

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 22-75 Caption [use short title]

Motion for: removal of the case from the expedited appeals calendar pursuant to LR 31.2(b)(2), or alternatively, a 30-day extension to file appellees' briefs Emilee Carpenter LLC v. James

Set forth below precise, complete statement of relief sought: Defendants-appellees jointly request that the Court remove this case from the expedited appeals calendar or, in the alternative, grant appellees a 30-day extension to file their briefs to May 9, 2022

MOVING PARTY: Appellees James, Imperial OPPOSING PARTY: Emilee Carpenter LLC, Emilee Carpenter
Plaintiff Defendant
Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Alexandria Twinem OPPOSING ATTORNEY: Bryan Neihart
New York Office of the Attorney General Alliance Defending Freedom
The Capitol, Albany, NY 12224 15100 North 90th Street, Scottsdale, AZ 85260
(518) 776-2015; Alexandria.Twinem@ag.ny.gov (480) 444-0020; BNeihart@adflegal.org

Court-Judge/Agency appealed from: U.S. District Judge Frank P. Geraci, Western District of New York

Please check appropriate boxes:
Has movant notified opposing counsel (required by Local Rule 27.1):
Opposing counsel's position on motion:
Does opposing counsel intend to file a response:

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:
Has request for relief been made below?
Has this relief been previously sought in this Court?
Requested return date and explanation of emergency:

Is oral argument on motion requested?
Has argument date of appeal been set?

Signature of Moving Attorney: /s/ Alexandria Twinem Date: 2/2/2022 Service by: CM/ECF Other [Attach proof of service]

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

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EMILEE CARPENTER, LLC and EMILEE  
CARPENTER,

Plaintiffs-Appellants,

– against –

**DECLARATION**

**Docket No. 22-75**

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

Defendants-Appellees.

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**DECLARATION OF ALEXANDRIA TWINEM IN SUPPORT  
OF MOTION TO REMOVE THE APPEAL FROM THE  
EXPEDITED APPEALS CALENDAR**

I, Alexandria Twinem, a lawyer duly admitted to the courts of the  
State of New York and this Court, do hereby declare under penalty of  
perjury as follows:

1. I am an Assistant Solicitor General in the office of Letitia  
James, Attorney General of the State of New York. I represent  
defendants-appellees Letitia James and Maria L. Imperial in the above-  
captioned case.

2. I submit this declaration in support of defendants-appellees' motion pursuant to Local Rule 31.2(b)(2) to remove this appeal from the Expedited Appeals Calendar (XAC) for good cause or, in the alternative, to extend the time for the filing of appellees' briefs in this matter by an additional 30 days, which would make their briefs due Monday, May 9, 2022. I make this declaration based on my review of the record in this appeal and my personal knowledge of the matter. This motion is joined by defendant-appellee Weedon Wetmore. It is opposed by plaintiffs-appellants Emilee Carpenter, LLC and Emilee Carpenter.

3. As explained below, this appeal is not well-suited to expedited review for three reasons: (1) the appeal involves constitutional issues that implicate important public policies and merit sufficient time for briefing, argument, and decision, (2) the district court dismissed the complaint following a full substantive review of the merits of appellants' constitutional claims, which is not the type of dismissal for which the XAC was developed, and (3) the U.S. Supreme Court's current consideration of a petition for certiorari on largely identical issues to the ones raised in this appeal is likely to affect the disposition of this case.

4. Appellant Emilee Carpenter is a photographer who operates her for-profit wedding photography business through the entity “Emilee Carpenter, LLC,” also named as a plaintiff-appellant in this case. Based on Ms. Carpenter’s religious beliefs, appellants decline to offer their photography services for same-sex weddings. They commenced this action in the United States District Court for the Western District of New York (Geraci, J.) pursuant to 42 U.S.C. § 1983 to challenge provisions of New York Human Rights Law that prohibit any public accommodation from discriminating on the basis of certain characteristics, including sexual orientation; advertising that the public accommodation will deny services on the basis of those characteristics; or publishing any communication indicating that persons with those characteristics are unwelcome at a public accommodation. Appellants argue that New York law violates their First Amendment rights of expression, association, and free exercise, as well as the First Amendment’s Establishment Clause. They also argue that New York’s law is facially vague and thus violates due process.

5. Appellants commenced this action in April 2021 seeking injunctive and declaratory relief. Dist. Ct. No. 21-cv-6303, ECF No. 1.

Immediately after commencing this action, appellants filed a motion for preliminary injunction. Dist. Ct. No. 21-cv-6303, ECF No. 3. Defendants-appellees filed oppositions to the motion for preliminary injunction and motions to dismiss for failure to state a claim. Dist. Ct. No. 21-cv-6303, ECF Nos. 24, 26, 27. In addition, multiple briefs of amicus curiae were submitted on behalf of over 50 governmental and nongovernmental organizations.

6. The district court issued a thorough, 46-page decision, in which it determined that the appellants had standing to bring a pre-enforcement challenge to New York's laws but that their numerous constitutional claims failed on the merits. Dist. Ct. No. 21-cv-6303, ECF No. 68. The court accordingly dismissed the complaint and denied the motion for a preliminary injunction as moot. *Id.*

7. Appellants filed their notice of appeal on January 12, 2022. Dist. Ct. No. 21-cv-6303, ECF No. 70. On January 28, 2022, this Court issued a Notice of Expedited Appeal, placing the appeal on the Court's XAC, and directing that appellants' brief must be filed no later than March 4, 2022, and appellees' briefs must be filed no later than April 8,

2022 or 35 days from the date of the filing of appellants' brief, whichever is sooner. Case No. 22-75, ECF No. 36.

7. There is good cause to remove this appeal from the XAC. First, the constitutional issues presented involve complex and important matters of public policy. One of the issues presented—whether public accommodation laws violate a business owner's First Amendment rights by prohibiting them from discriminating against prospective customers on the basis of those customers' sexual orientation—has already been heard by the U.S. Supreme Court in recent years, although the Court's opinion ultimately did not squarely rule on the issue. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). And numerous amicus curiae briefs, on both sides of the issue, were filed in the district court in connection with the present case. We expect a similar, if not greater, number of amicus briefs to be filed on the appeal in this Court. Should the case remain on the XAC, it will limit the time that these organizations have to prepare briefs that may be helpful to the Court.

8. Second, although appellants' appeal is from a judgment dismissing the complaint for failure to state a claim, that dismissal was

based on an extensive review of the merits of their constitutional claims and application of substantive law rather than a review of whether the allegations of the complaint satisfy basic pleading standards. Thus, the appeal does not involve the type of dismissal for which the XAC was designed. See Hon. Jon O. Newman, *Report: The Second Circuit's Expedited Appeals*, 80 Brook. L. Rev. 429, 429-30 (2015) (stating that the Court's XAC was instituted in the aftermath of Supreme Court decisions requiring a more rigorous pleading standard so that cases in which the new pleading standards were deemed to have been improperly applied could be returned more quickly to the district court).

9. Third, the central issue in this appeal is currently the subject of a petition for certiorari that is already pending before the U.S. Supreme Court. See Petition for Certiorari, at i, *303 Creative LLC v. Elenis*, No. 21-476 (U.S. Sept. 24, 2021).<sup>1</sup> That petition has been relisted by the Supreme Court for further consideration after its January 7, January 14, and January 21 conferences. The Supreme Court's decision on that petition is likely to affect the disposition of this case, including

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<sup>1</sup> The petitioner in *303 Creative LLC* is represented by appellants' counsel in the present case.

whether the appeal will go forward at all or potentially be held in abeyance pending a decision of the Supreme Court should it decide to hear *303 Creative LLC*. Accordingly, this appeal should be taken off the schedule to allow adequate time for the U.S. Supreme Court to decide whether to hear *303 Creative LLC* and for this Court to decide how to proceed in light of the Supreme Court's decision.

10. For these reasons, this Court should remove the case from the XAC. In the alternative, if the Court declines to remove the case, appellees respectfully request a 30-day extension of the last date to file their brief, which would make appellees' briefs due Monday, May 9, 2022.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 2, 2022.

/s/ Alexandria Twinem  
ALEXANDRIA TWINEM  
Assistant Solicitor General