ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

June 1, 2022

VIA CM/ECF

Ms. Catherine O'Hagan Wolfe
Clerk, Second Circuit Court of Appeals
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: Supplemental Authority
***Carpenter v. James*, Docket No. 22-75**

Dear Ms. O'Hagan Wolfe:

Appellants (Carpenter) write to notify the Court about *NetChoice, LLC v. Att'y Gen.*, No. 21-12355, 2022 WL 1613291 (11th Cir. May 23, 2022), which upheld an injunction against a Florida law regulating how social-media companies curated third-party content on their platforms. This opinion supports Carpenter's appeal for four reasons.

1. While Appellees James and Imperial (New York) said the State's laws did not affect Carpenter's editorial freedom (Response Br. 30), *Netchoice* concluded that a "private entity's decisions about whether … to disseminate third-party-created content … are editorial judgments protected by the First Amendment." *Id.* at *9. And Carpenter exercises even more editorial control than social-media companies; she exercises control over and personally creates, edits, and disseminates blogs and photographs. Appellants' Reply Br. 7-8. Under *Netchoice*, New York's laws must affect Carpenter's editorial freedom when requiring her to create and publish photographs and blogs celebrating same-sex weddings.

2. While New York invoked *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), to justify regulating Carpenter (Response Br. 22-23), *Netchoice* distinguished *FAIR* because "[s]ocial-media platforms, unlike law-school recruiting services, are in the business of disseminating curated collections of speech." *Id.* at *13. Under that logic, Carpenter falls even further outside of *FAIR*—she is in the business of creating, editing, and publishing her own speech.

3. While New York defended regulating Carpenter based on the public (mis)attributing her expression to others (Response Br. 30-31), *Netchoice* squarely rejected this confusion theory, which "finds little support in our precedent. Consumer confusion simply isn't a prerequisite to First Amendment protection." *Id*. at *14.

4. While New York justified regulating Carpenter because her business holds itself "out to the public" (Response Br. 28), *Netchoice* confirmed that businesses retain their First Amendment right to make "content- and viewpoint-based decisions" even when they "generally hold themselves open to all members of the public…" *Id*. at *15.

In short, if social-media platforms under *Netchoice* can control what third-party content they host, Carpenter surely has the First Amendment right to control what content she personally creates and publishes in her own photographs and blogs.

Sincerely,

s/ Jonathan Scruggs
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CERTIFICATE OF SERVICE

I certify that on June 1, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Jonathan Scruggs
Jonathan Scruggs
Attorney for Appellants