

22-75

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

EMILEE CARPENTER, LLC, D/B/A EMILEE CARPENTER
PHOTOGRAPHY; EMILEE CARPENTER,

Plaintiffs-Appellants,

– v. –

LETITIA JAMES, in her official capacity as Attorney General of New York;
MARIA L. IMPERIAL, in her official capacity as the Acting Commissioner
of the New York State Division of Human Right; WEEDON WETMORE, in
his official capacity as District Attorney of Chemung County,

Defendants-Appellees.

*On Appeal from the United States District Court
for the Western District Of New York, Case No. 6:21-CV-06303*

**BRIEF OF AMICI CURIAE NEW YORK CIVIL LIBERTIES UNION
AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF
DEFENDANTS-APPELLEES**

GABRIELLA LARIOS
ROBERT HODGSON
New York Civil Liberties Union
Foundation
125 Broad Street, 19th Floor
New York, NY 10004
Tel: (212) 607-3300
glarios@nyclu.org
rhodgson@nyclu.org

DUNCAN HOSIE*
LINDSEY KALEY
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2500
dhosie@aclu.org
lkaley@aclu.org

Dated: May 16, 2022
New York, N.Y.

* Application for admission pending

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

CORPORATE DISCLOSURE STATEMENT..... 1

AUTHORITY TO FILE AMICI BRIEF 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

INTEREST OF AMICI CURIAE..... 3

ARGUMENT 4

 I. New York’s Antidiscrimination Laws Do Not Infringe
 Appellants’ Free Speech or Association Rights..... 4

 A. The Antidiscrimination Laws Regulate Commercial
 Conduct and Affect Expression Only Incidentally. 4

 B. Any “Compelled Expression” Is Incidental to the
 Antidiscrimination Laws’ Requirement of Equal
 Treatment..... 16

 II. The Antidiscrimination Laws are Fully Consistent with the
 Religion Clauses of the First Amendment. 21

 A. The Antidiscrimination Laws Do Not Compel Any Business
 to Participate in a Religious Ceremony. 22

 B. The Existence of Narrow Exemptions Do Not Render the
 Antidiscrimination Laws Not Generally Applicable. 23

 III. The Antidiscrimination Laws Satisfy Even Strict Scrutiny. 25

 A. New York Has a Compelling Interest in Eradicating
 Discrimination..... 25

 B. Uniform Enforcement of the Antidiscrimination Laws Is
 the Least Restrictive Means for Furthering the State’s
 Compelling Interest. 31

CONCLUSION 33

TABLE OF AUTHORITIES

Cases

303 Creative LLC v. Elenis,
6 F.4th 1160 (2021)..... 26

303 Creative LLC v. Elenis,
No. 16-cv-02372, 2017 WL 4331065 (D. Colo. 2017) 30

Associated Press v. NLRB,
301 U.S. 103 (1937)..... 5

Associated Press v. United States,
326 U.S. 1 (1945)..... 5

Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte,
481 U.S. 537 (1987)..... 13

Boy Scouts of Am. v. Dale,
530 U.S. 640 (2000)..... 19

Boy Scouts of Am. v. Wyman,
335 F.3d 80 (2d Cir. 2003) 13, 14, 19

Brush & Nib Studio v. City of Phx.,
448 P.3d 890..... passim

Burns v. Martuscello,
890 F.3d 77 (2d Cir. 2018) 17

Burwell v. Hobby Lobby Stores, Inc.,
573 U.S. 682 (2014)..... 25

*Chelsey Nelson Photography LLC v. Louisville/Jefferson City Metro
Gov’t*,
479 F. Supp. 3d 543 (W.D. Ky. 2020) 14, 18

Christian Legal Soc’y v. Martinez,
561 U.S. 661 (2010)..... 12

Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.,
6 F.4th 1247 (11th Cir. 2021) 20

Elane Photography, LLC v. Willock,
309 P.3d 53 (N.M. 2013) passim

Employment Division, Dep’t of Human Resources of Oregon v. Smith,
494 U.S. 872 (1990)..... 23

Expressions Hair Design v. Schneiderman,
137 S. Ct. 1144 (2017)..... 11

Fulton v. City of Philadelphia, Pennsylvania,
141 S. Ct. 1868..... 23, 24, 27

Giboney v. Empire Storage & Ice Co.,
336 U.S. 490 (1949)..... 5

Gifford v. McCarthy,
23 N.Y.S.3d 422 (N.Y. App. Div. 2016) 26, 29, 30

Heart of Atlanta Motel, Inc. v. U.S.,
379 U.S. 241 (1964)..... 28, 30

Heckler v. Mathews,
465 U.S. 728 (1984)..... 30

Hishon v. King & Spalding,
467 U.S. 69 (1984)..... 8

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston,
515 U.S. 557 (1995)..... 12

Jews for Jesus, Inc. v. Jewish Cmty. Rels. Council of New York, Inc.,
968 F.2d 286 (2d Cir. 1992) 12, 26

Jian Zhang v. Baidu.com, Inc.,
10 F. Supp. 3d 433 (S.D.N.Y. 2014)..... 20

Lee v. Weisman,
505 U.S. 577 (1992)..... 22

<i>Legal Servs. Corp. v. Velazquez</i> , 531 U.S. 533 (2001).....	8
<i>Madsen v. Women’s Health Ctr.</i> , 512 U.S. 753 (1994).....	14
<i>Marrero-Méndez v. Calixto-Rodríguez</i> , 830 F.3d 38 (1st Cir. 2016)	22
<i>Masterpiece Cakeshop v. Colo. Civ. Rights Comm’n</i> , 138 S. Ct. 1719 (2018).....	7, 22, 25, 30
<i>Miami Herald Publ’g Co. v. Tornillo</i> , 418 U.S. 241 (1974).....	6, 20
<i>Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue</i> , 460 U.S. 575 (1983).....	5
<i>New Hope Family Servs. v. Poole</i> , 966 F.3d (2d Cir. 2020)	19, 21
<i>Newman v. Piggie Park Enters., Inc.</i> , 390 U.S. 400 (1968).....	8
<i>Norwood v. Harrison</i> , 413 U.S. 455 (1973).....	7
<i>Ohralik v. Ohio State Bar Ass’n</i> , 436 U.S. 447 (1978).....	5
<i>Pacific Gas & Electric Co. v. Pub. Util. Comm’n of California</i> , 475 U.S. 1 (1986).....	20
<i>Riley v. Nat’l Fed’n of the Blind of N.C., Inc.</i> , 487 U.S. 781 (1988).....	31
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984).....	14, 25, 26, 29
<i>Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (“FAIR”)</i> , 547 U.S. 47 (2006).....	10, 11

<i>Swanner v. Anchorage Equal Rights Comm’n</i> , 874 P.2d 274 (Alaska 1994)	29, 31
<i>Tandon v. Newsom</i> , 141 S. Ct. 1294 (2021).....	24
<i>Telescope Media Group v. Lucero</i> , 936 F.3d 740 (8th Cir. 2019).....	passim
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989).....	7
<i>United States v. Burke</i> , 504 U.S. 229 (1992).....	31
<i>United States v. O’Brien</i> , 391 U.S. 367 (1968).....	6
<i>Updegrove v. Herring</i> , No. 20-cv-1141, 2021 WL 1206805 (E.D. Va. Mar. 30, 2021)	30
<i>Wandering Dago, Inc. v. Destito</i> , 879 F.3d 20 (2d Cir. 2018)	14
<i>Warner v. Orange Cty. Dep’t of Probation</i> , 115 F.3d 1068 (2d Cir. 1996)	22
<i>Washington v. Arlene’s Flowers, Inc.</i> , 441 P.3d 1203 (Wash. 2019)	23, 30
<i>Wisconsin v. Mitchell</i> , 508 U.S. 476 (1993).....	12
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977).....	20
Statutes	
N.Y. Exec. Law § 296.2(b)	28

CORPORATE DISCLOSURE STATEMENT

No *amici* have parent corporations or are publicly held corporations.

AUTHORITY TO FILE AMICI BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici* state that all parties have consented to the filing of this brief.¹

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no party's counsel authored this brief in whole or in part, and that no party or person other than *amici* and their members contributed money toward the preparation or filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants (“the Photography Business”) seek a constitutional right to operate a business open to the public that denies equal service to same-sex couples in violation of New York law, counter to the basic principle, reflected in New York public accommodations laws, that businesses that choose to serve the public should serve all people without discrimination. The district court correctly rejected arguments that the First Amendment prohibits New York from enforcing its antidiscrimination laws against Appellants. The Supreme Court for more than fifty years has uniformly rejected businesses’ attempts to carve out exemptions from antidiscrimination laws, even where those businesses provided expressive goods or services. And Appellees have explained why the law of this Circuit mandates affirmance.

Amici submit this brief to offer additional doctrinal and historical context based on special First Amendment expertise derived from litigating similar cases around the country and before the Supreme Court, as well as litigating antidiscrimination cases in New York. If accepted, the Photography Business’s arguments would open the door for a wide range of businesses to refuse to serve interracial or interfaith

couples, women, Muslims, Black people, or any other group the company's owner objects to serving. For these reasons, along with those articulated by Appellees, *amici* urge this Court to affirm.

INTEREST OF AMICI CURIAE

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with approximately two million members dedicated to defending the principles of liberty and equality embodied in the Constitution. The New York Civil Liberties Union (“NYCLU”) is one of the ACLU’s statewide affiliates with more than 160,000 members. Drawing from their deep expertise in First Amendment issues, the NYCLU and ACLU have appeared as either counsel-of-record or *amicus curiae* in a number of cases nationwide in which businesses providing commercial services challenge public accommodations on First Amendment grounds, including before the District Court in this case. *See* JA1012–38 (ACLU and NYCLU *amicus curiae* brief before the district court); *see also Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1722 (2018) (ACLU represented private respondents in discrimination case involving refusal to sell a wedding cake to a gay couple); *Gifford v. McCarthy*, 23

N.Y.S.3d 422, 425 (N.Y. App. Div. 2016) (NYCLU and ACLU represented private respondents in discrimination case involving refusal to rent a wedding venue to a same-sex couple). As organizations that advocate for First Amendment liberties as well as equal rights for lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) people, the ACLU, NYCLU, and their members have a strong interest in the application of proper standards when evaluating constitutional challenges to civil rights laws.

ARGUMENT

I. NEW YORK’S ANTIDISCRIMINATION LAWS DO NOT INFRINGE APPELLANTS’ FREE SPEECH OR ASSOCIATION RIGHTS.

A. The Antidiscrimination Laws Regulate Commercial Conduct and Affect Expression Only Incidentally.

When confronted with First Amendment challenges to neutral laws that regulate commercial conduct and affect speech only incidentally, the Supreme Court and this Court have applied minimal scrutiny and upheld the laws’ application to businesses. This Court should do the same.

1. Generally applicable regulations of commercial conduct receive minimal First Amendment scrutiny.

“[I]t has never been deemed an abridgement of freedom of speech

or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *see also Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978). The First Amendment is not infringed when the government enforces a generally applicable regulation of commercial conduct against a business that deals in expressive goods or services.

Even newspaper publishers, whose very product is protected speech, can be subject “to generally applicable economic regulations” without implicating the First Amendment. *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 581 (1983). “The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating . . . business practices.”

Associated Press v. United States, 326 U.S. 1, 7 (1945); *see also*

Associated Press v. Nat’l Labor Relations Bd., 301 U.S. 103, 132 (1937).

In contrast, a law specifically requiring a newspaper to print particular content (or forbidding the same) directly intrudes on the First

Amendment. *See, e.g., Miami Herald Publ’g Co. v. Tornillo*, 418 U.S.

241, 258 (1974).

Even outside the commercial context, the Supreme Court has uniformly upheld laws that regulate conduct generally, without specifically targeting speech or communicative content, even where they are applied to expressive conduct. In *United States v. O'Brien*, 391 U.S. 367 (1968), the Court upheld a law prohibiting the destruction of draft cards as applied to an individual who burned his draft card to express his opposition to the draft. There was no question that Mr. O'Brien's burning of the card was expressive, but the Court explained that the focus of the constitutional inquiry is not on whether the *individual* is engaged in conduct for expressive purposes, but whether the *government regulation* is aimed at conduct generally, and therefore “unrelated to the suppression of free expression,” or is targeted at the conduct's *communicative content*, in which case strict scrutiny applies. *Id.* at 377 (holding that regulations of conduct that have only an incidental effect on expression need only further an important or substantial government interest and burden no more expression than necessary). Thus, while flag burning and draft card burning are equally expressive, a law that expressly prohibits flag burning must satisfy

strict scrutiny, because the only reason to regulate the burning is disapproval of the message it communicates. *Texas v. Johnson*, 491 U.S. 397, 412 (1989). But prohibiting the destruction of draft cards, the Court found, served the administrative interests in running the draft, regardless of whether a draft card was destroyed in someone's basement with no one watching or on the National Mall as part of a protest.

The key inquiry, in other words, is not whether the individual or institution subject to the regulation is engaged in expressive activity, but whether the government is regulating the conduct because of its communicative content. Here, New York's antidiscrimination laws are designed to ensure that all customers are served by businesses open to the public on an equal footing, without regard to whether the business is expressive or not.

Applying these principles, the Supreme Court for more than fifty years has uniformly rejected businesses' challenges to laws barring discrimination, even where those businesses provided expressive goods or services. *See Norwood v. Harrison*, 413 U.S. 455, 469–70 (1973); *see also Masterpiece Cakeshop*, 138 S. Ct. at 1723–24; *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968). For example, in *Hishon*,

a law firm argued that applying Title VII to require it to consider a woman for partnership “would infringe [its] constitutional rights of expression or association.” *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). Although a law firm’s services are indisputably expressive, the *Hishon* Court dismissed the law firm’s First Amendment defense, holding that there is “no constitutional right . . . to discriminate.” 467 U.S. at 78 (citations omitted). By contrast, a law specifically targeting a law firm’s *speech*—by, for example, preventing it from bringing cases that “challenge existing welfare laws”—would “implicat[e] central First Amendment concerns.” *See, e.g., Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547–48 (2001).

For this reason, the Photography Business misses the point when it focuses on the claim that its photography and blog are expressive. Br. of Appellants at 24–27. The relevant question, rather, is whether New York’s antidiscrimination laws prohibit discrimination because of the photographer’s communicative message, or irrespective of the photographer’s message.

New York’s laws do not tell the company how to frame its shots, edit its photographs, or what to include in its blog posts; they merely

require that whatever services it provides to the public, it must not deny them to customers based on protected categories such as race, sex, and sexual orientation. Photographers do not have to open a business to the public. Photographers, writers, and artists who do not offer their services to the public at large are not public accommodations, and therefore can photograph, paint, or write what they want. But businesses that choose to provide their photography services to the public at large—whether it is corporate headshots, passport photos, or wedding photos—are subject to the same generally applicable regulations of their commercial conduct as newspapers and law firms and must not discriminate.

As the Supreme Court of New Mexico held in *Elane Photography, LLC v. Willock*, where “[a photography business] is a public accommodation, its provision of services can be regulated” consistent with the First Amendment, “even though those services include artistic and creative work.” 309 P.3d 53, 66 (N.M. 2013); *see also id.* at 71 (“[T]here is no precedent to suggest that First Amendment protections allow such individuals or businesses to violate antidiscrimination laws.”). A video game business, though producing artistic expressions, is

not exempt from the Fair Labor Standards Act’s prohibition against hiring child laborers. Nor is a tattoo parlor exempt from a health code regulation governing the disposal of needles. Such businesses are likewise not exempt from antidiscrimination laws.

Although the Photography Business’s services involve expression, that “hardly means” that any regulation of its business operations “should be analyzed as one regulating [its] speech rather than conduct.” *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.* (“FAIR”), 547 U.S. 47, 62 (2006). New York’s antidiscrimination laws prohibit discriminatory conduct, irrespective of whether the business is a photography studio, a plumber, a bakery, or a hair salon. *See id.* (finding no “abridgement of freedom of speech” when a law “make[s] a course of conduct illegal” even where “the conduct was in part initiated, evidenced, or carried out by means of language” (internal quotation marks omitted)); *see also Elane Photography*, 309 P.3d at 64; *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 769 (8th Cir. 2019) (Kelly, J., concurring in part and dissenting in part); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 938 (Ariz. 2019) (Timmer, J., dissenting).

Laws mandating equal treatment may indirectly compel or

restrict speech in any number of ways, but these incidental regulations do not ordinarily trigger heightened First Amendment scrutiny. For example, in *FAIR*, a coalition of law schools challenged the Solomon Amendment, which requires federally-funded educational institutions to provide equal access to military and non-military recruiters. The schools argued *inter alia* that the Solomon Amendment unconstitutionally compelled speech because it required them to send e-mails and post bulletin board messages on behalf of military recruiters. 547 U.S. at 52–54, 61–62. The Supreme Court rejected this claim, reasoning that “[a]s a general matter, the [law] regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.” *Id.* at 60; *see also Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150–51 (2017) (explaining that a law requiring a restaurant to charge \$10 for sandwiches would not unconstitutionally compel speech despite the fact that the restaurant will “have to put ‘\$10’ on its menus or have its employees tell customers that price”). This Court reached a similar conclusion in *Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.*, holding that even if antidiscrimination laws

are “viewed as regulating ‘speech,’” they “regulate only that speech designed to secure a violation of the anti-discrimination statutes.” 968 F.2d 286, 296 (2d Cir. 1992).

2. New York’s antidiscrimination laws are content- and viewpoint-neutral.

“[F]ederal and state anti-discrimination laws” are “an example of a permissible content-neutral regulation of conduct.” *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993). Public accommodation laws do not “target speech or discriminate on the basis of its content”; they prohibit “the act of discriminating against individuals in the provision of publicly available goods, privileges, and services.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995); *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 694–95 (2010) (antidiscrimination policies are “textbook viewpoint neutral”); *Bd. of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (“Even if [an antidiscrimination law] does work some slight infringement on [an association’s] members’ right of expressive association, that infringement is justified because it serves the [s]tate’s compelling interest in eliminating discrimination against women.”). This Court has

held that “the purpose of Connecticut’s Gay Rights Law,” an antidiscrimination statute, is “to discourage harmful conduct and not to suppress expressive association” and is “viewpoint neutral.” *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 95 (2d Cir. 2003).

The Photography Business argues that New York’s antidiscrimination laws are content- and viewpoint-based because they tolerate only viewpoints that “celebrate” a same-sex couple’s marriage. Br. of Appellants at 31–33. But the laws would *also* prohibit a photography business from selling wedding photography services to *same-sex* couples while denying those same services to *heterosexual* couples. These laws are agnostic about particular messages; they simply prohibit businesses from refusing to provide goods and services on grounds of customers’ sexual orientation. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984) (observing an antidiscrimination law “does not aim at the suppression of speech” and instead “reflects [a state’s] strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services”). “[V]iewpoint disparity, standing alone, does not constitute proof of viewpoint discrimination.” *Wyman*, 335 F.3d at 93–94; *cf.*

Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753, 763 (1994) (“the fact that [an] injunction cover[s] people with a particular viewpoint does not . . . render the injunction content or viewpoint based”); *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 32 (2d Cir. 2018) (noting that antidiscrimination laws may cause “‘viewpoint disparity’ in workplaces, [but] are generally not considered viewpoint discriminatory”) (citing *Wyman*, 335 F.3d 93).

The Photography Business also argues that New York’s antidiscrimination laws are content-based because they are triggered by the business’s decision to offer wedding photography services as opposed to photographing other subject matters, such as “landscapes.” Br. of Appellants at 32.² But that is wrong. The laws apply equally to

² The Photography Business ignores this Court’s analysis in *Wyman* that “the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.” 335 F.3d at 94; *see also Elane Photography*, 309 P.3d at 62–63. For authority, it relies on the sharply divided rulings in *Telescope Media Grp.*, 936 F.3d 740, and *Brush & Nib Studio*, 448 P.3d 890, and a district court ruling in *Chelsey Nelson Photography LLC v. Louisville/Jefferson City Metro Government*, 479 F. Supp. 3d 543 (W.D. Ky. 2020). Br. of Appellants at 27, 30, 35, 36. Those cases wrongly reasoned that antidiscrimination laws as applied to commercial wedding services were content-based because they required the creation of products related to the topic of same-sex weddings. But as the dissent correctly notes in *Telescope Media Group*, “just because the

landscape photographers, passport photographers, and wedding photographers. No photography business is required to offer any service to the public at large, but once they do, they are required not to discriminate on the basis of customers' race, sex, sexual orientation, and the like. JA1145 (noting that antidiscrimination laws "only appl[y] to those businesses that have *chosen* to invite the public at large to make use of their expressive capacities through a commercial transaction"). Under New York's laws, a company may not refuse to provide landscape photography services to a Black customer if the company would provide the same service to a white customer. The relevant inquiry is not whether the businesses must, by following the law, engage in expression with which the owner may disagree. The question is whether the *law itself* draws distinctions based on content, that is, whether it regulates conduct because of what it communicates. New York's antidiscrimination laws do not.

[videographers] want to sell services that are in some manner 'expressive' does not mean that [the State's] content-neutral regulation of those services suddenly becomes content based." 936 F.3d at 775–76.

B. Any “Compelled Expression” Is Incidental to the Antidiscrimination Laws’ Requirement of Equal Treatment.

The Photography Business’s assertion that New York’s antidiscrimination laws compel it to express a message with which it disagrees, Br. of Appellants at 23–27, does not alter the analysis—any more than Piggie Park’s objection that serving Black customers violated its religious scruples, King & Spalding’s objection that making a woman a partner interfered with its associational rights, or Mr. O’Brien’s objection that he burned his draft card to protest the Vietnam War altered the analysis in *Piggie Park Enterprises*, *Hishon*, or *O’Brien*.

The challenged laws require no state-mandated messages; they merely require equal service to all. Just as it would not impermissibly “compel speech” for a state to prohibit a photography studio that offers corporate headshots to the public from refusing to provide the same portraits for Black employees that it provides for white employees, New York does not impermissibly “compel speech” by requiring that the Photography Business offer same-sex couples the same services it offers heterosexual couples. The laws do not compel the creation of any content, let alone content on a particular topic. Accordingly, the

Photography Business is mistaken when it relies on *Burns v.*

Martuscello, 890 F.3d 77 (2d Cir. 2018), in which an incarcerated person was punished for refusing to serve as an informant. Br. of Appellants at 25 (citing *id.* at 87). *Burns* is not applicable to this context, as New York’s antidiscrimination laws neither compel particular messages nor involve the penological issues present there.

The Photography Business’s reliance on *Hurley*, *id.* at 23–26, 45–46, is misplaced. *Hurley* involved a “peculiar” application of a public accommodation law to a private, nonprofit, and “inherent[ly] expressive[]” parade. *Hurley*, 515 U.S. at 568, 572. The only point of a parade is to express a particular message by choosing who marches and what they display; it is not a business that has chosen to serve the public. The Court found that instead of regulating the conduct of a business with only an incidental effect on expression, applying the law to the parade regulated nothing *but* expression—the content of the private parade sponsor’s speech. *Id.* at 573. Here, by contrast, the Photography Business is a for-profit business providing services to the public, not a private expressive association. As noted by the *Elane* Court:

[A photography business] argues that photographs are also inherently expressive, so *Hurley* must apply to this case as well. However, [the New Mexico antidiscrimination law] applies not to [the business's] photographs but to its business operation, and in particular, its business decision not to offer its services to protected classes of people. While photography may be expressive, the operation of a photography business is not. By way of analogy, the [antidiscrimination law] could not dictate which groups a parade organizer had to include. However, if a business sold parade-planning services, and that business operated as a public accommodation, the [antidiscrimination law] would prohibit that business from refusing to offer parade-planning services to persons because of their sexual orientation.

Elane Photography, 309 P.3d at 68.

Hurley itself distinguished the standard application of public accommodation laws to such businesses as constitutional. *See Hurley*, 515 U.S. at 578. To expand *Hurley*'s holding would put courts in the impossible "business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws." *Elane Photography*, 309 P.3d at 71.³

³ The decisions in *Telescope Media Grp.*, 936 F.3d 740, *Brush & Nib Studio*, 448 P.3d 890, and *Nelson Photography*, 2020 WL 4745771, mistakenly invite courts to apply different First Amendment standards based on the nature of the services sold. Such a shifting standard is neither consistent with precedent nor susceptible to clear or uniform application. Indeed, advocates for treating custom wedding cakes as protected speech failed to articulate a workable test when questioned at oral argument, and the Supreme Court declined to grant them such an

The Photography Business’s argument that it has an “expressive association” right to discriminate relies on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). Br. of Appellants at 36. Yet *Dale*, like *Hurley*, was a peculiar case in which the state sought to extend a business regulation to a nonprofit ideological association. There, plaintiff sought to be a member or an unpaid “volunteer Scout Leader” in a private, non-profit organization. *Dale*, 530 U.S. at 651–52. Indeed, the Second Circuit has explicitly limited *Dale* to the particular circumstances of that case. *See Wyman*, 335 F.3d at 95 n.8 (holding that even the Boy Scouts may be subject to a state antidiscrimination law when the state “has not prevented the [Boy Scouts of America] from exercising its First Amendment rights” and “has instead set up a regulatory scheme to achieve constitutionally valid ends under which, as it happens, the [Boy Scouts of America] pays a price for doing so”). In contrast, the Photography Business was formed to provide services in the public marketplace, not to participate in expressive activity. *See Dale*, 530 U.S. at 649. Likewise, the Photography Business’s invocation of *New Hope*

exemption. *See Oral Arg. Tr.* 11–19, *Masterpiece Cakeshop*, 138 S. Ct. 1719.

Family Services v. Poole, Br. of Appellants at 37, is inapposite. The plaintiff there was a non-profit “Christian ministry” rather than public-facing business. 966 F.3d at 148 (2d Cir. 2020).

This case is also dramatically different from cases in which the Supreme Court struck down laws that facially required businesses to publish particular messages. In *Tornillo*, 418 U.S. 241, a statute required newspapers that published attacks on political candidates to allow the candidates free space for a written reply in the newspaper itself. And in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, a state agency ordered a utility company to mail the newsletter of an environmental group to its customers. 475 U.S. 1 (1986).⁴ By contrast, New York’s antidiscrimination laws do not require

⁴ The other compelled speech cases that the Photography Business cites are inapposite, Br. of Appellants at 23, 27, because those cases involved a state directly compelling a speaker to express the state’s chosen message. *Wooley v. Maynard*, for example, involved a law requiring citizens to display the state-selected message “Live Free or Die” on their license plates. 430 U.S. 705, 715 (1977). Similarly, *Zhang v. Baidu.com, Inc.* rejected plaintiffs’ request to force an internet search engine to display political content. 10 F. Supp. 3d 433, 434, 440 (S.D.N.Y. 2014). In contrast, New York’s antidiscrimination laws do not directly compel expression of any state-chosen message. While involving public accommodations, *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247 (11th Cir. 2021), did not propose extending *Hurley*’s holding to commercial businesses open to the public, as are at issue

businesses to transmit any particular message; they merely require businesses open to the public offer the same goods and services to heterosexual couples as they do to same-sex couples. Any effect on speech is entirely incidental to the prohibition on discriminatory treatment. *Elane Photography*, 309 P.3d at 63–70.⁵ See also *Telescope Media Grp.*, 936 F.3d at 772–73 (Kelly, J., concurring in part and dissenting in part); *Brush & Nib Studio*, 448 P.3d at 932 (Bales, J., dissenting).

II. THE ANTIDISCRIMINATION LAWS ARE FULLY CONSISTENT WITH THE RELIGION CLAUSES OF THE FIRST AMENDMENT.

Appellants argue that New York’s antidiscrimination laws violate the Free Exercise Clause because they ostensibly compel participation in a religious ceremony and are not generally applicable. Br. of

here. The court in *Coral Ridge Ministries* declined to apply Title II to Amazon’s charity fundraising program where Amazon, not the customer, is paying charities. 6 F.4th at 1256.

⁵ For that reason, the laws here are also distinguishable from the alleged compelled speech at issue in *New Hope Family Services, Inc. v. Poole*, which involved the requirement that an adoption agency state their recommendation as to whether it would be in the best interests of a child to be adopted by particular applicants. 966 F.3d 145, 171 (2d Cir. 2020). Here, the Photography Business is subject to no such requirement.

Appellants at 38. They are wrong on both fronts.

A. The Antidiscrimination Laws Do Not Compel Any Business to Participate in a Religious Ceremony.

The Photography Business contends that New York’s antidiscrimination laws violate the Establishment and Free Exercise Clauses (“Religion Clauses”) by compelling it “to participate in religious ceremonies to which [it] objects.” Br. of Appellants at 23. But the laws do no such thing. They do not require that Ms. Carpenter “follow[] the officiant’s instructions” or “act[] as a witness” of the union “before God.” Br. of Appellants at 42. They only require that the Photography Business offer the same *photography* services to same-sex and heterosexual couples.⁶ Adopting such a broad definition of “participation”—and extending the rules applicable to clergy to all

⁶ The cases cited to support the Photography Business’s argument that New York’s antidiscrimination laws violate the Religion Clauses are inapplicable because they involve instances of coercion or mandatory participation in religious acts, where the laws here require no such participation. See *Marrero-Méndez v. Calixto-Rodríguez*, 830 F.3d 38, 45 (1st Cir. 2016) (an officer on duty was singled out and demoted after refusing to participate in prayer); *Lee v. Weisman*, 505 U.S. 577, 580, 599 (1992) (public school included prayers by clergy in graduation ceremonies and “young graduates who object[ed] [we]re induced to conform”); *Warner v. Orange Cty. Dep’t of Probation*, 115 F.3d 1068, 1069 (2d Cir. 1996) (probation conditioned on participation in a religious program).

businesses—would, as the Supreme Court has noted, mean that “a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to . . . public accommodations.” *Masterpiece Cakeshop*, 138 S. Ct. at 1727; *see also* Br. of Appellants at 41.

The Religion Clauses do not require that result. The laws here leave the Photography Business to decide “[t]he degree to which [photographers] voluntarily involve[] [themselves] in an event outside the scope of services [they] must provide to all customers on a non-discriminatory basis.” *Washington v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1213 (Wash. 2019), *petition for cert. denied*, No. 19-333 (U.S. Sept. July 2, 2021).

B. The Existence of Narrow Exemptions Do Not Render the Antidiscrimination Laws Not Generally Applicable.

As the Supreme Court explained in *Employment Division v. Smith*, “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general

applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” 494 U.S. at 879 (internal quotations omitted).

The Court’s opinion in *Fulton v. City of Philadelphia, Pennsylvania* did not change this analysis; it simply restated the *Smith* rule that neutral and generally applicable laws—like New York’s antidiscrimination laws—do not trigger strict scrutiny.⁷ 141 S. Ct. 1868, 1876 (2021). Unlike the contract at issue in *Fulton*, the laws here are generally applicable. The laws do not contain a mechanism for offering individualized, discretionary exemptions, *Fulton*, 141 S. Ct. at 1878, nor do they “treat *any* comparable secular activity more favorably,” *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Indeed, there are no exemptions in the challenged laws that would grant the relief that the Photography Business seeks.

⁷ Plaintiffs suggest *Smith* should be overruled, see Br. of Appellants at 43–44, but it continues to bind this Court. See *Fulton*, 141 S. Ct. at 1877; *id.* at 1883 (Barrett, J., concurring) (observing the majority opinion in *Fulton* did not overturn *Smith*). The Court’s order granting an injunction pending appeal in *Tandon v. Newsom* likewise left *Smith* intact. Moreover, *Tandon* was not a decision on the merits, as the Court has not granted a petition for writ of certiorari in the case. 141 S. Ct. 1294 (2021) (*per curiam*).

The two narrow exemptions within New York’s antidiscrimination laws are not applicable to the Photography Business and would not grant the relief the Photography Business seeks. *See* discussion *infra* at 28–29. Furthermore, no business receives an “exemption” under New York Law that lets it decline to offer a service to one group that it would offer to anyone. Because nearly all antidiscrimination laws contain some version of an exemption, Appellants’ theory calls into question a panoply of longstanding antidiscrimination laws. And while the existence of narrow exemptions should not trigger strict scrutiny review, application of the laws would be constitutional even if strict scrutiny applied. *See* Part III.

III. THE ANTIDISCRIMINATION LAWS SATISFY EVEN STRICT SCRUTINY.

Although, as shown above, application of New York’s antidiscrimination laws fails to trigger strict scrutiny, application of the laws would be constitutional even if strict scrutiny applied—as the district court correctly found. JA1149.

A. New York Has a Compelling Interest in Eradicating Discrimination.

Antidiscrimination laws ensure “society the benefits of wide participation in political, economic, and cultural life.” *Roberts*, 468 U.S.

at 625; see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733–34 (2014). In *Masterpiece Cakeshop*, the Supreme Court affirmed that it is “unexceptional” that the “law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.” 138 S. Ct. at 1728. And the Court has recognized repeatedly that the government has a compelling interest in “eliminating discrimination and assuring its citizens equal access to publicly available goods and services.” *Roberts*, 468 U.S. at 624; see also *Gifford v. McCarthy*, 23 N.Y.S.3d 422, 431 (2016) (“[a]ssuring the citizens of New York ‘equal access to publicly available goods and services [thus] plainly serves compelling state interests of the highest order’” (internal citations omitted)). “[P]ublic accommodations laws help ensure a free and open economy,” and “the commercial nature” of the Photography Business provides New York with a governmental interest that is “absent when regulating non-commercial activity.” *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1179 (2021), cert. granted in part, 142 S. Ct. 1106 (U.S. Feb. 22, 2022) (No. 21-476); see also *Jews for Jesus, Inc.*, 968 F.2d at 295 (“New York has the constitutional authority to prohibit,

and a substantial, indeed compelling, interest in prohibiting, racial and religious discrimination in obtaining public accommodations.”).

It is discriminatory “to offer a ‘limited menu’ of goods or services to customers on the basis of a status that fits within one of the [antidiscrimination laws] protected categories.” *Gifford*, 23 N.Y.S.3d at 429 (citing *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013) (“[I]f a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers.”)). Here, the Photography Business objects to providing a *service* to an entire class of customers: same-sex couples seeking photography services for their weddings.

Appellants misstate the legal test in evaluating New York’s compelling interest in the eradication of discrimination. Br. of Appellants at 44. Here, unlike in *Fulton*, there are no existing, discretionary exemptions that are available to others that the state refused to extend to the Photography Business. 141 S. Ct. 1878. The state’s weighty interest in equal treatment thus is not compromised. Appellants cite the existence of exemptions to New York’s antidiscrimination laws in employment and housing, see Br. of

Appellants at 47, but exemptions to *other* provisions of the law do not undermine New York's compelling interest in prohibiting discrimination in public accommodations. The district court correctly determined that other exemptions cited by Appellants, which bar discrimination in employment and housing, are simply not relevant here. JA1154.

The challenged laws themselves contain only two narrow exemptions that are not comparable to the exemption sought here and do not undermine the state's compelling interest. The first permits room rentals based on sex, N.Y. Exec. Law § 296.2(b), which concerns people's ongoing housing arrangements that are in no way analogous to wedding-related services. The district court correctly found it to be irrelevant. JA1154–55. The second permits barring a person from a public accommodation based on sex for bona fide public policy considerations where approved by the state's Division of Human Rights, where the Human Rights Law already explicitly establishes multiple contexts in which differential treatment or access on the basis of sex may be permitted. N.Y. Exec. Law § 296.2(b). That too is not applicable to a business like the Photography Business, which does not seek to

discriminate on the basis of sex and where there exists no statutorily-endorsed framework for differential treatment on the basis of sexual orientation.

Contrary to the Photography Business’s suggestion, the harm of being refused service because of one’s identity is not erased just because a customer might be able to obtain goods elsewhere. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (reasoning antidiscrimination laws “vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments” (internal quotation marks omitted)). “Discriminatory denial of equal access to goods, services and other advantages made available to the public . . . ‘deprives persons of their individual dignity.’” *Gifford*, 23 N.Y.S.3d at 431 (quoting *Roberts*, 468 U.S. at 625). “The government views acts of discrimination as independent social evils even if the prospective [customers] ultimately find” the goods or services they sought. *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 283 (Alaska 1994).

Telescope Media Group, Brush & Nib Studio, and Nelson Photography, relied on by the Photography Business, all recognize that

the eradication of discrimination in the provision of goods and services is a compelling government interest.⁸ But by concluding that this interest does not apply in the context of businesses that provide services to create custom expressive products, those courts misunderstood the nature of the harm addressed by laws against discrimination. “The argument that victims of discrimination are free to go elsewhere carries little force. Antidiscrimination laws . . . were passed to guarantee equal access to *all* goods and services otherwise available to the public.” *Telescope Media Grp.*, 936 F.3d at 777 (Kelly, J., concurring in part and dissenting in part); *see also Heckler v. Mathews*, 465 U.S. 728, 739 (1984) (“[D]iscrimination itself . . . can cause serious non-economic injuries.”); *Heart of Atlanta Motel*, 379 U.S. at 292 (Goldberg, J., concurring) (“Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and

⁸ *See Telescope Media Grp.*, 936 F.3d at 754 (“ensuring . . . equal enjoyment of public accommodations . . . is compelling” (internal quotation marks omitted)); *Nelson Photography*, 479 F. Supp. at 559 (ensuring same-sex couples “will not be turned away” is “unquestionably compelling” (internal quotation marks omitted)); *Brush & Nib Studio*, 448 P.3d at 914 (“ensuring equal access to publicly available goods and services for all citizens, regardless of their status” is “compelling”).

embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public . . .” (internal quotation marks omitted)). And the Photography Business’s suggestion that there is no “actual problem” of businesses discriminating against same-sex couples seeking wedding services, Br. of Appellants at 51, is belied by the many businesses in recent years seeking court approval to do just that. *See generally Masterpiece Cakeshop*, 138 S. Ct. 1719; *303 Creative*, 6 F.4th 1160; *Gifford v. McCarthy*, 23 N.Y.S.3d 422; *Arlene’s Flowers*, 441 P.3d 1203; *303 Creative LLC v. Elenis*, No. 16-cv-02372, 2017 WL 4331065 (D. Colo. 2017); *Nelson Photography*, 2020 WL 4745771; *Updegrove v. Herring*, No. 20-cv-1141, 2021 WL 1206805 (E.D. Va. Mar. 30, 2021); *Brush & Nib Studio*, 448 P.3d 890; *Elane Photography*, 309 P.3d 53. Without New York’s antidiscrimination laws, same-sex couples would be relegated to an “inferior market than that enjoyed by the public at large,” with access to only a “narrower selection of generic services.” JA1148 (internal citations and quotations omitted).

**B. Uniform Enforcement of the Antidiscrimination Laws
Is the Least Restrictive Means for Furthering the
State’s Compelling Interest.**

Because the most carefully tailored way to ensure equal treatment

is to prohibit discrimination, New York’s antidiscrimination laws are “precisely tailored” to achieve the state’s interest. *See Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988). The district court properly held that the laws were narrowly tailored, as there is a “tight fit” between the types of public businesses regulated and New York’s interest in ensuring businesses open to the public do not discriminate against LGBT people. JA1147. Every instance of discrimination “causes grave harm to its victims.” *United States v. Burke*, 504 U.S. 229, 238 (1992). Because of the harms associated with each instance of invidious discrimination, there is simply no “numerical cutoff below which the harm is insignificant.” *Swanner*, 874 P.2d at 282.

The Photography Business contends that the laws are not narrowly tailored because New York could choose, as it alleges other jurisdictions have done, to “define ‘public accommodations’ more narrowly to exclude expressive businesses” and not apply the laws to this category of business. Br. of Appellants at 48. But a law exempting “expressive businesses”—a term for which Appellants provide no workable and consistent definition—would not serve New York’s specific interest in eliminating discrimination from all businesses that

offer goods and services to the general public. The Photography Business also posits that New York “could apply its law to stop status discrimination, not message-based objections.” Br. of Appellants at 48. Yet the existing laws are designed to—and in practice, *do*—stop status discrimination without regulating “message-based” content.

New York’s antidiscrimination laws are narrowly tailored to serve a compelling interest in eradicating discrimination in the commercial market. The narrow exemptions in the challenged laws do not change this analysis. *See generally supra* Part II. Accordingly, New York’s antidiscrimination laws satisfy any standard of review, including strict scrutiny.

CONCLUSION

This Court should affirm the dismissal of the Photography Business’s complaint.

Dated: May 16, 2022

Respectfully submitted,

/s/ Gabriella Larios

GABRIELLA LARIOS

ROBERT HODGSON

New York Civil Liberties Union

Foundation

125 Broad Street, 19th Floor

New York, NY 10004

Phone: (212) 607-3317

glarios@nyclu.org

rhodgson@nyclu.org

DUNCAN HOSIE*

LINDSEY KALEY

American Civil Liberties Union

Foundation

125 Broad Street, 18th Floor

New York, NY 10004

dhosie@aclu.org

lkaley@aclu.org

Counsel for Amici Curiae

* Application for admission pending

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2022, this brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Gabriella Larios
Gabriella Larios

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(a)(5) and Local Rule 29.1(c) because, excluding the portions exempted by Fed. R. App. P. 32(f), this brief contains 6,420 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Gabriella Larios
Gabriella Larios