damages by saying she has not proved any injury-in-fact at all. Louisville relies on Joseph Bradford's status in *Uzuegbunam*, compares Nelson to the student in *Morrison v. Board of Education of Boyd County,* 521 F.3d 602 (6th Cir. 2008), and lobs a smattering of other claims.

But Louisville starts in the wrong place. This Court already held that Nelson suffered an injury, and the Sixth Circuit left that holding "in place."[1] Pls.' MSJ, Doc. 159, PageID.5488–5489 (making this point). Louisville never explains why an Article III "Case[]" or Controvers[y]" would differ as between prospective and retrospective relief. *Id.* at PageID.5489. So the debate about injury is off the table. The issue now is redressability—and *Uzuegbunam* says nominal damages redress Nelson's injury. Because Nelson's prior injury is a given, Louisville cannot viably compare Nelson to *Uzuegbunam*'s Bradford or to the student in *Morrison*.

Start with Bradford. The district court and the Supreme Court in *Uzuegbunam* only addressed the redressability of an injury. *See Uzuegbunam v. Preczewski*, 378 F. Supp. 3d 1195, 1208 (N.D. Ga. 2018). But neither court answered a predicate question: Was Bradford *actually* injured? The Supreme Court remanded that question back to the district court to decide whether the college had injured Bradford at all by "violat[ing]" his "constitutional rights." *Uzuegbunam*, 592 U.S. at 293 n.*. Even so, Louisville claims that the Supreme Court "expressly declined to hold that Bradford was also entitled to pursue nominal damages." Defs.' MSJ, Doc. 161, PageID.5613. Louisville overstates *Uzuegbunam*. In truth, the Supreme Court authorized Bradford to pursue nominal damages as a remedy, so long as he first established "a past, completed injury." *Uzuegbunam*, 592 U.S. at 292–293 & n.*.

Turn next to the student in *Morrison*. There, the student failed to show an injury-in-fact because there was no credible threat that the school would enforce its policy against him. Pls.' MSJ, Doc. 159, PageID.5492–5493. But Nelson proved an injury based on a credible threat. *Id.* Louisville never grapples with this distinction. But it makes all the difference. It explains why the student's chill was "subjective"

[1] The Sixth Circuit recently held two plaintiffs had pre-enforcement standing to challenge a state's anti-discrimination laws under an analysis like this Court's. *See Christian Healthcare Centers, Inc. v. Nessel*, 117 F.4th 826, 848–55 (6th Cir. 2024).

while Nelson's self-restraint was objectively reasonable. The student did not face a credible threat of enforcement; Nelson did. Because of that real threat, it was not Nelson's "choice" to self-censor. *Contra* Defs.' MSJ, Doc. 161, PageID.5614, 5616.

That leaves Louisville's two other tactics to dispute Nelson's injury-in-fact. Louisville first minimizes the importance of Nelson's statements by claiming they "were drafted in consultation with" counsel. *Id.* at PageID.5611. But it would have been foolish for Nelson to *not* consult counsel. The statements violate Louisville's law and Nelson feared being prosecuted. Doc. 92–7, PageID.2887, 3265. What's more, it is undisputed that Nelson drafted the statements "[her]self" to express her sincerely held beliefs. Doc. 97–7, PageID.3990. *Accord* Doc. 92–2, PageID.2887.

Louisville's second argument fares no better. Louisville claims that its law never censored Nelson because she "advertised her religious beliefs for years" without referring to "a same-sex wedding." Defs.' MSJ, Doc. 161, PageID.5611–5612. But requiring someone to "chang[e] what they say to avoid" violating the law is not free speech—it's limited speech. *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 477 n.9 (2007) (collecting cases). Nelson desired to state her views on same-sex marriage to offer a "more comprehensive and precise expression[] of [her] religious beliefs about marriage." Doc. 92–2, PageID.2887. As Louisville admits, its law prohibited her from expressing that view. That injured Nelson.

B. Nominal damages redress Nelson's past, completed injury.

For redressability, Louisville says that *Morrison* and Judge Walker's opinion bar Nelson from receiving nominal damages. Relying on those authorities, Louisville claims "nominal damages cannot redress past chill." Defs.' MSJ, Doc. 161, PageID.5614 (cleaned up); *id.* at 5612 ("Judge Justin Walker" found "nominal damages would not redress Nelson's past chill."). But *Uzuegbunam* confronted this claim head-on, rejected it, and validated Nelson's request for nominal damages.

In *Uzuegbunam*, the Supreme Court "conclude[d] that a request for nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right." 592 U.S. at 292. Put differently, nominal damages redress "a completed injury." *Id.* at 284. *Uzuegbunam* overruled *Morrison* and Judge Walker's opinion as much as they held nominal damages cannot redress past chill. And because Judge Walker dismissed Nelson's nominal damages based solely on that premise, MPI Order, Doc. 47, PageID.1212, this Court should reinstate her request and then award her that relief.

Consider it this way. *Morrison* and Judge Walker believed there was "[n]o readily apparent theory" on "how nominal damages might redress past chill." 521 F.3d at 610; MPI Order, Doc. 47, PageID.1212. But *Uzuegbunam* laid out the theory based on centuries of common law practice. 592 U.S. at 285–89. That theory leads to an award of nominal damages to Nelson. Nor does Louisville explain why this Court should treat a past First Amendment violation worse than other instances where courts award nominal damages to redress past, non-material injuries. *See Soule v. Conn. Ass'n of Sch., Inc.*, 90 F.4th 34, 47 (2d Cir. 2023) (recognizing nominal damages redressed loss of "equal athletic opportunity," "titles," and "placements"). Losing one's right to speak is at least as harmful, and deserves the same treatment.

C. *Kareem* confirms Nelson's entitlement to nominal damages.

In *Kareem*, a voter chilled her speech to avoid prosecution. 95 F.4th at 1021–27. The voter was injured when she restricted her speech—even though the government never enforced the law against her. *Id.* Nominal damages redressed the voter's injury. *Id.* at 1022, 1027. So too here. Case closed.

Louisville tries to distinguish *Kareem* based on the *reasons* the court held the voter suffered an injury. Defs.' MSJ, Doc.161, PageID.5614–5615. But that is a distinction without a difference. The bottom line is the same for the voter and

Nelson: both established an injury-in-fact through chilled speech. *Kareem*, relying on *Uzuegbunam*, held nominal damages redress that injury. 95 F.4th at 1027.

In any event, Louisville's effort to distinguish the voter and Nelson fall flat. To distinguish *Kareem*, Louisville mentions that the law targeted "the speech at issue," the law imposed "criminal penalties," and enforcement officials said displaying "marked ballots" was "illegal." Defs.' MSJ, Doc. 161, PageID.5614–5615. But Louisville's law prohibits Nelson's speech, the law imposes severe penalties, and Louisville has labeled Nelson's speech illegal for years. *See* Table; MSJ Order, Doc. 130, PageID.5393 (discussing penalties).

Both Nelson and the voter were injured. The Sixth Circuit held that the voter could receive nominal damages. Many other courts have likewise concluded that speakers who chill their speech can receive nominal damages. *See* Pls.' MSJ, Doc. 159, PageID.5491 nn.1–2 (collecting cases).[2] Nelson can too.

II. Nelson is entitled to the prospective relief she has already received because her claims are not moot.

Nelson's permanent injunction should not be dissolved and her claims for prospective relief are not moot. Louisville has the burden here. It cannot meet that burden. Louisville (A) incorrectly relies on standing cases and (B) never makes it "absolutely clear" that it would not prosecute Nelson.

A. Louisville cannot meet its burden on mootness by relying on cases that only discuss standing.

Louisville says Nelson's permanent injunction should be dissolved and her claims dismissed "as moot because she no longer has standing." Defs.' MSJ, Doc. 161, PageID.5608. But Louisville confuses standing and mootness. Standing

[2] Louisville says the cases are distinguishable. Defs.' MSJ, Doc. 161, PageID.5615–5616. But Louisville again wrongly focuses on the *reasons* the courts held that the plaintiffs had an injury. The takeaway is that these plaintiffs were deprived of a constitutional right and nominal damages redressed their injury—just like here.

concerns the start of a suit while mootness applies to the rest of the litigation. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189–92 (2000). Once a plaintiff shows standing "at the time" she filed the "complaint," ongoing jurisdiction shifts to the mootness rubric. *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 525 (6th Cir. 2001). *See also W. Va. v. EPA*, 597 U.S. 697, 718–19 (2022); *Kentucky v. Yellen*, 54 F.4th 325, 340 (6th Cir. 2022).

The move from standing to mootness comes with a shift in the burdens of proof. Nelson had and met the initial burden to establish standing. *Yellen*, 54 F.4th at 340 n.10. Louisville now has "the burden" to prove mootness. *Id.*

To do so, Louisville cites precedent on standing. Defs.' MSJ, Doc. 161, PageID.5609–5610. But standing and mootness are different. Louisville's stock in *Erickson v. City of Leavenworth* likewise crashes. *Erickson* never mentions mootness because (unlike Nelson) the plaintiff failed to meet his initial burden on standing. 782 F. Supp. 2d 1163, 1170 (E.D. Wash. 2011). *Erickson* is inapplicable.

Louisville also suggests that Leon County's ordinance dampens Nelson's credible fear of Louisville's law. Defs.' MSJ, Doc. 161, PageID.5607–5608. But these independent ordinances pose asymmetrical threats. Leon County covers entities that "sell" food or are "gasoline stations, places of exhibition or entertainment," or explicitly "covered establishments." Doc. 161–7, PageID.5635–5636 (defining "public accommodation"); *Warner v. Tinder, Inc.*, 2018 WL 1894726, at *9 (S.D. Fla. Jan. 18, 2018) (narrowly interpreting Florida's similar public-accommodations law to not cover "a phone-based app"). Nelson's studio fits none of those descriptions.

B. Louisville has not made "absolutely clear" that it will not prosecute Nelson.

With mootness as the proper framework, Louisville cannot meet its burden. Courts apply a burden *and* a presumption against mootness. Courts describe the burden as "heavy," "formidable," and "stringent." *Friends of the Earth,* 528 U.S. at

189–90. Courts also presume that "[v]oluntary cessation of the alleged illegal conduct" does not moot a case without more. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019). Taken together, a government can moot a case through voluntary conduct only when intervening events make "it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189. *Accord Speech First, Inc.*, 939 F.3d at 767 (noting mootness requires "completely and irrevocably eradicat[ing] the effects of the alleged violation" (cleaned up)). To establish Nelson's prospective claims for relief are moot, Louisville must show that there is no chance that it will enforce its law against her in the future. Louisville comes nowhere near this demanding standard.

Louisville hangs its hat on its alleged "disavowal" of enforcing the law against Nelson. But Louisville overplays the "disavowal." To be clear, Louisville's "disavowal" is this: in discovery responses, Louisville stated that "based on the information regarding Chelsey Nelson Photography, LLC presently available to Defendants," it would not investigate or take enforcement action against Nelson. *See* Doc. 161–9, PageID.5683–5686, 5692–5697, 5702–5704, 5716–5719. That cold comfort is not sufficient because (1) the Supreme Court recently rejected a nearly identical promise; (2) Louisville's position is discretionary; (3) Louisville continued to defend its law in court and in the public after learning that Nelson moved; and (4) the timing of Louisville's disavowal raises suspicions.

1. ***FBI v. Fikre.*** In *FBI v. Fikre*, the government placed a traveler on the No Fly List. 601 U.S. 234, 236 (2024). The traveler sued, asking to be kept off the list in the future. *Id.* at 238–39. After he filed the complaint, the government removed him from the list. *Id.* The government then tried to moot the case by filing a declaration representing that the traveler "will not be placed on the No Fly List in the future based on the *currently available information*." *Id.* at 240 (emphasis added).

The Supreme Court said this "sparse declaration" was not enough. *Id.* at 242. While the declaration may have meant that the traveler's "past actions" would not "warrant his relisting," it did not "speak[] to whether the government might relist him if he does the same or similar things in the future." *Id.* Without that assurance, the declaration fell "short of demonstrating that [the government] cannot reasonably be expected to do again in the future what it is alleged to have done in the past." *Id.* And that was decisive. Mootness asks about "the potential for a defendant's future conduct." *Id.* at 244. With only a shallow promise, the government "offer[ed]" nothing to "satisf[y]" its "formidable burden." *Id.* at 241, 243.

Louisville's assurance based on "presently available" information is similarly shallow. Nothing in it proves Louisville "could not revert" to its prior enforcement position. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 n.1 (2017). It is not legally binding. It does not reflect what new information Louisville might change its mind. And by its plain terms, the assurance doesn't stop Louisville from prosecuting Nelson. After all, Louisville agrees that its law applies to Nelson, consistently states that granting an exemption undermines its interests, and believes Nelson's policies and statements still violate the law. *See* Table. In one breath, Louisville says it would not investigate Nelson based on "presently available" information, while in the next two Louisville admits that Nelson's statements violate the law now and that it "must investigate" all complaints. Doc. 161–9, PageID.5695–5696; Suppl. App. 336–337. All complaints require some investigation because Louisville takes "the complainant at their word for where the event happened" before uncovering the real facts. Doc. 159–4, PageID.5554. And Louisville's former Executive Director affirmed it "must attempt to informally resolve or conciliate[] every complaint it receives." Doc. 15–2, PageID.794.

To avoid focusing on its possible future conduct, Louisville turns to the past. But the past further justifies keeping Nelson's injunction in place. Louisville's prior

conduct fails to make "it absolutely clear that" it will not prosecute Nelson later. *Friends of the Earth*, 528 U.S. at 189.

For example, Louisville says no evidence shows that it has enforced its law against a photographer. Defs.' MSJ, Doc.161, PageID.5610. But, early on, Louisville broadened its law "to include a commercial photography business that provides services to the public and advertises on the Internet." Doc. 15–1, PageID.773; Doc. 104–4, PageID.4596 (admitting Nelson's studio is a public accommodation). Louisville has touted its authority and compelling need to enforce its law against Nelson for years. *See* Table. And Louisville's 30(b)(6) witness admitted that Louisville's "[p]ractices"—meaning "how we go about carrying out our responsibilities and duties"—can "change." Doc. 159–4, PageID.5552.

Louisville next says it has never enforced its law against "a business without a physical place of business." Defs.' MSJ, Doc.161, PageID.5607. But that says nothing about Louisville's plans. Louisville has "no policy that would prohibit [it] from doing it." Doc. 159–4, PageID.5551. Louisville admitted, for example, that it would evaluate a complaint alleging a violation of the Publication Provision by a public accommodation located outside Louisville "on a case-by-case basis." Doc. 161–8, PageID.5668–5669. True, Louisville may consider a physical storefront as a "factor." Doc. 159–4, PageID.5556. But Louisville also considers whether the complainant was in Louisville when he or she was denied a service. *Id.* at PageID.5554, 5562–5563. Louisville recognizes that denials may happen over the phone, over email, or on a social media message. *Id.* at PageID.5557. Because Louisville's interest is in "safeguard[ing] all individuals within Jefferson County," Metro Ord. § 92.01, there is no reason for it to avoid prosecuting public accommodations located outside Louisville who deny services to persons within Louisville, *e.g.*, Doc. 159–4, PageID.5558 (discussing caterer example).

Louisville ends by claiming it "does not aim to police the worldwide web." Defs.' MSJ, Doc.161, PageID.5607. But the undisputed facts tell a different story. Louisville launched a prosecution against Scooter's Triple B's after learning through social media that the restaurant had posted a sign. Doc. 159–4, PageID.5573–5574; Doc. 92–7, PageID.3662. Louisville has also used testers to scour the internet to look for illegal online advertisements and then prosecuted housing providers for those posts. Suppl. App. 351–407. Louisville has no policy that would prevent it from doing the same as to public accommodations. Doc. 159–4, PageID.5571. And Louisville admitted anyone could file a complaint against the statements Nelson posted on her website, and it would investigate. *Id.* at PageID.5570.

Mootness focuses on the government's expected actions. As *Fikre* explains, statements about current actions based on current information reveal nothing about "future conduct." 601 U.S. at 244. Because Louisville offers no more than that, it has fallen short of its "burden to establish that it cannot reasonably be expected to resume *its* challenged conduct." *Id.* at 243 (cleaned up).

2. Louisville's discretion. Governments can moot a case by making enduring policy changes "through formal, legislative-like procedures." *Speech First, Inc.*, 939 F.3d at 768. But a government's shift in position is nearly meaningless when it comes about through "ad hoc, discretionary, and easily reversible actions." *Id.* An announcement about a policy change does not moot a case. *Trinity Lutheran*, 582 U.S. at 457 n.1. Neither does a defendant's "own statement" about its future intent because it does not preclude a "return to [the defendant's] old ways." *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). Louisville's assurance falls into the latter category.

Louisville only has seven pages of policies about its law. Suppl. App. 323–324. Those include two complaint forms, one conciliation template, and one procedural chart with deadlines. *Id.* at 327–333. No other written policies exist. Doc. 159–4,

PageID.5548 ("I'm not aware of any written policies" about enforcement.). And none of the existing policies bind or limit Louisville's enforcement discretion.

As a result, Louisville's enforcement decisions are inherently ad hoc and discretionary. Louisville admits as much. In response to discovery requests about how Louisville applies its law to internet-based businesses (like Nelson's), Louisville stated that it "evaluates" each complaint "on a case-by-case basis" and considers a list of factors. Doc. 161–9, PageID.5710–5714. Louisville's 30(b)(6) witness made the same point. She testified that enforcement actions are "[v]ery much a case by case" determination. Doc. 159–4, PageID.5564. She also testified that there is "no set rule about" Louisville enforcing its law against a commercial photography studio that advertises over the internet. *Id.* at PageID.5565.

Considering those admissions and Louisville's lack of authoritative policies, Louisville's non-enforcement assurance based on "presently available" information "does not relieve" the city "of its burden to show that the case is moot." *Speech First, Inc.*, 939 F.3d at 769. Louisville can change its mind on a whim because the assurance appeared from nowhere. It did not come about through an enduring formal policy change or deliberative process. *Id.* Worse still, the last-minute assurance conflicts with Louisville's litigation position over the last five years.

Louisville has consistently interpreted its law to prohibit Nelson's policy of photographing and blogging about engagements and weddings consistent with her religious beliefs and to ban her two statements explaining her choice. *See* Table. Louisville has doggedly defended its compelling interest in enforcing its law against Nelson. *Id.* And Louisville has claimed that even a single exemption to its law undermines its interests. *Id.*; Doc. 159–4, PageID.5550. Given that history, and the fact that Nelson continues to engage in all of this speech, Louisville's whiplash on its enforcement position cannot moot Nelson's claims.

Indeed, Louisville stood on its usual positions on October 21, 2024, just a week before its self-styled assurance. At the time, Louisville's 30(b)(6) witness testified that (a) Nelson's policy and two statements still violated the law; (b) Nelson would violate the law if she declined to photograph a same-sex engagement or wedding; and (c) Nelson's website *currently* violated the law because it displayed Nelson's two statements. Doc. 159–4, PageID.5569–5570; *id.* at PageID.5508–5519 (Nelson's current website). The witness also (a) admitted Louisville "may look at" a complaint filed by someone who viewed Nelson's website "to determine if -- if it meets a prima face case for investigation"; (b) admitted Louisville "may investigate" a complaint against Nelson "to see if it is -- it merits enforcement"; (c) refused to "deny[]" that Louisville might investigate a complaint against Nelson; (d) admitted "it is possible" that Louisville would find jurisdiction over a complaint against Nelson; and (e) admitted it was possible that Louisville would find Nelson's statements violated the law after an investigation. Doc. 159–4, PageID.5570–5571.

Louisville's 30(b)(6) witness also ticked through seven factors Louisville might consider before applying its law to a "commercial photography business that provides services to the public and advertises on the Internet." Doc. 159–4, PageID.5559; Doc. 161–8, PageID.5674 (interrogatory with response). This was the first ever mention of these factors. Louisville's first 30(6)(b) witness testified that he would only consult the text of the "ordinance" and the "county attorney" before investigating a complaint against a public accommodation outside of Louisville. Doc. 92–7, PageID.3638. Regardless, each factor applies to Nelson in Louisville's view.

First, Louisville evaluates "the declaration of policy in Metro Ord. § 92.01." Doc. 161–8, PageID.5674. That policy includes protecting "individuals'[] personal dignity." Metro Ord. § 92.01; Doc. 159–4, PageID.5559. Louisville's witness testified that Nelson's statements could cause "dignitary harms" and that Louisville has an interest in eliminating those harms. Doc. 159–4, PageID.5569.

Second, Louisville looks at "whether the business denies services to a potential customer in Louisville, Kentucky for a reason prohibited by Metro Ord. § 92.05(A)." Doc. 161–8, PageID.5674. Louisville's witness agreed that Nelson would violate Metro Ord. § 92.05(A)—the Accommodations Clause—if she declined to photograph a same-sex engagement or wedding. Doc. 159–4, PageID.5569.

Third, Louisville considers "where the business is located." Doc. 161–8, PageID.5674. Many factors inform that consideration, including where the business is "incorporated," the business's "principal place of business," where the business "pays taxes," where the business has "historically done business," and where the business "receives mail." Doc. 159–4, PageID.5561. "[A]ll" those factors "go into the analysis" but even "one could be sufficient, depending on the facts." *Id.* Nelson's studio is incorporated in Kentucky, has its principal place of business in Louisville, pays taxes in Louisville, has historically done business in Louisville, receives mail in Louisville, and continues to do each of these. Nelson Decl. ¶¶ 2–74.

Fourth, Louisville asks "whether the service would require physical presence in Louisville." Doc. 161–8, PageID.5674–5675. Photographers like Nelson must be on "location" to create the photographs. Doc. 159–4, PageID.5562.

Fifth, Louisville considers a business's past practice and advertising in Louisville. Doc. 161–8, PageID.5675. This is a low threshold. Providing a service once before in Louisville is enough to trigger this factor. Doc. 159–4, PageID.5562. For that reason, Louisville wrongly implies the case is moot because Nelson has photographed one engagement in Louisville since she moved. She continues to receive requests from people in Louisville and is contracted to photograph a wedding in Kentucky already next year. Nelson Decl. ¶¶ 40–57, 71. And Louisville proclaimed a compelling interest in enforcing its law against Nelson even when it (incorrectly) believed her studio was "barely active." Doc. 111, PageID.4779, 4799. And Louisville has no "formal" or "informal" policy to evaluate a business's

advertisements. Doc. 159–4, PageID.5563. Meanwhile, Nelson currently provides her wedding celebration services in Louisville and intentionally targets that market. Nelson Decl. ¶¶ 13–31, 40–57.

Sixth, Louisville evaluates "whether there is a realistic possibility that the business will provide services to other customers in Louisville." Doc. 161–8, 5675. This factor "look[s] at the definition of a public accommodation." Doc. 159–4, PageID.5563. Louisville admitted Nelson's studio is a public accommodation. Doc. 104–4, PageID.4596.

Finally, Louisville analyzes the "extent the services" are otherwise "available" in Louisville. Doc. 161–8, 5675. For services with a "limited" number of "providers," denial of services "cause[s] even greater harm to individuals if they are denied those services." Doc. 159–4, PageID.5563. Nelson's services are limited. Her photographs and blogs are "created custom for each client." Doc. 92–2, PageID.2845.

No one factor is dispositive. Louisville "considers them altogether and gives them different weights" depending "on the facts." Doc. 159–4, PageID.5564. Nelson arguably satisfies each factor. But Nelson need not prove that she meets any factor, nor does any uncertainty create a dispute of material fact. Louisville—not Nelson—bears the burden to establish mootness. If any questions remain, Louisville has failed its burden. That—combined with Louisville's enforcement history and litigation position—makes Louisville's assurance based on "presently available" information insufficient to deprive Nelson of a personal stake in this litigation.

3. Louisville's defense. Louisville has also "continue[d] to defend its use of the challenge[d]" law. *Speech First, Inc.*, 939 F.3d at 770. Nelson disclosed her move to Florida in April 2023. *See* Table. Since then, Louisville refused to disavow enforcement in court, Doc. 151, PageID.5446, and admitted that Nelson's policies and statements violate the law, the statements currently displayed on Nelson's website violate the law, and it is "possible" that Louisville would investigate a

complaint against Nelson, find jurisdiction over the complaint, and find that Nelson violated the law, Doc. 159–4, PageID.5568–5571.

Louisville has made similar statements in public. Three months after Nelson revealed that she had moved to Florida, Louisville's mayor spoke on an NPR podcast in his official capacity and expressed Louisville's official position on the case. Doc. 159–4, PageID.5572. The mayor said that Louisville would "continue to defend our fairness ordinances." Suppl. App. 306. He said Louisville would "pursue" this "case" for "clarity" "on what … we can still continue to enforce" after *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) and try to distinguish that case from Nelson's. *Id.* at 307, 310–312. And the mayor explained that Louisville held its position because "we want to be very clear to our citizens and the country that we are going to continue to defend this, and we will continue to fight." *Id.* at 309.

None of Louisville's statements in court, in depositions, or in public make it "absolutely clear" that Louisville will not resume its "wrongful behavior." *Friends of the Earth*, 528 U.S. at 189. Louisville's statements rather sound like a government intent on enforcing its law with references to Nelson.

4. Louisville's timing. Louisville's "timing" of its "change also raises suspicions that its cessation is not genuine." *Speech First, Inc.*, 939 F.3d at 769. From April 2023 when Nelson disclosed her move to Florida until October 27, 2024, Louisville defended its right to enforce its law, claimed Nelson violated its law, and refused to disavow enforcement. *See* Table. On October 21, 2024, Louisville's 30(b)(6) witness testified that Nelson's policies and statements still violated Louisville's law and that it was "possible" Louisville would investigate Nelson. Doc. 159–4, PageID.5568–5571. When she testified, she knew Nelson had moved. *Id.* at PageID.5567. Only on October 28, 2024, the last day of discovery, did Louisville say it would not investigate or enforce the law against Nelson based on "presently available" information. By that time, Louisville had known of the critical fact—

Nelson's move to Florida—for over eighteen months. Louisville's decision to hold its cards until the last day of discovery makes its supposed assurance "appear less genuine." *Speech First, Inc.*, 939 F.3d at 769 (cleaned up). *Cf. Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986) (establishing sham affidavit rule whereby party cannot create material dispute of fact with affidavit that contradicted earlier testimony). Under the "totality of the circumstances," Louisville has failed to show that the threat against Nelson "could not reasonably be expected to recur." *Speech First, Inc.*, 939 F.3d at 768. For that reason, Nelson's permanent injunction should remain in place and her claims for prospective relief should not be dismissed.

III. The Court should neither dissolve the permanent injunction nor vacate its prior decision.

Nelson's requests for prospective relief are not moot, and this Court should not dismiss them or dissolve the injunction. This Court should also decline to vacate its declaratory judgment on Nelson's Kentucky Religious Freedom Restoration Act (KRFRA) claim; dismiss Nelson's other declaratory relief requests; and dissolve the permanent injunction.

The Sixth Circuit kept this Court's prior ruling "in place," including its declaratory judgment that Louisville's law violated Nelson's KRFRA rights. But Louisville never asks the Court to vacate that judgment or dismiss Nelson's claims for declaratory judgment as moot. Defs.' MSJ, Doc. 161, PageID.5608–5611, 5617. With that omission, Louisville forfeited any argument that the Court should vacate its declaratory judgment on KRFRA or dismiss Nelson's declaratory judgment requests as moot. *See Radiant Global Logistics, Inc. v. Furstenau*, 951 F.3d 393, 397 (6th Cir. 2020) (per curiam) ("[V]acatur is an equitable remedy subject to the strictures of waiver and forfeiture."); *Cockrun v. Berrien County*, 101 F.4th 416, 418 n.1 (6th Cir. 2024) (explaining that forfeiture is the failure to timely assert a right). And there is no reason to excuse that forfeiture here. Louisville's protest of

KRFRA's extraterritorial application does not warrant vacating the judgment either. Defs.' MSJ, Doc. 161, PageID.5611. Nelson is not asking that KRFRA protect her in Florida; she's asking that KRFRA protect her in *Louisville*. The judgment presents no extraterritorial issue. *See BMW Stores, Inc. v. Peugeot Motor of Am., Inc.*, 860 F.2d 212, 214 (6th Cir. 1988) ("[W]here the defendants' conduct occurs in-state, application of the law to that conduct is not extraterritorial." (cleaned up)).

Louisville invokes Rule 60(b) to dissolve Nelson's injunction. Doc. 161, PageID.5608. The rule contains six subsections. Louisville never describes which of them it relies on. But Louisville has the burden to establish that changed circumstances warrant relief from the injunction. *Horne v. Flores*, 557 U.S. 433, 447 (2009). Louisville's only rationale is its discredited disavowal based on "presently available" information. If true, Louisville has no harm from the injunction, which prevents Louisville from investigating Nelson—the very thing Louisville alleges it might not do. And if Louisville has left itself wiggle room to enforce the law later (as it has), then Nelson's claims are not moot. Either way, the injunction should stay.

CONCLUSION

Nelson chilled her speech for ten months to avoid being prosecuted by Louisville. Nelson already proved, and this Court already ruled, that self-censorship caused by Louisville's law violated her First Amendment rights. Nominal damages redress that injury. And Louisville's statement that it might not prosecute Nelson based on "presently available" information does not moot her claims. Louisville can change its mind at any time, Louisville's 30(b)(6) witness said prosecution was still "possible," Louisville's mayor defended the law, and Louisville has aggressively litigated this case for five years. An injunction protects Nelson's freedom to create photographs and blogs celebrating marriage consistent with her religious beliefs.

Respectfully submitted this 18th day of December, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2024, 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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