No. 22-75

In the United States Court of Appeals for the Second Circuit

EMILEE CARPENTER, LLC d/b/a/ Emilee Carpenter Photography and 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 Acting Commissioner of the New York State Division of Human Rights; and WEEDEN 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 FOR LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ACTION NETWORK, LATINOJUSTICE PRLDEF, THE CENTER FOR CONSTITUTIONAL RIGHTS, THE MISSISSIPPI CENTER FOR JUSTICE, AND PUBLIC COUNSEL AS AMICI CURIAE SUPPORTING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Second Circuit Rule 26.1, counsel for amici certifies that (1) amici do not have any parent corporations, and (2) no publicly held companies hold 10% or more of stock or ownership interest in amici.

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INTEREST OF AMICI CURIAE[1]

Amici are the Lawyers' Committee for Civil Rights Under Law, the National Action Network, LatinoJustice PRLDEF, the Center for Constitutional Rights, the Mississippi Center for Justice, and Public Counsel. These organizations have different missions, but each is committed to furthering the goal of eradicating discrimination in public accommodations.

The **Lawyers' Committee for Civil Rights Under Law** (Lawyers' Committee) is a nonpartisan, nonprofit organization that uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have voice, opportunity, and power to make the promises of our democracy real**.** To that end, the Lawyers' Committee has participated in hundreds of impact lawsuits challenging race discrimination prohibited by the Constitution and federal statutes relating to voting rights, housing, employment, education, and public accommodation. *See, e.g.*, *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *303 Creative LLC v. Elenis*, 6 F.4th 1160,

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), no counsel for a party has authored this brief in whole or in part, and no person other than amici curiae, their members, and their counsel has made monetary contribution intended to fund preparing or submitting this brief. Pursuant to Fed. R. App. P. 29(a)(2), all parties have consented to the filing of this brief.

1168 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022); *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581 (2d Cir. 2016); *Gonzalez v. Pritzker*, 28 F. Supp. 3d 222 (S.D.N.Y. 2014). As a leading national racial justice organization, the Lawyers' Committee has a vested interest in ensuring that people of color, including those who identify as lesbian, gay, bisexual, and transgender, have strong, enforceable protections from discrimination in places of public accommodation.

The **National Action Network** works within the spirit and tradition of Dr. Martin Luther King, Jr. to promote a modern civil rights agenda that includes the fight for one standard of justice, decency and equal opportunities for all people regardless of race, religion, ethnicity, citizenship, criminal record, economic status, gender, gender expression, or sexuality.

LatinoJustice PRLDEF, founded in 1972 as the Puerto Rican Legal Defense and Education Fund, is a national not-for-profit civil rights organization that advocates for and defends the constitutional rights of Latinos under the law. LatinoJustice has challenged discriminatory practices in the areas of criminal justice by suing

police departments and correctional institutions. During its nearly fifty-year history, LatinoJustice has brought impact litigation to address discrimination against Latinos in education, employment, fair housing, immigrants' rights, language rights, redistricting, and voting rights.

The **Center for Constitutional Rights** (CCR) is a New York City-based national nonprofit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the U.S. Constitution and international law. Founded in 1966, in support of the Civil Rights Movement, CCR maintains a core mission to challenge state sponsored and private forms of racial discrimination while supporting, through litigation and advocacy, social justice movements challenging unlawful policing practices, government surveillance, racial and ethnic profiling, and discrimination against LGBTQI+ communities.

The **Mississippi Center for Justice**, the Deep South Affiliate of the Lawyers' Committee, is a public interest law organization founded in 2003 in Jackson, Mississippi and committed to advancing racial and economic justice. The Center pursues strategies to combat

discrimination and poverty statewide. MCJ is concerned about access to justice for all, particularly LGBTQ+ people of color who depend on public accommodations laws to protect them from discrimination from businesses operating in the public sphere.

For over fifty years, **Public Counsel** has worked with low income communities and communities of color to create a more just society through direct legal services, advocacy, and civil rights litigation. Public Counsel is the nation's largest pro bono law firm. This work includes seeking equal and fair opportunities for individuals in these communities to pursue higher education based on merit in order to better their circumstances and become meaningful participants in the political process in order to realize the promise of democracy in the expression of our diverse heritages and experiences.

SUMMARY OF THE ARGUMENT

Carpenter Photography seeks a broad exemption to New York's public accommodations law. That law, like its corollaries across the nation, responded to a sordid history of discrimination and segregation that excluded Black people from all walks of public and private life. Because of the valuable role public accommodation laws have played integrating American society and protecting the dignity of Black people, many states have since expanded their reach to cover other groups that have faced discrimination based on personal characteristics. Today, these laws continue to play a vital role ensuring that all businesses are open to everyone on a nondiscriminatory basis. Amici write to offer additional context about the history and purpose of public accommodation laws, particularly in New York, and why they continue to serve compelling interests today.

The Supreme Court has repeatedly rejected challenges to public accommodations laws similar to those that plaintiffs ("Carpenter Photography") levy here. These cases recognize that the state has a strong interest in eliminating discrimination and guaranteeing that its residents may access publicly available goods and services free from discrimination based on their personal characteristics, and that these interests are unrelated to suppressing speech or religious beliefs. These decisions are

not limited to the state's interest in eradicating only racial discrimination. Rather, the Court has observed that public accommodations statutes that prohibit discrimination on the basis of "race, color, religious creed, national origin, sex, [and] sexual orientation" are "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination and do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995) (internal quotation marks and citation omitted).

Despite the advances our country has made in eradicating segregation and other forms of invidious discrimination, people of color and those in the LGBTQ+ community continue to suffer from structural and pervasive discrimination. Bigotry persists, and hate crimes have increased across the country in recent years. *See The Year In Hate and Extremism* (2021), https://tinyurl.com/yueyhtzd. Today, consumers of color continue to receive worse treatment in the marketplace and experience disparate access to goods and services as a result of business owners' biased attitudes. Public accommodations laws remain a critical tool for ensuring access to services, promoting equality, and providing relief when consumers experience discrimination.

Carpenter Photography seeks to take the country back in time with arguments that it is free to refuse providing wedding photography services to couples forming a same-sex union. But public accommodations laws were designed to combat the very arguments Carpenter Photography makes, and these laws strengthen our country by ensuring our economy is an inclusive one where all people regardless of background, identity, or belief can participate free of discrimination. Though dressed up in constitutional language, Carpenter Photography's lawsuit simply asks this Court to sanction the company's desire to discriminate without consequences. Business owners' religious and speech interests must not supplant the rights of disenfranchised and targeted individuals to be free from discrimination in the marketplace. Carpenter Photography's proposed license to discriminate would potentially apply to any business, permit discrimination against people of color, overturn well-established precedent, and result in a dramatic rollback of hard-won civil rights protections. This Court should reject that proposal.

ARGUMENT

I. Like its federal and sister-state counterparts, New York's public accommodations law has played an integral role in rooting out discrimination.

Civil rights laws have a long and storied history in the ongoing fight against discrimination in the United States. Congress and the States have

enacted various laws, such as the Voting Rights Act or 42 U.S.C. § 1983, that prohibit public discrimination by the government. But so much of our everyday lives takes place in private. Most Americans eat, shop, work, and recreate without interacting with the government. To guard against segregation in these daily activities, Congress and most States have enacted public accommodations laws. *See State Public Accommodation Laws*, Nat'l Conference of State Legislators (April 8, 2019), https://perma.cc/GX6R-Q2QB. These laws play an essential role in this nation's ongoing drive to ensure equality for every resident, and courts have consistently upheld them against constitutional attacks.

Public accommodations laws were born out of necessity. Since this country's founding, Black communities and other communities of color have faced discriminatory laws and practices that excluded them from businesses that serve the general public. In the post-Reconstruction United States, states ushered in the Jim Crow era by systematically relegating Black people to second-class citizenship. They did so by enacting laws, ordinances, and customs that separated white and Black people in every conceivable area of life—both public and private. C. Vann Woodward, *The Strange Career of Jim Crow* 7 (1955). This code of segregation "lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking," and

"that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries." *Id.* And racial segregation was not limited to the postbellum South. To the contrary, some northern states maintained separate schools for Black children and had laws against intermarriage. *See* John Hope Franklin, *History of Racial Segregation in the United States*, in The Annals of the American Academy of Political and Social Science Vol. 304, 1-9 (Mar. 1956).

Congress first attempted to prohibit discrimination on the basis of race in places of public accommodation through the passage of the Civil Rights Act of 1875. *Id.* at 6-9. The Supreme Court, however, infamously held that the Act exceeded Congress's power under the Thirteenth and Fourteenth Amendments. *See Civil Rights Cases*, 109 U.S. 3 (1883). Southern states responded with a steady onslaught of legislation to ensure that Black people remained segregated in nearly every aspect of society. Franklin, *supra*, at 6-9.[2] "The supply of ideas for new ways to segregate seemed inexhaustible, and "[n]umerous devices were employed to

[2] It was not until 1964 that the Supreme Court distinguished the *Civil Rights Cases* and affirmed Congress's Commerce Clause authority to establish federal public accommodations laws affecting interstate commerce through the enactment of the Civil Rights of Act of 1964. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250-62 (1964).

perpetuate segregation in housing, education, and places of public accommodation," including "[s]eparate Bibles for oath taking in courts of law, separate doors … separate elevators and stairways, [and] separate drinking fountains." *Id.* at 8. And where laws left gaps, informal codes filled them. So eager were states to divide people based on race that "separate toilets existed even where the law did not require them." *Id.*

New York is no exception to this odious history. In fact, "New York was the only state in the country to require [B]lacks – and only [B]lacks – to own real property in order to qualify to vote." Liz Budnitz, Garima Malhotra, Charles Ogletree & Erika Wood, *Jim Crow in New York*, Brennan Center for Justice (Feb. 10, 2010), https://tinyurl.com/2p8t28tu. In 1892, a mob of "hundreds" in Port Jervis lynched Robert Lewis, a Black man "who had been accused of sexually assaulting a white woman, though evidence later pointed elsewhere." Jessica Cohen, *Historian: 1892 Lynching Made Port Jervis Infamous*, Times Herald-Record (July 16, 2020), https://tinyurl.com/y84c46cu. And Black people were not the only community of color subjected to state-sponsored racial discrimination here. As just one example, New York confined Japanese residents to an internment camp on Ellis Island "within hours" of the attack on Pearl Harbor, even before President Roosevelt's Executive Order 9066 calling for Japanese internment. *Statement of Albert Fox Cahn*, Council on American-

Islamic Relations (Oct. 25, 2017), https://tinyurl.com/2sd9684t; *see also* Anna Pegler-Gordon, *"New York Has a Concentration Camp of Its Own": Japanese Confinement on Ellis Island during World War II*, 20 J. Asian-Am. Studies 373 (2017).

New York's abhorrent treatment of people of color extended into private life as well. A front-page New York Times story once opened by admitting that "[f]or the Negro in the North, segregation is as much a fact of life as it is in the South. Almost invariably the color of his skin determines where he lives, where he goes to school and how he makes his living." Thomas Buckley, *Negro Segregation in the North*, New York Times A1 (June 2, 1963), https://tinyurl.com/ycktcyb8. After the Supreme Court struck down explicitly racist zoning laws in 1917, residents of Buffalo turned to restrictive covenants to "prevent[] African Americans from living in many areas." Anna Blatto, *A City Divided: A Brief History of Segregation in Buffalo*, Partnership for the Public Good (April 2018), https://tinyurl.com/y44mdtwv. Similarly, when the first Levittown opened on Long Island, welcoming in soldiers returning from World War II and symbolizing the American Dream, its gates were closed to people of color. The first leases, with options to buy, bore bold letters warning that "the home could not 'be used or occupied by any person other than members of the Caucasian race.'" Bruce Lambert, *At 50, Levittown Contends with Its*

Legacy of Bias, New York Times (Dec. 28, 1997), https://tinyurl.com/2p8a8rcj.

Given the painful brutality of segregation, and despite the very real threat of arrest and severe physical harm, Black people and others opposed to segregation staged protests and boycotts throughout the early and mid-twentieth century. *See generally* David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. Rev. 645 (1995). Those efforts eventually brought national attention to the inhumanity of segregation and resulted in successful legal challenges to discrimination in access to voting (*Smith v. Allwright*, 321 U.S. 649 (1944)), interstate buses (*Morgan v. Virginia*, 328 U.S. 373 (1946)), graduate school facilities (*McLaurin v. Okla. State Regents for Higher Ed.*, 339 U.S. 637 (1950)), law school admissions (*Sweatt v. Painter*, 339 U.S. 629 (1950)), and, of course, public school education (*Brown v. Board of Educ.*, 347 U.S. 483 (1954)). These victories slowly but steadily chipped away at segregation's reach.

While courtroom constitutional challenges helped stymie public discrimination, the Constitution offers no refuge against private discrimination. To fill that gap, many states began to combat discriminatory business practices by enacting public accommodations statutes. *See Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984).

These laws "provided the primary means for protecting the civil rights of historically disadvantaged groups until the Federal Government reentered the field" with the Civil Rights Act of 1957. *Id.* New York proudly led this charge. In 1945, New York became "the first state in the country to enact legislation prohibiting discrimination in employment based on race, creed, color, and national origin." *Agency History*, N.Y. Division of Human Rights (last visited April 14, 2022), https://dhr.ny.gov/agency-history.

After numerous legal challenges and non-violent resistance to racial segregation in places of public accommodation, the federal government followed suit with the Civil Rights Act of 1964. Title II of that Act prohibited discrimination by entitling everyone in this country "to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation … without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. 2000a(a). Title II was a watershed piece of legislation that aimed to eliminate the loss of "personal dignity that surely accompanies denials of equal access to public establishments." S. Rep. No. 88-872 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2370. The Senate Committee on Commerce's report stressed that "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is

told that he is unacceptable as a member of the public because of his race or color." *Id.*

Since their inception, public accommodations laws have served as a bulwark against the deprivation of personal dignity that accompanies discriminatory private conduct. Today we take for granted that any person may walk into a restaurant, stay at a hotel, or buy goods and services regardless of their race. But this freedom should not be assumed. It exists only because public accommodations laws prohibit and—when necessary—provide remedies against discrimination.

II. Courts have repeatedly upheld public accommodation laws against constitutional challenges, and New York's law should be no different.

Just like the New York public accommodations statute at issue here—and similar state statutes throughout the country—Title II of the Civil Rights Act of 1964 also faced strong opposition from recalcitrant business owners who sought to maintain the codified racial discrimination of Jim Crow. Those opponents, like Carpenter Photography here, also raised free speech, free exercise, and other liberty-related arguments to justify their refusal to serve Black people. Carpenter Photography seeks to resurrect the same claims Title II opponents made a generation ago: that offering its services on a nondiscriminatory basis infringes on its rights to

free speech and free exercise of religion. This Court should reject those arguments, just as courts rejected them in the past.

A. The Supreme Court has repeatedly upheld state and federal public accommodation laws against free speech and free exercise challenges.

For decades, business owners have been seeking exceptions to public accommodations laws that would allow them to intentionally discriminate against customers, and the Supreme Court has rejected those challenges time and again. As the Court explained more than 50 years ago, there are a "long line of cases" in which the Court "has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty." *Heart of Atlanta Hotel*, 379 U.S. at 260; *see also Jaycees*, 468 U.S. at 625.

Likewise, the Supreme Court has repeatedly confirmed that state public accommodations laws do not generally infringe on free speech or free exercise interests. That is because States enjoy "broad authority to create rights of public access on behalf of [their] citizens." *Jaycees*, 468 U.S. at 625. And measured against this broad authority, the right to discriminate receives little weight. Indeed, the Court has rejected the idea that "every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." *N.Y. State Club Ass'n, Inc. v. City of New*

York, 487 U.S. 1, 13-14 (1988); *see also Hishon v. King & Spalding*, 467 U.S. 69 (1984) (rejecting First Amendment defenses against Title VII enforcement).

Given the strong state interests and lack of infringement on any right, public accommodations laws withstand any level of constitutional scrutiny. These laws evince states' "strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services"—a goal that "is unrelated to the suppression of expression" and that "plainly serves compelling state interests of the highest order." *Jaycees*, 468 U.S. at 624. Thus, even if these laws impose some "slight infringement" on First Amendment rights, "that infringement is justified because it serves the State's compelling interest in eliminating discrimination." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *see also Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds,* 390 U.S. 400 (1968) (holding that business owner did not have absolute right to exercise and practice religious beliefs in utter disregard to the constitutional rights of other citizens).

Many states now have public accommodations statutes that prohibit discrimination against certain characteristics that Title II did not initially

cover. New York, for instance, has gradually expanded its law to cover contexts outside of employment and to reach other characteristics that have served as the basis for persecution among its residents. *See Agency History*, N.Y. State Division of Human Rights (last visited April 14, 2022), https://dhr.ny.gov/agency-history.

The Supreme Court has upheld the states' authority to broaden the scope of public accommodations statutes. These laws, the Court has explained, are an extension of the common-law principle that "innkeepers, smiths, and others who 'made profession of a public employment' were prohibited from refusing, without good reason, to serve a customer." *Hurley*, 515 U.S. at 571. That general common-law duty, however, "proved insufficient in many instances" and gave way to modern statutes that build on common-law protections by "enumerating the groups or persons within their ambit of protection." *Romer v. Evans*, 517 U.S. 620, 627-28 (1996). That "[e]numeration is the essential device [states] used to make the duty not to discriminate concrete and to provide guidance for those who must comply," *id.* at 628, and the Court has expressly affirmed states' power to determine which groups suffer from discrimination and warrant protection, *Hurley*, 515 U.S. at 572. And lest there be any doubt, the Court has specifically endorsed protection against discrimination based on "sexual orientation." *Romer*, 517 U.S. a 629.

These expanded protections generally satisfy both the First and Fourteenth Amendments because they do not "on [their] face, target speech or discriminate on the basis of [their] content, the focal point of [their] prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." *Hurley*, 515 U.S. at 571-72. The New York public accommodations law merely continues this "venerable history" of state efforts to weed out discriminatory treatment of its residents in the provision of goods and services. *Id.*

Likewise, "one would expect" retail shops, including businesses that deliver custom goods like Carpenter Photography, "to be places where the public is invited" because it is a "clearly commercial entit[y]" properly subject to state nondiscrimination provisions. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000); *see also Romer*, 517 U.S. at 628. Carpenter Photography and other small businesses, whether they offer custom services or not, thus fall squarely within the traditional scope of nondiscrimination laws that the Supreme Court has upheld. Carpenter Photography therefore must provide its goods and services in a nondiscriminatory manner; after all, retailers are not guaranteed "a right to choose … customers … or those with whom one engages in simple commercial transactions without restraint from the State." *Jaycees*, 468

U.S. at 634 (O'Connor, J., concurring). Carpenter Photography has no constitutional right to deal only with persons of one background or identity.

B. Carpenter Photography's attempt to create a new exception to public accommodation laws fails.

This Court should reject Carpenter Photography's attempt to establish an expansive exception to public accommodations laws for allegedly expressive services like wedding photography. Carpenter Photography argues that the New York public accommodations law forces it to endorse same-sex marriage by taking photographs at same-sex weddings, in violation of both its free speech and free exercise rights. *See* Appellants' Br. 23-44. These objections have never been sufficient to exempt a business from public accommodations laws that mandate equal access for goods and services. By requiring Carpenter Photography to offer its services on a nondiscriminatory basis, New York's public accommodations statute does not compel Carpenter Photography to express endorsement for same-sex marriage nor does New York compel Carpenter Photography to participate in a wedding ceremony to which it objects.

Nearly all of Carpenter Photography's brief relies on the false premise that taking photographs of same-sex marriages inherently

endorses those unions. *See, e.g.*, Appellant's Br. 6-12, 24-25. But the First Amendment analysis requires an objective test to determine whether expression is compelled or infringed. That is, a court does not take at face value whether a party subjectively believes its actions convey a message when evaluating the constitutionality of the challenged statute. Rather, it asks whether the expression is likely to be understood by a reasonable observer to convey a particular message. *See*, *e.g.*, *Morse v. Frederick*, 551 U.S. 393, 401-02 (2007) (focusing on school officials' "interpretation" of a sign rather than student's testimony that the sign's expression was meant to be "meaningless and funny"). The Supreme Court has thus "rejected the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). Instead, as it did in *Jaycees*, *New York State Club*, and *Duarte*, the Supreme Court examines the actual expression at issue to determine whether the application of the public accommodations law objectively and materially affects the speaker's message. In conducting that analysis, it matters whether "[a]n intent to convey a particularized message [is] present, and … [whether] the likelihood [is] great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

This Court therefore should not accept Carpenter Photography's repeated, bare assertions that taking photographs at a wedding in exchange for payment conveys an implicit message that is inextricably intertwined with the identity of the customers themselves. Nothing about wedding photographs or wedding photography conveys Carpenter Photography's own views on the propriety of the particular wedding celebrated, much less an endorsement of the morality or legitimacy of the wedding. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) (observing that law schools were not permitted to "'erect a shield' against laws requiring [equal] access [by military recruiters] 'simply by asserting' that mere association 'would impair its message'") (citations omitted). A picture of a wedding communicates merely that the wedding occurred. To an objective viewer, a photo of a same-sex wedding does not suggest that the photographer endorses the wedding, any more than a photo of a war victim communicates the photographer's support for war, or a photo of a white supremacist rally implies that the photographer endorses white supremacy. Nor does the mere fact that photography may be an expressive medium immunize it from civil rights laws. *See Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376 (1973) (upholding application of civil rights ordinance to newspaper that ran a sex-segregated "help wanted" section).

New York's enforcement of its public accommodations law against businesses like Carpenter Photography that seek to intentionally discriminate against customers with certain, protected characteristics does not infringe unconstitutionally on any other expressive interests either. The New York law leaves Carpenter Photography's creative process entirely intact. It does not restrict content by demanding that Carpenter Photography take photographs a particular way or seek to interfere with whatever artistic skill goes into taking the pictures. The law instead restricts public businesses, like Carpenter Photography, from engaging in discriminatory conduct, and "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

Carpenter Photography insists that its wedding photos are expressive and urges the Court to focus on the artistic or putative communicative elements of those photos.[3] *See, e.g.*, Appellants' Br. 27-29. But Carpenter Photography is a business, not a personal hobby for its

[3] Carpenter Photography also relies extensively—and almost exclusively—on this the Supreme Court's decision in *Hurley* to argue that the State's interests cannot justify New York's public accommodations law. *See, e.g.*, Appellants' Br. 30, 45-46, 56. As the State has explained in its response,

owner. If Emilee Carpenter wanted to spend her free time taking pictures at weddings for no charge, she could pick and choose her subjects without triggering New York's public accommodations law. But Carpenter photography is a *business* that sells goods and services to customers, and once a company "enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas." *Jaycees*, 468 U.S. at 636 (O'Connor, J., concurring). As long as Carpenter Photography is open to the public, New York law simply requires that it provide its service to paying customers without regard to their sexual orientation, race, sex, creed, or other protected classifications under New York law.

Even if Carpenter Photography's service is expressive, it would pass any level of scrutiny for the basic reason that the government has a well-established, compelling interest in "eradicating discrimination." *Jaycees*, 468 U.S. at 623. In *Jaycees*, the Court held that this interest was sufficient to warrant intrusion on the petitioner's freedom of association, guaranteed under the First Amendment. *Id.* Thus, even if New York's public accommodations statute does burden Carpenter Photography's free speech

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however, *Hurley* is distinguishable from this case. *See* Appellant's Br. 54-55.

or free exercise rights, that intrusion is justified by the state's well-founded and compelling interest.

For this reason, there is no merit to Carpenter Photography's repeated arguments that New York's law fails constitutional scrutiny because it *forbids* discrimination. Carpenter Photography notes, for instance, that New York allows bakers to refuse to create "anti-LGBTQ cakes" or "cakes with 'racist messages.'" Appellants' Br. 31; *see also id.* at 38, 48. It later complains that photography studios may advertise that they will serve "same-sex weddings" but may not declare that they "cannot photograph same-sex weddings." *Id.* at 34. Of course the law operates this way. States have a compelling interest in eradicating discrimination, but they have no interest in promoting or permitting discrimination. Under Carpenter Photography's theory, a public accommodations law that would prohibit "Whites Only" signs in the window of a diner would violate the First Amendment if the diner could permissibly hang a sign that says "All Are Welcome." Because states have a compelling interest in preventing exactly this sort of conduct, Carpenter Photography's distinction is meritless.

Carpenter Photography elsewhere insists that New York "has no compelling interest in applying its laws" to Carpenter Photography's "photographs and blogs." Appellants' Br. 44. Stunningly, Carpenter

Photograph claims this is so because "[t]housands of New York photographers photograph same-sex weddings." *Id.* Carpenter Photography envisions a New York with a divided marketplace, where LGBTQ+ couples may access one tier of services, but not another that is available to everyone else. In other words, Carpenter Photography sees no harm in denying access to its services because same-sex couples have access to other wedding photography services. Separate-but-equal public accommodations, however, are "inherently unequal," just as separate-but-equal schools were in *Brown*. 347 U.S. at 495. As explained above, anti-discrimination laws do not merely ensure that everyone has equal access to goods and services; they safeguard the "personal dignity that surely accompanies denials of equal access to public establishments" and prevent "humiliation, frustration, and embarrassment that a person must surely feel" when denied access because of a protected characteristic. S. Rep. No. 88-872 (1964); *cf. United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (explaining that discrimination against same-sex couples "interfere[s] with the equal dignity … conferred by the States in the exercise of their sovereign power."). No matter the quality of their work, wedding photography services down the street cannot restore to same-sex couples the dignity that Carpenter Photography strips away when it denies service.

At every turn, Carpenter Photography repeats arguments levied against civil rights laws in recent generations. These arguments fail for the same reasons that their predecessors did. Carpenter Photography has no expressive interest in providing its commercial photography services, and states have a compelling interest in eradicating discrimination. Under any degree of scrutiny, New York's law passes constitutional muster, just as its predecessors have.

III. Black people, and other people of color, continue to experience discrimination and greatly need the protection of strong public accommodation laws.

Opening the door to broad First Amendment exemptions to civil rights statutes will harm not only LGBTQ+ members of society but people of all races, sexes, creeds, national origins, and more. If businesses may intentionally discriminate against LGBTQ+ people, whether for reasons allegedly rooted in speech or religious interests, they will inevitably seek to discriminate against other groups too. Not only *can* people of color be excluded—they *will* be. While America has made great strides in combatting racial prejudice, this societal blight persists today. Just as in 1968, public accommodations statutes remain a vital prophylactic that allow people of color to participate fully and freely in the market.

Religious objections to racial integration were commonplace during and after the civil rights movement. Indeed, the trial court in *Loving v. Virginia* infamously began its opinion by declaring:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix.

388 U.S. 1, 3 (1967). A couple years later, the Supreme Court confronted a case that began when a restaurant owner insisted that he could deny service to Black customers "since his religious beliefs compel him to oppose any integration of the races whatever." *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966); *cf. also Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968) (holding that defendants could not avoid attorney's fees based on a good faith defense). Or consider Bob Jones University, which relied on its religious views to prevent students from engaging in interracial relationships up until the year 2000—*decades after* the Supreme Court approved of the IRS's decision to revoke the school's tax-exempt status because of that discriminatory practice. *See Bob Jones University v. United States*, 461 U.S. 574 (1983). This argument is not some outdated relic that will never recur either. Just five years ago, a Catholic college facing a claim that it had expelled a student for racially discriminatory reasons argued that Pennsylvania's public accommodations

law violated the school's First Amendment rights. *Chestnut Hill Coll. v. Pa. Human Relations Comm'n*, 158 A.3d 251, 256 (Pa. Commw. Ct. 2017). While Carpenter Photography insists that its owner's religious beliefs preclude her from photographing same-sex weddings, rest assured that the next plaintiff will insist that their deeply held religious beliefs preclude them from photographing an interracial ceremony.

The same is true of Carpenter Photography's free speech objections. In the leadup to the Civil Rights Act of 1964, "[o]pponents argued that Title II violated the rights of owners of public accommodations to decide whom to serve, characterizing this as both an individual right of association and a property right." Brian K. Landsberg, *Public Accommodations and the Civil Rights Act of 1964: A Surprising Success?*, 36 Hamline J. Pub. L. & Pol'y 1, 4 (2014). That desire to discriminate has not been fully extinguished. Within the last decade, the owners of a gun range in Oklahoma posted a sign at the entrance of their business stating: "This privately owned business is a Muslim-free establishment!!! We reserve the right to refuse service to anyone!!!" Compl. ¶ 24, *Fatihah v. Neal*, No. 16-cv-00058 (E.D. Okla. Feb. 17, 2016). After the range denied service to a Black Muslim U.S. Army reserve member, the owners invoked a First Amendment free-speech defense, arguing that the "Muslim Free" sign is "political and public issue speech such that any cause of action

based on this speech is barred by the First and Fourteenth Amendments." Def'ts' Br. in Support of Motion to Dismiss and/or for Summary Judgment at 16–17, *Fatihah*, No. 16-cv-00058 (E.D. Okla. Apr. 28, 2017), ECF No. 67; Def'ts' Response in Opp. to Plaintiff's Motion for Summary Judgment at 27–29, *Fatihah*, No. 16-cv-00058 (E.D. Okla. May 12, 2017), ECF No. 77. The district court correctly rejected that defense for the simple reason that "[t]he First Amendment is not a defense to a discrimination claim." Order at 10, *Fatihah*, No. 16-cv-00058 (E.D. Okla. Dec. 19, 2018), ECF No. 97 (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006)).

Beyond the filed lawsuits lies an ocean of non-litigated instances of discrimination. For example, in 2019, a wedding venue refused to rent to an interracial couple citing religious beliefs. P.R. Lockhart, *A Venue Turned Down an Interracial Wedding, Citing "Christian Belief." It's Far From the First to Do So*, Vox.com (Sept. 3, 2019), available at https://perma.cc/5WWN-JPW2. On a video, an employee explained: "We don't do gay weddings or mixed race, because of our Christian race—I mean, our Christian belief." *Id.* Following extensive publicity, the venue eventually changed course but likely would not have done so without massive public pressure. *Id.* Or note the story of a Harvard Law professor whose Korean student and his friends were excluded from a club because

they "are Korean and that apparently bugged the bouncer," whose manager then supported the bouncer and "used a racial epithet to express his animus toward Asians." Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations And The Mark Of Sodom*, 95 B.U. L. Rev. 929, 930 (2015).

These examples only scratch the surface of the pervasive discrimination that still exists in private life. If Carpenter Photography's view of free speech or free exercise prevails, there is no discernable limit to where it would end. Carpenter Photography envisions a world where much of our lives could be permissibly segregated. Businesses could pick and choose their customers based on their race, sex, religious faith, national origin, age, and beyond. Even if those exclusions were limited to expressive activities, that would leave a world in which restaurants, fashion boutiques, interior design shops, architecture firms, musical artists, barbershops, and more could limit access to their goods and services based on free speech or free exercise objections. Public accommodations laws have brought Americans together in private life while protecting individuals' dignity. This Court should reject Carpenter Photography's request for an exception that would re-divide us—one that is inconsistent with both Supreme Court precedent and the principle that states may

protect equal access to publicly available goods and services for all residents.

CONCLUSION

This Court should affirm.

Respectfully submitted,

/s/ *Benjamin F. Aiken*

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Dated: May 16, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g) and Second Circuit Rule 29.1, the undersigned counsel for amici curiae certifies that this brief:

(i) complies with the type-volume limitation of Second Circuit Rule 29.1(c) because it contains 6,349 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size 14 font.

Dated: May 16, 2022 /s/ *Benjamin F. Aiken*

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2022, I electronically filed the foregoing brief with the Clerk of this Court using the CM/ECF system, and counsel for all parties will be served by the CM/ECF system.

/s/ *Benjamin F. Aiken*