



September 2, 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
Emilee Carpenter, LLC v. James, Docket No. 22-75

Dear Ms. O'Hagan Wolfe:

Appellants (Emilee) write to notify the Court about *Chelsey Nelson Photography, LLC v. Louisville/Jefferson County Metro Government*, No. 3:19-cv-851-BJB, 2022 WL 3972873 (W.D. Ky. Aug. 30, 2022), which permanently enjoined Louisville from mis-applying its public-accommodations law to compel a photographer to create photographs and blogs celebrating same-sex wedding ceremonies. This decision analyzed nearly identical facts and supports Emilee's appeal for at least five reasons.

1. *Chelsey Nelson* concluded that a public-accommodations law—like New York's—regulates speech, not conduct, when it “regulat[es] an artist's choice” about what speech to create. *Id.* at *13. *Contra* NY.Br.21–25; Cnty.Br.4. *Chelsey Nelson* distinguished Appellees' (New York) cited cases (NY.Br.22–23, 26, 40) that mistook speech for conduct or analyzed non-expressive activities like room access. *Id.* at *11–15.

2. *Chelsey Nelson* concluded that businesses retain First Amendment rights even when open “to the public” (NY.Br.28). *Id.* at *15. After all, the First Amendment protects newspapers even though “[n]o one forced the *Miami Herald* to put out a newspaper.” *Id.*

3. *Chelsey Nelson* concluded that Louisville's law was content-based because celebrating “opposite-sex marriage triggered an obligation to” promote “same-sex marriage.” *Id.* at *16. Likewise, Emilee must “photograph same-sex weddings if she photographs opposite-sex weddings.” NY.Br.30. Because Louisville's

law was content-based, the speech-incidental-to-conduct theory—on which New York relies—didn’t apply. *Id.* at *13 n.7. *Contra* NY.Br.22–25.

4. *Chelsey Nelson* concluded that Louisville’s Publication Provisions were content- and viewpoint-based and that Louisville could not prohibit the photographer from publishing her religious views. *Id.* at *25–27. That logic applies to New York’s similar Accommodations, Discrimination, and Publication Clauses.

5. *Chelsey Nelson* concluded that Louisville’s law failed strict scrutiny. *Id.* at *18–25. The law was overinclusive because Louisville could have stopped discrimination without regulating speech; there’s a difference between illegal “discrimination based on status” and constitutional “disagreement with a message.” *Id.* at *17, *19–22. And the law was underinclusive because it contained many exemptions. *Id.* at *21. New York’s laws suffer these same defects. Emilee.Br.44–49.

Chelsey Nelson fully supports Emilee’s First Amendment right to create visual narratives consistent with her faith.

Sincerely,

s/ Jonathan Scruggs
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CERTIFICATE OF SERVICE

I certify that on September 2, 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