22-75

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 Courtfor the Western District of New York

BRIEF OF FIRST AMENDMENT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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INTEREST OF *AMICI CURIAE*

Amici are scholars of the First Amendment. They have an interest in promoting the sound interpretation of the First Amendment in a way that does not dilute the rigorous protection of the freedom of speech and association afforded by precedent.

Amici's names are set forth in the Appendix.[1]

ISSUES PRESENTED

Amici scholars submit this brief to offer additional history and context regarding the First Amendment's protections and limits with regard to the first two issues presented:

1. Whether New York's public accommodations laws violate a wedding photographer's First Amendment right to free speech by preventing her from discriminating among potential customers on the basis of sexual orientation.

[1] All parties have consented to the filing of this brief. Under FRAP 29(a)(4)(E) and Rule 29.1(b) of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no party or counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

2. Whether New York's public accommodations laws violate a wedding photographer's First Amendment right to expressive association in her commercial business, when she is the only employee.

SUMMARY OF ARGUMENT

Our democracy depends on the First Amendment's guarantee that speakers may select the messages they wish to express. It also depends on the Amendment's limits. As the Supreme Court has held repeatedly, the Constitution does not protect a business owner's right to select her customers. This is true even when the selection of customers—or employees—might involve incidental expression. The refusal to serve a customer based on their identity is not constitutionally protected speech, expression, or association. A contrary holding would imperil all of antidiscrimination law.

Emilee Carpenter and Emilee Carpenter LLC, the entity through which she operates her for-profit wedding-photography business as Emilee Carpenter Photography (together, "Carpenter"), claim a First Amendment right to select their customers, contrary to well-established law. Carpenter's claim in this regard fails for at least three reasons. First, the New York law that Carpenter challenges allows public

accommodations like her photography business to express or refuse any message they wish, so long as they make the same decision without regard to a customer's protected status. Second, at this pre-enforcement stage, Carpenter knows nothing about the customers she wishes to turn away, let alone any message they aim to convey, other than the fact that their sex matches their partners'. Third, because observers generally do not understand for-profit businesses to endorse their customers, compliance with the New York law does not implicate Carpenter in any particular message.

The First Amendment does not shelter Carpenter's discrimination. The message that Carpenter wishes to avoid depends only on the identities of her customers. But disapproval of a customer does not entitle a business owner to a constitutional exemption from generally applicable antidiscrimination laws, as Appellants themselves concede. Opening Br. of Appellants 69, ECF No. 46 ("[T]he First Amendment lets all speakers . . . choos[e] the messages they speak, just not the clients they serve.").

ARGUMENT

I. The First Amendment Protects the Choice of Message, Not of Customer.

The First Amendment protects the right of businesses to discriminate among messages in some contexts,[2] but not among customers. A hotel may invoke the First Amendment to refuse to fly a Black Lives Matter flag at a customer's request but not to turn a customer away because he is Black. A Christmas shop may invoke the First Amendment to refuse to sell menorahs, but not to decline business from Jews. A soccer stadium may invoke the First Amendment to refuse to play a rival country's national anthem but not to deny entry to people of that country's national origin. And a wedding photographer may invoke the First Amendment to refuse to endorse same-sex, interracial, or interfaith marriages—but not to refuse business from same-sex, interracial, or interfaith couples that she offers to others.

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[2] Many things that might be characterized as speech, association, or messages expressed by businesses outside of the antidiscrimination context are not protected or covered by the First Amendment. *See, e.g.*, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004). Consider, for example, fraud, contract, antitrust, or malpractice law—all of which involve speech or expression but are treated as outside of the First Amendment's reach.

Requiring a business to provide customers with the same goods and services without regard to their identity does not compel any protected speech, expression, or association. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984) (explaining that "discrimination in the distribution of publicly available goods, services, and other advantages" is "entitled to no constitutional protection"); *id.* at 634 (O'Connor, J., concurring in part and concurring in the judgment) ("The Constitution does not guarantee a right to choose . . . customers . . . without restraint from the State."); *Norwood v. Harrison*, 413 U.S. 455, 470 (1973) ("Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."). The Supreme Court has upheld laws forbidding discrimination in public accommodations against repeated constitutional challenge, explaining that such laws have a "venerable history" and "do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 571-72 (1995). These laws enforce the traditional common law rule that "[t]he innkeeper is not to select his guests." *Id.* at 571 (quoting *Rex v. Ivens*, 7 Car. & P. 213, 219

(N.P. 1835)). As Chief Justice Rehnquist wrote for a unanimous Court, "antidiscrimination laws . . . have long been held constitutional" because they regulate conduct, not expression, even if that conduct was inspired by constitutionally-protected beliefs. *Wisconsin v. Mitchell*, 508 U.S. 476, 482 (1993); *id.* at 487; *see also Jews for Jesus, Inc. v. Jewish Cmty. Rels. Council of N.Y.*, 968 F.2d 286, 295 (2d. Cir. 1992) (New York statutes that bar "discrimination on the basis of, among other things, race or religion, ... are plainly aimed at conduct, *i.e.,* discrimination, not speech.").

This is true even if the business believes that compliance with the antidiscrimination law would alter its expression. Thus, for instance, Ollie's Barbecue had no First Amendment right to bar Black customers from its dining room, *see Katzenbach v. McClung*, 379 U.S. 294, 305 (1964), despite the intensely political message integration conveyed in Birmingham, Alabama in 1964. Law schools had no First Amendment right to bar military recruiters from their campuses despite the contentious anti-LGBT military policy with which they disagreed. *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 69 (2006) ("*FAIR*"). And a law firm had no First Amendment right to exclude women despite the social and political conflict over women's participation in

traditionally male occupations in the 1980s. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). For this reason, as the New Mexico Supreme Court concluded, a state's "prohibition on sexual-orientation discrimination does not violate [a commercial wedding photographer's] First Amendment right[s] . . . . [e]ven if the services it offers are creative or expressive." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 72 (N.M. 2013).

II. Carpenter Seeks to Choose Her Customers, Not Her Message.

Carpenter does not contest the fact that the First Amendment provides no right to exclude customers. And her argument that New York's law violates her First Amendment rights because it compels her to express a message she opposes (approval of same-sex marriage), is incorrect. *See* Opening Br. of Appellants 28.

The New York law requires only that Carpenter provide photography services to same-sex couples and straight couples alike. To the extent her photographs convey a message, the message depends on the identities of her customers—the very thing that Carpenter concedes does not trigger First Amendment protection. *See* Opening Br. of

Appellants 69 ("[T]he First Amendment lets all speakers . . . choos[e] the messages they speak, just not the clients they serve.").

Three points make clear that Carpenter seeks to choose her customers, not her message.

First: New York's law forbids discrimination against customers, not messages. It forbids discrimination against "any person" on account of a protected characteristic. N.Y. Exec. Law § 296(2)(a). It does not forbid discrimination against messages. Carpenter could refuse to announce on her website that "God endorses homosexuality" upon a customer's request if she would refuse to express that message for *any* customer. She could refuse to photograph violence, still lifes, or dogs. But if her photography company holds itself out as providing the commercial service of wedding photography for hire, she must provide that same service to straight couples and same-sex ones alike—just as she must photograph the weddings of interracial or interfaith couples. For the same reasons, the law would require a commercial birthday party photographer to photograph a Black child's birthday party—even if she opposed the celebration of Black lives and believed that photographing such an event conveyed that celebratory message.

Carpenter tries to avoid this conclusion by incorporating discrimination into the definition of the service she offers: she insists that she offers "photographs and blogs that celebrate opposite-sex weddings." Opening Br. of Appellants 58. Once she defines her service in this way, Carpenter claims that she provides "the same services to everyone." *Id.* But, of course, nobody hires Carpenter to celebrate "opposite-sex weddings," just as nobody seeks to hire her to celebrate same-sex weddings, interracial weddings, or interfaith weddings. Couples hire her to photograph *their* wedding: the union of two people, not a class. *See* EMILEE CARPENTER, https://www.emileecarpenter.com/ (advertising the business's ability to "capture . . . *your* love story!"). Carpenter's statement that she offers photographs of "opposite-sex weddings," then, is nothing more than a concession that she will photograph some couples and not others. If Ollie McClung could not escape Title II by defining his restaurant as "sit-down barbecue for white people," neither can Carpenter escape New York's law by redefining her service as photographs for opposite-sex weddings.

Carpenter's argument that she does not *always* discriminate against gay and lesbian customers—for instance, serving gay or lesbian

parents who engage her services for an opposite-sex wedding—does not save her. Opening Br. of Appellants 58. The First Amendment does not protect sporadic discrimination any more than it does consistent discrimination. And because of the close nexus between same-sex marriage and gay or lesbian identity, a refusal to serve same-sex weddings is still discrimination against gay and lesbian people—regardless of Carpenter's other actions. *See Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in judgment) ("[T]he conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (state refusal to equally recognize same-sex and straight marriages violates equal protection); *United States v. Windsor*, 570 U.S. 744, 771 (2013) (Defense of Marriage Act, which "expresses . . . a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality," is unconstitutional due to its unequal treatment of same-sex and straight marriages); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

Second: Because Carpenter brings this lawsuit pre-enforcement, there is no message to which she objects. All she knows about the hypothetical weddings she refuses to photograph is that they involve two people of the same sex. *See* Compl. 15. That is, she objects to serving potential customers because of their identities—precisely what she concedes, as she must, the First Amendment does not protect. *See* Opening Br. of Appellants 69. As the Supreme Court has made clear, while "religious and philosophical objections [to same-sex marriage] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, LTD v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018).

Third: As the Supreme Court has acknowledged, observers do not generally understand for-profit businesses that are open to the public to endorse their customers. *See FAIR*, 547 U.S. at 65. This is as true in wedding photography as it is in other professions: a concert photographer does not express approval of a band's lyrics, for instance, when he accepts a gig photographing its show; nor does a photojournalist working in a

warzone approve of war. This observation is especially true where, as here, service is required by an antidiscrimination law not subject to conscience-based objections. *See FAIR*, 547 U.S. at 65 (explaining that observers "appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy").

III. Carpenter's Photography Business Is Not Within the Class of "Peculiar" Applications of Antidiscrimination Laws that Violate the First Amendment.

Antidiscrimination laws can, of course, run afoul of the First Amendment when applied "in a peculiar way." *Hurley*, 515 U.S. at 572. In *Hurley*, for instance, the Supreme Court held that Massachusetts could not require parade organizers to include in their parade the Irish-American Gay, Lesbian & Bisexual Group of Boston (GLIB) carrying "its own banner," *id.* at 572, and so "imparting a message the organizers [did] not wish to convey." *Id.* at 559; *see also FAIR*, 547 U.S. at 63; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (noting that in *Hurley* "the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner"). *Dale* teaches the same lesson. Just as Massachusetts could not

force parade organizers to include the GLIB banner, New Jersey could not apply a public accommodations law to the Boy Scouts and require them to promote "an avowed homosexual and gay rights activist" who was "on record as disagreeing with Boy Scouts policy" to a leadership position. *Dale*, 530 U.S. at 653, 655-56.

What made *Hurley* and *Dale* "peculiar" exceptions to the general rule that public accommodations laws are consistent with the First Amendment? Both involved state attempts to define private expressive associations as public accommodations.[3] The parade in *Hurley* was quintessential political speech curated by the expressive association of its organizers. Likewise, the Boy Scouts in *Dale* were a "private, membership organization." 530 U.S. at 652. Both contexts thus varied in key respects from conventional public accommodations—commercial businesses open to the public, like Carpenter's. *See* Compl. 20.

[3] For this reason, the Court exhibited skepticism that the parade in *Hurley* and the Boy Scouts in *Dale* were properly defined as public accommodations. *See Hurley*, 515 U.S. at 572 (noting the "peculiar" application of the Massachusetts law); *Elane Photography*, 309 P.3d at 68 ("[T]he Massachusetts courts [in *Hurley*] appear to have erroneously classified the privately organized parade as a public accommodation."); *Dale*, 530 U.S. at 656-57, 657 n.3 (noting that "[n]o [other] federal appellate court or state supreme court" shared the New Jersey Supreme Court's "extremely broad" definition of public accommodation).

This distinction is pivotal for constitutional purposes. As Justice O'Connor has observed, the Supreme "Court's case law recognizes radically different constitutional protections for . . . a private organization engaged exclusively in protected expressive activity [than for] a commercial association." *Jaycees*, 468 U.S. at 638 (O'Connor, J., concurring). For this reason, a "shopkeeper has no constitutional right to deal only with persons of one sex." *Id.* at 634.

IV. A Ruling in Carpenter's Favor Would Threaten All of Antidiscrimination Law.

Rejecting existing First Amendment principles and ruling for Carpenter would threaten all of antidiscrimination law and more. If the conduct of serving customers of a given identity is treated as a constitutionally-protected message when the provider believes that is the case, no such law will be secure, for four reasons.

First, the argument has no limiting principle. Nothing confines Carpenter's argument to weddings or sexual orientation. A holding that the New York law unconstitutionally compels Carpenter to speak when it requires her to serve same-sex couples in the same way she serves opposite-sex couples, *see* Opening Br. of Appellants 26, would mean that businesses could invoke the First Amendment to refuse to serve or hire

all manner of people they disfavored. The logic of Carpenter's argument would mean New York's law could not be applied to a photography studio that refused to take corporate headshots of women or Muslims, if the studio objected. It would likewise extend constitutional protection to businesses that object to serving or employing people of particular races or religions, women, divorced people, or people with disabilities.

Second, because Carpenter's argument rests on speech rather than religion, businesses would not need to demonstrate a genuine religious conviction. Compelled speech is compelled speech whether it offends faith or inclination. Carpenter's argument thus threatens to carve a much wider constitutional exemption from antidiscrimination laws than does a challenger seeking a religious exemption.

Third, the implications of Carpenter's argument, if accepted, would extend beyond antidiscrimination law. Carpenter argues that because she believes providing her services to same-sex couples expresses a message, the First Amendment gives her a right to violate antidiscrimination law. While Carpenter's business is wedding photography, nothing in her argument limits her claims to that domain; instead, the purported expression she points to is that created by the very

conduct the law requires: serving same-sex couples. On this view, anyone who believes that, by following a law, they express a message with which they disagree would receive a constitutional right to do so, allowing every individual "to become a law unto himself." *Reynolds v. United States*, 98 U.S. 145, 167 (1878). The First Amendment would grant a graffiti artist constitutional immunity from property laws. It would protect a company's refusal to abide by environmental laws to "express" its opposition to those laws. Someone who refused to pay taxes could argue that doing so expressed a message about their view of government policies. Would that mean that their conduct was constitutionally protected? Of course not. The Court has been clear: "We cannot accept 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." *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *see also Mitchell*, 508 U.S. at 484; *Jews for Jesus, Inc.*, 968 F.2d at 295-96.

Fourth, Carpenter is incorrect that New York's law is a content- or viewpoint-based regulation of speech. Opening Br. of Appellants 31. Both the Supreme Court and this Court of Appeals have emphasized that as applied to the provision of publicly available goods, privileges, and

services—as Carpenter's services are—public accommodations laws are regulations of conduct, not content- or viewpoint-based regulations of speech. *See Hurley*, 515 U.S. at 572 (Massachusetts antidiscrimination law "does not . . . target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds"); *Mitchell*, 508 U.S. at 487 (citing Title VII "as an example of a permissible content-neutral regulation of conduct"); *Jaycees*, 468 U.S. at 623; *Jews for Jesus*, *Inc.*, 968 F.2d at 295 ("These statutes are plainly aimed at conduct, *i.e.,* discrimination, not speech. . . . The governmental interest in prohibiting such discrimination in these situations is not directed at or related to suppressing expression.").

Ignoring these authorities, Carpenter argues that the New York law is content-based because it causes "[c]reating speech about one subject"—opposite-sex marriage—to "trigger[] her obligation to create speech about another"—same-sex marriage. Opening Br. of Appellants 32. But, of course, treating one sort of conduct as a prerequisite for a legal requirement does not imperil the constitutionality of a law; rather, this

type of "trigger" is commonplace. For instance, if an employer employs 15 or more employees, it must then abide by the Americans with Disabilities Act and Title VII. 42 U.S.C. § 12111(5)(A); 42 U.S.C. § 2000e(b); *see also* 29 C.F.R. 825.104a (private employer must abide by the Family Medical Leave Act if it employs 50 or more employees); 42 U.S.C § 2000d (Title IV of the Civil Rights Act, prohibiting discrimination by schools and other programs that receive federal funding). Compliance with these laws is not excused if the business characterizes them as restricting speech (e.g., by preventing harassment) or compelling association (e.g., with women or people with disabilities). *See Hishon v. King & Spalding*, 467 U.S. 69 (1984) (no First Amendment right to associate only with male law firm partners in violation of Title VII); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19 (1993) (upholding Title VII against First Amendment challenge to its prohibition on workplace harassment); *see also* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1.

Public accommodations laws, which apply to businesses that provide goods or services to the public—as Carpenter does—are ordinary in this respect. For instance, Ollie McClung's decision to operate a BBQ

restaurant serving white customers triggered an obligation to serve Black customers. *See McClung*, 379 U.S. at 305. That feature does not render public accommodations laws content- or viewpoint-based. New York's public accommodations law remains a regulation of conduct (i.e., discrimination against customers), regardless of whether it is applied to a business that sells sandwiches, books, or photography services. If a restaurant serves white customers, it must serve Black ones. If a bookstore sells books to Protestant customers, it must sell them to Catholic ones. And, if Carpenter wants to sell her wedding photography services to straight couples, she must sell her services to same-sex couples. The Constitution does not license her to violate antidiscrimination laws.

CONCLUSION

New York's law regulates the customers businesses must serve, not the messages they must convey. Carpenter objects to a type of customer, not a message the Constitution protects. The First Amendment offers her no refuge. This Court should affirm.

Respectfully submitted,

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May 16, 2022

APPENDIX

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Amanda Shanor, counsel for *amici curiae*, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 3,760 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Amanda Shanor