UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Emilee Carpenter, LLC d/b/a Emilee Carpenter Photography and **Emilee Carpenter**,

Plaintiffs,

v.

Letitia James, in her official capacity as Attorney General of New York; **Denise Miranda**, in her official capacity as Commissioner of the New York State Division of Human Rights,

Defendants.

Case No. 6:21-cv-06303-FPG-CDH

Memorandum of Law in Support of Plaintiffs' Renewed Preliminary Injunction Motion

Oral Argument Requested

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Introduction

New York's public-accommodation laws force Plaintiffs Emilee Carpenter and her studio (Carpenter) to create messages promoting a view of marriage that contradicts her faith because she offers custom photographs and blogs celebrating opposite-sex engagements and weddings. That is compelled speech. And it violates the First Amendment. In *303 Creative LLC v. Elenis*, the Supreme Court reiterated that governments may not misuse public-accommodations laws to "compel a person to speak its own preferred messages" about marriage. 600 U.S. 570, 586 (2023). But New York seeks to do the same thing to Carpenter.

The Second Circuit observed that the facts "in Carpenter's complaint are substantially similar to the relevant facts" in *303 Creative*. *Emilee Carpenter, LLC v. James* (*ECP II*), 107 F.4th 92, 101 (2d Cir. 2024). But it also asked for a "factual record" before issuing an injunction *Id.* at 102. That factual record—now with over 45,000 pages of documents produced by Carpenter and two days of her deposition testimony—confirms that these facts are, indeed, "substantially" like those in *303 Creative*. To wit: Carpenter's photographs and blogs are her speech. She creates photographs and blogs to express her views on marriage. And New York's laws compel her to speak contrary messages that promote same-sex engagements and weddings. *303 Creative* resolves this case and other Supreme Court and Second Circuit precedent hold that this violates the First Amendment. Carpenter asks for a preliminary injunction to stop the ongoing threat to her freedom of speech so that she can speak only those messages about marriage that align with her faith.

Summary of the Facts

After years of photographing as a small side job, Carpenter formed Emilee Carpenter, LLC in 2019 to "prioritize creating photography that told stories that matter to her." Decl. of Emilee Carpenter in Supp. of Pls.' Renewed Prelim. Inj. Mot. (Decl.) ¶¶ 31–35. Carpenter offers several types of photography services to the

public but specializes in engagement and wedding photography. *Id.* at ¶ 69. For that service, Carpenter offers different packages, but they all always include a number of final photographs, an online viewing gallery, and a blog post. Appendix in Supp. of Pls.' Renewed Prelim. Inj. Mot. (App.) 75, 91, 727–28. Carpenter uses each part of the package to tell a story about the wedding. Decl. ¶¶ 73–323.

Carpenter creates every engagement and wedding photograph unique for each client. *Id.* at ¶ 183. Those photographs depict a *specific* couple at a *specific* time and place, and Carpenter's photographs of one couple could not substitute for photographs of another couple. *Id.* at ¶¶ 183–86. Carpenter often collaborates with the couple about shots they would like at the engagement session or the wedding. *Id.* at ¶¶ 145–52 But Carpenter creates mostly candid, off-script images. *Id.* at ¶¶ 159–61. And for all her photographs, Carpenter ultimately decides how to take each photograph, clients defer to her artistic judgment, and clients agree in contract to give Carpenter final say over the photographs. *Id.* at ¶¶ 153–158; App. 102.

Once Carpenter creates the initial photographs, she alone culls them to a manageable number and selects which photographs to edit. Decl. ¶¶ 222–237. Carpenter alone decides how to edit each photograph and adjusts them according to her own style. *Id.* at ¶¶ 240–91. Carpenter then chooses which final photographs to produce to the clients. *Id.* at ¶¶ 255–57. She makes that decision alone and clients give her final authority over those selections too. *Id.* at ¶ 255; App. 104.

Later, Carpenter blogs about the engagement or wedding. Decl. ¶¶ 292–323. Carpenter writes these blogs for several reasons, including to promote her views on marriage and to provide a valuable service to her clients. *Id.* at ¶¶ 298–308. Carpenter does not offer an option for wedding photography that does not include a blog. App. 727–28. On the blog, Carpenter selects which words to use and which photographs to display based on her perspectives on the engagement or wedding. Decl. ¶¶ 309–314.

Throughout this process, Carpenter's faith guides the content in the photographs and blogs she creates. *Id.* at ¶¶ 73–81, 131–38. Carpenter desires to and intends to convey uplifting messages about God's design for marriage between a man and a woman. *E.g.*, *id.* at ¶ 134. Not only does her work celebrate the couple's union, it also publicly testifies about marriage as an inherent good that should be pursued and preserved. *Id.* at ¶¶ 136–37.

Carpenter cannot separate her beliefs from her vocation or her creations from her artistry. *Id.* at ¶ 324. For example, Carpenter will not create works that contradict biblical principles or conflict with her editorial style. *Id.* at ¶¶ 325–29, 354. She declined a request for an opposite-sex wedding when asked to create photographs in a light, bright, and airy style. *Id.* at ¶¶ 355–56. She likewise clarified a request to photograph a "Last Supper" portrait to confirm that it would not be irreverent. *Id.* at ¶¶ 330–36. Carpenter also will not create photographs or blogs celebrating same-sex engagements or weddings. *Id.* at ¶¶ 337–38. Even so, Carpenter will happily provide photography services to LGBT persons. *Id.* at ¶¶ 363–378. She simply will not create photographs or write blogs promoting same-sex engagements or weddings, no matter who asks her to do so. *Id.* at ¶ 362.

Concern over this latter point led Carpenter to learn about New York's public-accommodations laws. *Id.* at ¶¶ 392–99. There are two such laws: the Human Rights Law and the Civil Rights Law. New York considers Carpenter's studio to be a public accommodation. App. 418. The laws thus require Carpenter to photograph and blog about same-sex engagements and weddings to the same extent she does so for opposite-sex weddings. App. 408.

The Human Rights Law's Accommodations Clause makes it unlawful for public accommodations to deny someone "accommodations, advantages, [and] privileges" because of sexual orientation. N.Y. Exec. Law § 296(2)(a). The Civil Rights Law's Discrimination Clause operates the same way by prohibiting any

person or business from "discriminat[ing]" against anyone "because of … sexual orientation." N.Y. Civ. Rts. Law § 40-c(2). The clauses are co-extensive, as New York acknowledges. App. 364. And under both clauses, sexual orientation includes "actual or perceived" orientation. N.Y. Exec. Law § 292(27); *People v. Dieppa*, 158 Misc. 2d 584, 587 (Sup. Ct. 1993) (noting relevance of "perceived" status). Together, these two clauses force Carpenter to tell positive stories about same-sex wedding ceremonies and prohibit her from amending her studio's operating agreement to bind her company to operate according to her religious beliefs. App. 378, 408.

The Human Rights Law's Publication Clause prohibits public accommodations from posting "any written or printed communication" to the effect that their "advantages" or "privileges" (i) "shall be refused, withheld from or denied" to anyone because of sexual orientation (Denial Clause) or (ii) "that the patronage" of any person, because of sexual orientation, is "unwelcome, objectionable or not acceptable, desired or solicited" (Unwelcome Clause). N.Y. Exec. Law § 296(2)(a). So Carpenter cannot post a policy statement on her website explaining her religious beliefs about marriage and why she only creates content for opposite-sex weddings or ask what type of ceremony clients want photographed. App. 378.

The Office of the Attorney General enforces the Human Rights and the Civil Rights Laws. App. 419. The New York State Division of Human Rights (Division) enforce the Human Rights Law. *Id.* New York actively enforces these laws, prosecutes businesses with beliefs like Carpenter's, and files amicus briefs claiming that activities like Carpenter's violate public-accommodations laws. App. 566–87, 600–718. New York receives complaints from testers, "aggrieved" members of the public, and persons in "association" with "aggrieved" persons. App. 420–21, 506–09; 9 N.Y.C.R.R. § 466.14. And penalties for violating the laws are severe, including massive fines, criminal penalties, and loss-of-license. N.Y. Exec. Law §§ 63(10), 63(12), 297(4)(c), (e); N.Y. Civ. Rts. Law § 40-d.

Carpenter began receiving (and still receives) requests that ask her to create photographs celebrating same-sex engagements or weddings. Decl. ¶¶ 425–27. Those requests, the ongoing threat of New York's laws, and the desire to speak consistent with her faith led Carpenter to file this lawsuit. Decl. ¶¶ 429–436. She seeks the freedom to (1) offer and create engagement and wedding photographs and blogs celebrating only opposite-sex weddings; (2) be transparent about her editorial choice by publishing a statement on her website explaining her inability to celebrate same-sex weddings and making similar statements to prospective clients; (3) bind her company to follow a policy of celebrating weddings only between one man and one woman by amending her LLC's operating agreement; and (4) ask prospective clients if they want her to create content that would violate her religious beliefs. *See* Verified Complaint ¶¶ 118–23, 229–31, 236, 246–51, ECF No. 1; App. 238–40.[1]

Argument

Carpenter deserves a preliminary injunction because she is likely to succeed on the merits of her First Amendment claim against New York's laws. *See Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 631 (2d Cir. 2020) (outlining elements). Those laws (I) compel Carpenter to express messages about marriage that she disagrees with and (II–III) compel and restrict her speech based on content and viewpoint. So (IV) the laws must, but cannot, satisfy at least strict scrutiny. Carpenter's likely success means an injunction should issue because that is "the dominant, if not the dipositive, factor." *Id.* at 637 (cleaned up). But Carpenter (V) meets the other preliminary-injunction factors too because her ongoing First Amendment losses cause irreparable harm, and the public interest and equities favor her. *See id.*

[1] Carpenter reserves the right to supplement this record based on new information and documents provided by New York's supplemental production and responses.

I. New York's laws violate the First Amendment because they compel Carpenter to speak messages that contradict her beliefs.

The First Amendment protects "the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This freedom stands as an "inalienable human right[]," encourages "the discovery and spread of political truth," and promotes "an uninhibited marketplace of ideas." *303 Creative*, 600 U.S. at 584–85 (cleaned up). For these reasons, New York may not "compel" Carpenter "to speak its own preferred messages," force her to "speak its message when [she] would prefer to remain silent," or require her "to include other ideas with [her] own speech that" she would "prefer not to include." *Id.* at 586.

A compelled-speech claim has two parts. *See Moody v. Netchoice, LLC*, 603 U.S. 707, 727 (2024) (applying two elements); *303 Creative*, 600 U.S. at 587–89 (same); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572–73 (1995) (similar). Carpenter meets both. First, (A) New York's laws regulate her speech—her photographs and blogs. Second, (B) the laws affect the message of Carpenter's speech by compelling her to express a message about marriage that violates her beliefs.

A. Carpenter's photographs and blogs are her protected speech.

Carpenter's photographs and blogs are protected speech. She creates each photograph and blog custom for each client, selects which photographs to take, edit, and produce to her clients, and contributes her views on marriage to the public through those photographs and blogs. Decl. ¶¶ 131–323.

Over fifty years ago, the Supreme Court said that the "First Amendment" applies to "photographs." *Kaplan v. California*, 413 U.S. 115, 119–20 (1973). More recently, the Second Circuit observed that the expressive quality of photographs is so great that "'photographs'" "automatically trigger First Amendment review." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 93 (2d Cir. 2006) (quoting *Bery v.*

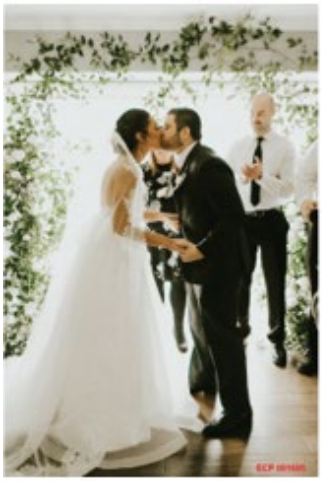
City of New York, 97 F.3d 689, 696 (2d Cir. 1996)). The Constitution has since adapted to the internet. It is now well-settled that the First Amendment protects ideas communicated online through "traditional print" or "audio, video, and still images." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). And, on several occasions, the Supreme Court has held that the "selection and presentation of content is … speech activity"—even when the speech was "originally created by others." *Moody*, 603 U.S. at 728, 731 (cleaned up) (collecting cases).

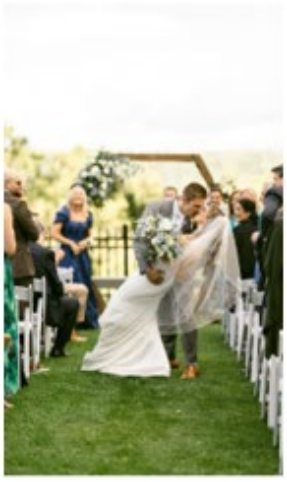
Carpenter's photographs and blogs check all these boxes and more. As an *original* content creator who exercises "editorial control and judgment" throughout the creative process, she deserves maximum First Amendment protection. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). She selects which messages to express—and has declined requests for opposite-sex weddings that contradict her artistic vision. Decl. ¶¶ 86, 333, 355. Carpenter has an initial call with prospective clients to ensure they are requesting a message she is willing to express. *Id.* at ¶¶ 104–11. She retains control over the final photographs she creates and provides to clients in her contracts. App. 102. Carpenter consults with clients to discuss their unique stories as source material, and she then then exercises her discretion to decide which photographs to take. Decl. ¶¶ 144–96. Afterwards, Carpenter curates and edits those photographs based on her own judgments. *Id.* at ¶¶ 218–91. She then organizes them for clients on an online gallery to showcase the wedding. *Id.* at ¶¶ 255–57. Later, Carpenter selects a sub-set of those final images to display on her blog where she writes about her perspective of the day. *Id.* at ¶¶ 292–323. In the end, her works convey a celebratory story message about each wedding—and in favor of marriage between a man and a woman. *E.g.*, *id.* at ¶¶ 300–02.

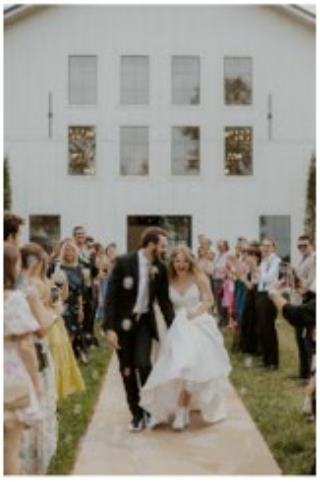
Each step on its own would be enough to warrant First Amendment protection. Taken together, this protection is inevitable. This outcome does not change though Carpenter creates the speech for a profit, "may combine [her speech]

with the couple's in the final product," or offers her services to the public. *303 Creative*, 600 U.S. at 588, 593, 600. Nor can Carpenter's creative process be disaggregated from the final expression, "reduced" to its "constituent acts," and then redefined as "conduct." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010). *Accord Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011) ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference."). The speech thread runs throughout.

Creating photographs. Carpenter's photographs are her speech. *See Chelsey Nelson Photography, LLC v. Louisville /Jefferson Cnty. Metro Gov't* ("*CNP*"), 624 F. Supp. 3d 761, 782–86 (W.D. Ky. 2022) (reaching this conclusion for a wedding photographer). Through them she "convey[s] her view of the world," *id.* at 783, by communicating her beliefs about marriage. Decl. ¶¶ 133–36. In telling this story, she considers elements like subject matter, angle, light exposure, and others to create each image. *Id.* at ¶¶ 147–95. And Carpenter creates each photograph unique for each client—they are not interchangeable. *Id.* at ¶¶ 183–84. Consider how the content of each photograph below changes with adjustments to the subject matter and other features. *See* App. 247, 298, 339.





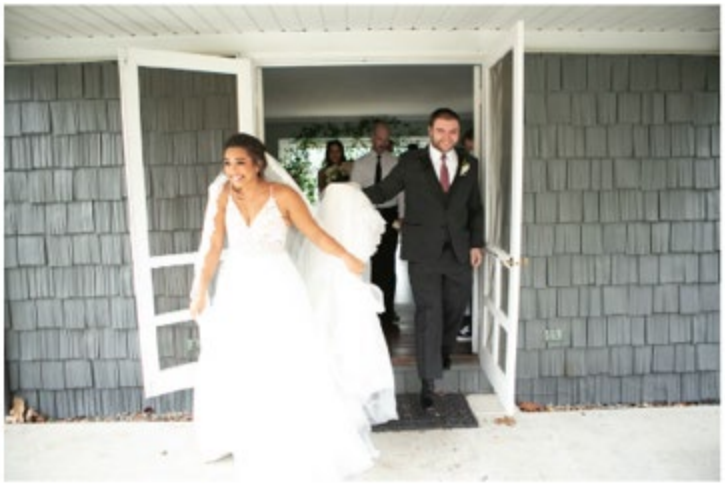


Carpenter's clients often have suggestions on which photographs to take at their engagements or weddings and often list scenes they would like prioritized.

App. 117–31. Carpenter typically abides by these requests. Decl. ¶¶ 150–52. But that makes no difference to the speech analysis. "An individual does not forfeit constitutional protection simply by combining multifarious voices in a single communication." *303 Creative*, 600 U.S. at 588 (cleaned up). At bottom, whatever input her clients offer, Carpenter is the one behind the camera lens deciding which specific scenes to capture at just the right moment. Decl. ¶¶ 150–62.

And each of those decisions leads to a message in Carpenter's photographs—that marriages between one man and one woman should be celebrated. Decl. ¶¶ 134–35. Even New York admitted that wedding photographs convey *some* view—"the message conveyed is similar: the ceremony was a joyful affair, whatever the photographer's personal beliefs about marriage." App. 372. For Carpenter, the view is more specific about marriage: God intended it between one man and one woman. Decl. ¶ 134.

Editing photographs. Carpenter's edits to original photographs are also expressive. Carpenter takes between 1,800 and 11,000 photographs per wedding. Decl. ¶ 223. Of those, she selects about twenty-five percent to edit. *Id.* at ¶ 235. Pairing down the number of photographs to edit by that degree is itself speech as an act of "compiling and curating." *Moody*, 603 U.S. at 731–32. But Carpenter does more. Once she has curated the universe of photographs, she edits them to account for things like lighting, shadows, and contrasts. Decl. ¶ 241. Those adjustments effect the content of the photographs—darkening images, cropping scenes, and other changes. *Id.* at ¶¶ 242–45. Those changes make a difference. Compare the edited image (left) with an unedited image (right) below. *See* App. 249, 265.



To be sure, Carpenter has dabbled with AI to expedite the editing process. Decl. ¶¶ 266–91. But even there, Carpenter uploads her prior images to the AI platform so that it can imitate her style, chooses which images to upload, reviews each image edited by AI, and tweaks those images based on her own personal vision. *Id.*; App. 737–39. Though technology may speed up Carpenter's editing, the final edits and the final images remain hers. Decl. ¶ 391. After all, an author still gets full credit for her book even if she submits the manuscript to a publisher for printing instead of publishing it through hand-written copies.

When Carpenter has finished editing the photographs, she provides the final images to her clients. *Id.* at ¶¶ 238, 255–58. Carpenter chooses which photographs to give to the clients too, and she has final authority over which photographs make the final cut. Decl. ¶ 255; App. 102, 104. She curates only those images which, in her view, tell the best story about the engagement or wedding. Decl. ¶¶ 255–58.

Publishing blogs. After Carpenter creates her wedding photographs, she completes a blog post. Decl. ¶¶ 292–323. For blogs, Carpenter selects her favorite images to publish and writes encouraging text about the wedding and the couple. *Id.* at ¶¶ 292–95. The blog serves the couple by giving them an easy-to-share platform so that their loved ones can see (and relive) the day's greatest hits. *Id.* at

¶¶ 303–08. The blog also allows Carpenter to communicate her views on marriage. *Id.* at ¶ 299. The blogs are Carpenter's speech too. *303 Creative*, 600 U.S. at 588–89.

She chooses the photographs to display and arranges them based on the events of the wedding day. Decl. ¶¶ 308–14; App. 158–222. Carpenter also writes text about her perspectives and desires for the couple. Decl. ¶¶ 308–14. And Carpenter has final control over what to post on her blog. *Id.* at ¶¶ 309, 314, 323. Throughout that process, Carpenter creates an original, visual narrative about her clients' love for each other. *See* App. 158–222.

Carpenter sometimes collaborates on the blogs with her virtual assistant. They have created blogs through an iterative process where Carpenter supplies initial bullet-pointed ideas, the virtual assistant takes a first pass at drafting the blog's content, and then they both coordinate the final lay out and text. Decl. ¶¶ 315–19. But that collaboration does not minimize Carpenter's speech. Speech collaborators have expressive interests. *See Hurley*, 515 U.S. at 569–70 (protecting combination of "multifarious voices"). Even when collaborating, Carpenter retains editorial discretion over the final blog. Decl. ¶ 309. And Carpenter includes the content on *her* website—another act of *her* expression. *See Moody*, 603 U.S. at 731–32 (collecting cases holding that "[d]eciding on the third-party speech that will be included" in a compilation "is expressive activity of its own").

From first click to final post, Carpenter engages in her own protected speech.

B. The Accommodations and Discrimination Clauses affect the message Carpenter wishes to send.

As much as Carpenter speaks, New York seeks to compel her to speak messages that contradict her beliefs on marriage.

The Accommodations Clause makes it an "unlawful discriminatory practice" for public accommodations to "refuse" a person a service or "advantage[]" "because of" the person's "sexual orientation." N.Y. Exec. Law § 296(2)(a). New York

acknowledged that this clause is co-extensive with the similarly-worded Discrimination Clause (N.Y. Civ. Rts. Law § 40-c(2)). App. 364. New York state courts interpret these provisions as prohibiting public-accommodations from offering "a limited menu of goods or services to customers." *In re Gifford v. McCarthy*, 137 A.D.3d 30, 37–38 (2016) (cleaned up). New York's enforcement guide—citing *this case*—instructs that its laws require "a wedding photographer" to provide services "equally to" opposite-sex and same-sex couples regardless of the photographer's "religious beliefs." App. 483. And New York admitted that Carpenter must offer to photograph and blog about same-sex weddings to the same extent she photographs and blogs about opposite-sex weddings. *See* App. 408, 414–16.

Based on this interpretation, this Court observed that it is not a "strained" reading that these laws compel Carpenter "to create photographs for same-sex couples that celebrate their marriages if she creates photographs for opposite-sex couples that celebrate their marriages." *Emilee Carpenter, LLC v. James* (*ECP I*), 575 F. Supp. 3d 353, 372 (W.D.N.Y. 2021). New York agrees. It told the Second Circuit, "Of course, as a result of New York's prohibition on discrimination," Carpenter "may be required to produce wedding photographs for same-sex couples that she would not otherwise choose to create." App. 367; *id.* at 371.

Carpenter also always offers and posts blogs celebrating weddings she photographs for her clients. App. 727–28. She offers this as a service to her clients which gives them an easily-accessible repository of their photographs, a shareable format for their photographs, and other benefits. Decl. ¶¶ 303–08. She does not offer a wedding photography package that does not include a blog. App. 727–28. Because New York's laws prohibit *any* differentiation in services—any "limited menu," *Gifford*, 137 A.D.3d at 37–38; App. 381, 687—the laws likewise force Carpenter to create and then post blogs promoting same-sex marriage. New York agreed again. At the Second Circuit, it answered "Yes" to whether "New York require[s] her to

comparably blog about same-sex weddings that she photographs" if "she provides "a service that blogs about the wedding that she photographs." App. 395. Nor does it matter that Carpenter lists her blogs as "complimentary." The blog feature is a service she always offers. And New York's laws apply to free online services too. *See Sullivan v. BDG Media, Inc.*, 146 N.Y.S.3d 395, 402 (Sup. Ct. 2021) (applying law to website that "offer[ed] free content to its online readers" (cleaned up)).

In similar contexts involving similar laws applied against web designers and custom cake artists, New York has consistently argued that the First Amendment does not exempt public-accommodations from anti-discrimination laws—even when those entities claim to be engaged in expression. App. 566–87. Other courts have likewise interpreted similar public-accommodation laws to reach activities like photography, parades, videos, and custom artwork. *See infra* n.2.

The upshot is that New York's laws require Carpenter to create photographs and promote blogs celebrating same-sex weddings because she photographs and blogs about opposite-sex weddings. Time and again, the Supreme Court has rebuffed efforts to apply public-accommodation laws in this way—even when the speech at issue touched on sexual orientation. Such laws cannot be used to "affect[] the message conveyed by" a speaker like Carpenter. *Hurley*, 515 U.S. at 572. *Accord 303 Creative*, 600 U.S. at 588; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000). And the Supreme Court is not alone. Courts across the country and in this state have reached the same conclusion.[2]

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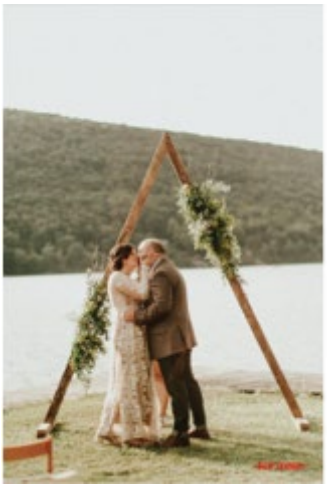
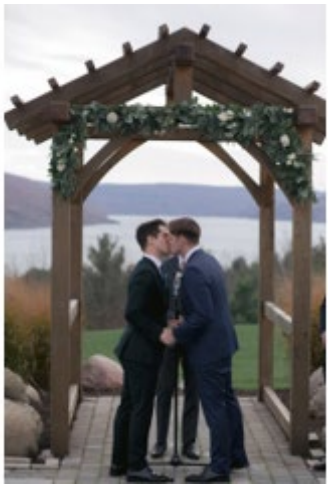
[2] *See Green v. Miss United States of Am., LLC*, 52 F.4th 773, 783 (9th Cir. 2022) (pageant); *Telescope Media Grp. v. Lucero* (*TMG*), 936 F.3d 740, 753 (8th Cir. 2019) (wedding films); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 913–14 (Ariz. 2019) (wedding invitations); *CNP*, 624 F. Supp. 3d at 787–89 (wedding photographs); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 441 (S.D.N.Y. 2014) (search-engine website); *N.Y. Cnty. Bd. of Ancient Ord. of Hibernians v. Dinkins*, 814 F. Supp. 358, 367 (S.D.N.Y. 1993) (parade).

Worse still, the laws force her to express messages about marriage she would otherwise avoid. Carpenter objects to creating or endorsing a message that supports same-sex marriage. *E.g.*, Decl. ¶¶ 362–64. That message contradicts her religious beliefs about marriage. *Id.* But New York's laws compel Carpenter to express a view she disagrees with. Consider how applying New York's laws to Carpenter's photographs (left) would alter their content (right). *See* 271, 786–87.





New York's laws work the same intrusion on Carpenter's blogs. Those laws require Carpenter to promote a view of marriage on her own blog that violates her beliefs. If she praises the marriage of an opposite-sex couple as being able to "finally join their lives together as husband and wife!,"" App. 160, she must promote the future "lives together as husband and husband" for a same-sex couple according to New York. Carpenter must also publish photographs of that same-sex ceremony on her studio's blog, just as she does for opposite-sex weddings. App. 408. Such a demand invades the heartland of Carpenter's First Amendment freedom of speech.

The requirements of New York's laws have the practical effect of prohibiting Carpenter from amending her company's operating agreement to include a policy explaining her religious and artistic reasons for declining to celebrate same-sex weddings. App. 378. Carpenter desires to adopt this policy to bind her company to

an editorial policy consistent with her beliefs. Decl. ¶¶ 418–23. But doing so would be to deny accommodations contrary to New York's laws.

New York takes this position even though Carpenter serves all people regardless of their status, does not discriminate against those who identify as gay or lesbian, and declines requests only for message-based reasons. Decl. ¶¶ 362–78. She has an across-the-board policy of declining to create any messages that contradict her beliefs or artistic style, whether that's for an opposite-sex wedding, a same-sex wedding, or other events. Decl. ¶ 86. For example, Carpenter declined a request for an opposite-sex wedding when asked to create photographs contrary to her artistic style. Decl. ¶¶ 354–56. She likewise followed up on a request to ensure it would not violate her religious beliefs. Decl. ¶¶ 330–36. The First Amendment protects Carpenter's choice to "control her own message," which is categorically different than "status-based discrimination." *303 Creative*, 600 U.S. at 595 n.3.

II. New York's laws violate the First Amendment because they compel Carpenter's speech based on content and viewpoint.

The Accommodations and Discrimination Clauses also compel Carpenter's speech based on its content and viewpoint. The *content* of Carpenter's message determines whether the Clauses apply, and her *viewpoint* determines its illegality.

The Clauses are content-based because they "single[] out specific subject matter for differential treatment." *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015). Carpenter must create photographs and blogs promoting a view of marriage she disagrees with. This necessarily "alters the content" of her desired speech and constitutes "a content-based regulation of speech." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 776 (2018) (cleaned up). The clauses also "treat[]" Carpenter's "choice to talk about" marriage "as a trigger for compelling [her] to" promote "a topic [she] would rather avoid"—i.e., same-sex marriage. *TMG*, 936 F.3d at 753. *Accord 303 Creative*, 600 U.S. at 589 (government cannot condition speaker's

speech on her adopting the views "the State demands"). If Carpenter only photographed landscapes, New York conceded she need not photograph same-sex weddings. App. 375 ("If she does not offer wedding photography, New York does not force her to photograph any weddings."). Carpenter must promote same-sex weddings only because she promotes opposite-sex marriage.

The Clauses are also viewpoint-based because they regulate Carpenter's speech based on her "particular views" on marriage. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Carpenter can photograph same-sex *and* opposite-sex engagements and weddings, but not *only* opposite-sex engagements and weddings. *See* App. 428. New York treats a decline to speak one view different than a decline to speak other views on the same topic. That's viewpoint discrimination. It is unconstitutional.

III. New York's laws violate the First Amendment because they restrict Carpenter's speech based on content and viewpoint.

New York's laws cannot dictate the content of Carpenter's expression, so they cannot restrict her speech on how she explains her decisions about what to say. *See 303 Creative*, 600 U.S. at 581 n.1, 598 n.5; *ECP II*, 107 F. 4th at 101 n.1. Nor can these laws restrict her speech based on content and viewpoint. But they do.

The Publication Clause is facially content-based because it "draws distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163. It prohibits statements "to the effect that" public accommodations will decline service based on sexual orientation and a few other traits. N.Y. Exec. Law § 296(2)(a); N.Y. Civ. Rts. Law § 40-c(2). But any other comments are fair game. The Unwelcome Clause is also facially viewpoint-based because it only bans communications that may make someone feel "unwelcome, objectionable or not acceptable, desired or solicited" because of certain characteristics. N.Y. Exec. Law § 296(2)(a); N.Y. Civ.

Rts. Law § 40-c(2). By targeting remarks that some may find "offensive," the clause "discriminates based on viewpoint." *Iancu v. Brunetti*, 588 U.S. 388, 396 (2019).

For reasons like those described above (§ II), the Accommodations, Discrimination, and Publication Clauses restrict Carpenter's speech based on content and viewpoint. They prohibit Carpenter from publishing a statement on her website explaining her policy of only celebrating marriage between a man and a woman, amending her operating agreement to that affect, or conveying that policy to prospective clients. Decl. ¶¶ 407–24; App. 378. These restrictions apply only because Carpenter talks about weddings (content). And they only prohibit her from expressing her choice because she *exclusively* celebrates a particular view of marriage (viewpoint). This outcome elevates the view that same-sex and opposite-sex marriages are equivalent, and denigrates the idea that marriage is defined *only* as the union between one man and one woman.

IV. New York's laws fail scrutiny as applied to Carpenter's speech.

New York cannot apply its laws to change the content of Carpenter's photographs and blogs. At a minimum, New York's laws are (B) subject to strict scrutiny. The laws (A) are also per se unconstitutional because they compel Carpenter's speech with no historical evidence of similar laws being used this way. New York flunks either test.

A. The laws trigger and fail strict scrutiny.

New York's laws are at least subject to strict scrutiny because they compel and restrict Carpenter's expression based on content and viewpoint. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795–96 (1988) (compelled speech); *Reed*, 576 U.S. at 166 (content and viewpoint). To meet that burden, New York must show the laws (i) serve a compelling interest (ii) in a narrowly tailored way. *E.g.*, *Reed*, 576 U.S. at 171. This "is a demanding standard" and "[i]t is rare" a

law satisfies it. *Brown*, 564 U.S. at 799 (cleaned up). So rare, in fact, that the Supreme Court has never compelled a speaker to express an ideological message they disagree with. *See 303 Creative*, 600 U.S. at 586 (collecting cases). New York's laws are not one of the exceedingly rare exceptions.

Compelling interest. To prove a "compelling … interest," New York must "specifically identify an actual problem in need of solving." *Brown*, 564 U.S. at 799 (cleaned up). New York must identify the "real problem" through tangible evidence, not "anecdote and supposition." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822 (2000). And, when defining the problem, New York cannot rely on "a high level of generality." *Fulton v. City of Phila.*, 593 U.S. 522, 541 (2021). Instead, New York must engage in "a more precise analysis" that proves its interest "in denying an exception" from its laws to Carpenter. *Id.*

New York cannot show it has a compelling interest in applying its laws to Carpenter because New York's justifications have changed throughout this suit. At first, New York broadly defined its interest as "[t]he eradication of discrimination" to end "an 'all-pervasive climate of fear,' including hostility, distrust, and physical violence." MPI Resp. 19, ECF No. 26. On appeal, New York asserted interests in ensuring "equal access" and preventing "stigma and humiliation." App. 365. Later, New York said it "lack[s] information" to identify an interest. *Id.* at 400–01. Now, New York only mentions an "access" interest. *Id.* at 411. These shifting stances suggest New York has "invented *post hoc*" reasons "in response to litigation." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022). That is improper. *Id.*; *Agudath Israel of Am.*, 983 F.3d at 634–35.

New York's asserted interests fail anyway. New York interests are too general. *See Fulton*, 593 U.S. at 541. A broad interest in ending discrimination, ensuring access, and preventing dignity harm is not the same as New York's specific

interests as to Carpenter. New York must instead show that letting Carpenter speak consistent with her conscience will undermine those interests. It cannot.

New York cited no specific facts to support its supposed interest in applying its laws to Carpenter here. App. 411. The legislature never mentions photography when it amended the Human Rights Law. Ex. M 24–26, ECF No. 26–2. New York admitted that it "lack[s] information as to whether there exists any person living within the State of New York without access, for any reason, to a wedding photographer willing to photograph same-sex weddings." App. 408–09. And over a thousand photographers are available to photograph same-sex engagements and weddings in New York. *See id.* at 762, 774–75. Without evidence of an "actual problem" of access to wedding photography, New York's interests are not compelling here. *Brown*, 564 U.S. at 799 (cleaned up).

New York's equal access interest fails as applied to Carpenter for other reasons too. Carpenter offers the same services to everyone. She creates photographs and blogs that celebrate opposite-sex engagements and weddings according to her religious beliefs and artistic values. Decl. ¶¶ 324–78. Carpenter declines requests outside this scope—like stylistic requests for "light bright and airy" photographs of opposite-sex weddings—for anyone, regardless of who asks. Decl. ¶¶ 333, 354–56. New York normally approves of this approach. According to "the Attorney General's Office[]," a public accommodation need not "create a message for someone with a protected status" if it would not "create [that] message for anyone." App. 409. New York just denies this same carve-out for Carpenter, and instead forces her to create messages that she otherwise would not create for anyone. Public-accommodation laws serve no "legitimate end" when they compel speakers like that. *Hurley*, 515 U.S. at 578. *Accord Dale*, 530 U.S. at 659 (same conclusion about law that worked "a severe intrusion" on expression).

New York's "stigma and humiliation" interest likewise cannot compel Carpenter's speech. The First Amendment protects views that others find "misinformed or offensive," "misguided," or "likely to cause anguish or incalculable grief." *303 Creative*, 600 U.S. at 586, 595 (cleaned up). New York's alleged interest is particularly weak because Carpenter decides what to create based on the message she is asked to express, not the status of the person making the request. New York's interest also ignores Carpenter's dignity. Her dignity is worth protecting from the "demeaning" attempt to force her to speak against her will. *Janus v. Am. Fed. of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 893 (2018). In the end, New York's solution is far worse—force Carpenter to violate her beliefs and require a same-sex couple to have as their wedding photographer someone who disagrees with their union. That is a lose-lose proposition.

New York's interests are also "wildly underinclusive." *Brown*, 564 U.S. at 802. A law is "underinclusive" when it "fail[s] to prohibit" other activities "that endanger[]" the government's "interests in a similar or greater degree." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543, 546–47 (1993). An underinclusive law is problematic because it raises "doubts about" the government's motive in "pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint," *Brown*, 564 U.S. at 802, and may "reveal that a law does not actually advance a compelling interest," *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015). For example, New York allows benevolent orders and religious corporations to decline "to provide services, accommodations, advantages, facilities, goods, or privileges" to celebrate same-sex marriage. N.Y. Dom. Rel. Law § 10-b(1). Put simply, New York exempts other entities from the *exact* thing it requires Carpenter to do—provide a service for the "celebration of a marriage." *Id.*

This Court had questioned whether the entities exempted by section 10-b(1) "engage in public commercial activities to such a degree that an exemption limits

LGBT individuals' access to publicly available goods and service." *ECP I*, 575 F. Supp. 3d at 378 n.12. But New York has the burden to show that its laws "can brook no departures." *Fulton*, 593 U.S. at 542. It must produce evidence to prove "why it has a particular interest in denying an exception to [Carpenter] while making them available to others." *Id.* New York cannot make this showing because it conceded that a single exemption undermines its interests. On appeal, New York argued that "[s]hrinking the market available to same-sex couples, *even by exempting a single business*, undermines th[e] goal" of equal access. App. 380 (emphasis added). Section 10-b(1) renders New York's laws underinclusive judged against the interests New York relies on to compel Carpenter's speech. New York has no basis to deny Carpenter an exemption when it already excuses others.

New York's laws have other exemptions too. They do not apply at all to "distinctly private" accommodations, benevolent organizations, or religious corporations. *See* N.Y. Exec. Law § 292(9), (11); N.Y. Civ. Rts. Law § 40. New York also grants exemptions to public accommodations to bar persons "because of the sex of such person … based on bona fide considerations of public policy." N.Y. Exec. Law § 296(2)(b). "Sex" includes sex and gender identity and expression. 9 N.Y.C.R.R. § 466.13(d). Under the exemption, public accommodations can reserve restrooms, locker rooms, and other facilities to members of one sex. App. 478. And New York admitted that it has at least the same interests in preventing sex discrimination as sexual orientation discrimination. *Id.* at 412–13. New York cannot explain how this exemption supports its interests while exempting Carpenter undermines them.

Narrow tailoring. New Yorks laws also fail narrow tailoring. For narrow tailoring, New York must prove that regulating Emilee is "the least restrictive means among available, effective alternatives." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). When presented with "plausible, less restrictive alternative[s]," New York has the "obligation to prove that the alternative will be ineffective to achieve its

goals." *Playboy Ent. Grp., Inc.*, 529 U.S. at 816. Once again, this requires "evidence as to *how* effective or ineffective" proposed alternatives may be. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 130 (1989). New York cites no concrete evidence about whether it considered any alternatives or whether those alternatives were ineffective. App. 411–12. That's decisive. And many better options exist.

First, New York could extend its existing exemptions. New York could exempt Carpenter from creating expression in "celebration of a marriage" that she objects to, as it does for religious and benevolent corporations. N.Y. Dom. Rel. Law § 10-b(1). Next, New York could apply the logic of allowing someone to decline to create a "message" that they would not create "for anyone" to exempt Carpenter because she would not promote same-sex engagements and weddings no matter who asks. App. 409. Or New York could expand its "bona fide … public policy" exemption to cover Carpenter's choices about her photographs and blogs. N.Y. Exec. Law § 296(2)(b); App. 478. New York also could exempt businesses that fall below certain revenue thresholds or services provided per-year threshold as it does for "distinctly private" accommodations with less than "one hundred members." N.Y. Exec. Law § 292(9); N.Y. Civ. Rts. Law § 40. Finally, New York could apply a First Amendment exception to Carpenter like it does in the fair housing context. App. 594 (funding may not "be used to investigate or prosecute any activity engaged in by one or more persons that may be protected by the First Amendment").

Second, New York could expand its exemptions for "distinctly private" institutions to artists like Carpenter as this Court suggested. *ECP I*, 575 F. Supp. 3d at 378 n.13; App. 493 (outlining criteria for distinctly private institutions).

Third, New York could apply its laws to stop actual status discrimination but refrain from forcing Carpenter to express views she finds objectionable as *303 Creative* commands. Even before *303 Creative*, at least nineteen states applied their laws in this way and found "no evidence … that enforcement of" their public-

accommodations laws in this way has "compromised" their interests. Br. of Amici Curiae State of Nebraska, et al. Supporting Appellants and Reversal 21, *Emilee Carpenter, LLC v. James,* No. 22-75 (10th Cir. Mar. 14, 2022). The same is true of other jurisdictions in New York. Chemung County agreed that it had "an ongoing interest in prohibiting" sexual orientation discrimination by enforcing New York's laws. Stip. of Non-Enforcement 2, ECF No. 93. But it found those interests were not "undermined" by allowing Carpenter to create content consistent with her religious beliefs about marriage. *Id.* at 2–3. Other states have developed different successful solutions to balance protecting against discrimination with allowing free expression. *CNP*, 624 F. Supp. 3d at 795–96 (collecting examples). New York's laws cannot be narrowly tailored when other states and enforcement officials achieve similar interests with less intrusive tools. *See McCullen v. Coakley*, 573 U.S. 464, 491–92 (2014) (holding law failed intermediate scrutiny when other jurisdictions adopted less burdensome alternatives).

The First Amendment requires New York to have "considered different methods that other jurisdictions have found effective." *Id.* at 494. New York cites no evidence that it considered any of the above alternatives. App. 411–12. New York's oversight seals the fate of the laws—they are not tailored enough here.

B. The laws are per se unconstitutional as applied here.

New York's laws compel Carpenter to express messages that conflict with her beliefs and prohibit her from fully explaining her views on her website. After nearly four years of litigation, New York still has not identified "a well-established and representative historical *analogue*" of the type of regulation at issue—i.e., a public-accommodations law that compels speech about an ideological topic. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 30 (2022). And there is no historical evidence of similar public-accommodations laws being used in this way. *See 303*

Creative, 600 U.S. at 590–92. Without this evidence, the laws cannot be applied to alter the content of Carpenter's photographs and blogs. *See Bruen*, 597 U.S. at 24–25 (articulating historical test in First Amendment context).

In *303 Creative*, Colorado argued that its interest in "equal access" to 303 Creative's designs had "a historic pedigree." Br. for Resp'ts, *303 Creative, LLC v. Elenis*, 600 U.S. 570 (2023) (No. 21-475), 2022 WL 3597176, at *36. Colorado relied on what it believed to be the "common law" requirement that "businesses open to the public … provide their services to all customers." *Id.* at *3. New York made the same argument about to the Supreme Court in an amicus brief. App. 580–83.

The Supreme Court acknowledged this general history. *303 Creative*, 600 U.S. at 590–92. But it held that history had nothing to say about instances when those laws "sweep too broadly" to "deploy[] to compel speech." *Id.* at 592. In those cases, "public accommodations law[s]" are not "immune" from the First Amendment. *Id.* (collecting cases). That is just as true when the laws are applied to public accommodations "who seek profit" as it is when applied to public accommodations who are "nonprofits." *Id.* at 600 (cleaned up). "When a state public accommodations law and the Constitution collide, there can be no question" that the Constitution "prevail[s]." *Id.* at 592. That unconstitutional collision happens here.

V. The remaining preliminary-injunction factors favor an injunction.

Because Carpenter will likely win her First Amendment claim, the other preliminary-injunction factors fall into place. Carpenter suffers harm from the threatened enforcement of these laws, continues to receive requests to celebrate same-sex weddings, and has refrained from posting her statement and adopting her policy to avoid liability under New York's laws. Decl. ¶¶ 410–28. Her chilled speech "unquestionably constitutes irreparable injury." *N.Y. Progress and Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (cleaned up).

The narrow injunction requested here protects the public interest. New York has a "diminished" interest here because its laws "likely" violate the First Amendment. *A.H. ex rel. Hester v. French*, 985 F.3d 165, 184 (2d Cir. 2021). Conversely, the public has an interest in "securing First Amendment rights." *Walsh*, 733 F.3d at 488. So "the public interest is well served by the correction of … constitutional harm" here. *French*, 985 F.3d at 184. Under New York's logic, the state could require an LGBT poet at The Poetry Society of New York—which offers commissioned poems to the public—to write a haiku criticizing same-sex marriage for a religious group or a pacifist poet to pen an ode celebrating a war hero's military career. *See* The Poetry Society of New York, *Commission a Poem*, https://poetrysocietyny.org/commission-a-poem; N.Y. Exec. Law § 296(2)(a) (protecting "military status"). That runs against New Yorkers' interests. *See* U.S. Const. amend. I.

The equities favor Carpenter too. Carpenter can create photographs and blogs consistent with her religious beliefs on marriage free from the threat of government punishment while New York can continue to enforce its laws in any other way that does not violate Carpenter's First Amendment freedoms. All these factors justify Carpenter's need for immediate relief.

Conclusion

Forcing Carpenter to promote a view of marriage that she objects to violates the First Amendment and threatens everyone's free speech in the end. To stop this violation, Carpenter asks this Court to grant her preliminary-injunction motion.

Respectfully submitted this 18th day of February, 2025.

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Certificate of Service

I hereby certify that on the 18th day of February, 2025, 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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