

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

EMILEE CARPENTER, LLC, dba EMILEE
CARPENTER PHOTOGRAPHY; EMILEE
CARPENTER,

No. 22-75

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

**APPELLANTS' OPPOSITION TO APPELLEES' MOTION TO
REMOVE CASE FROM EXPEDITED APPEALS CALENDAR**

Preliminary Statement

1. Plaintiffs-Appellants Emilee Carpenter, LLC and Emilee Carpenter (“Emilee”) create custom photographs and blogs celebrating marriage and other topics consistent with Emilee’s religious beliefs. Dist. Ct. No. 21–cv–6303, ECF No. 1 at 7–9. Emilee desires to photograph, blog about, and participate in weddings consistent with her religious views on marriage, adopt an operating agreement binding her company to this editorial policy, post a statement explaining her religious reasons for adopting this policy, and ask prospective clients

certain questions about the photography they seek. *Id.* at 14–18, 33, 35–36; *id.* at ECF Nos. 1–1, 1–2.

2. But New York’s public-accommodations laws prohibit Emilee from engaging in these activities. *Id.* at ECF No. 1 at 20–21. In turn, these laws require her to participate in and create photographs and blogs celebrating same-sex weddings, prohibit her from formally adopting her editorial policy, ban her from publicly explaining this policy on her business website, and forbid her from asking whether clients seek photographs celebrating same-sex weddings. *Id.* at 21–26. If Emilee engages in speech which New York’s laws disapprove, or fails to create speech or participate in religious events that New York’s laws demand, Defendants-Appellees (“New York”) can force her business *and her personally* to pay limitless damages and a \$100,000 fine, require her to create artwork against her beliefs via court order, revoke her business license, and imprison her for up to a year. *Id.* at 27, 31.

3. After learning about New York’s laws and receiving several requests to photograph same-sex weddings, *id.* at 38, Emilee filed this suit on April 6, 2021. She alleged that New York’s laws violate her First Amendment rights to free speech, expressive association, religious freedom, and to be free from the establishment of religion. *Id.* at 47–52. She also alleged that one clause facially violates the First and Fourteenth Amendments because it is vague, overbroad, and grants

officials unbridled discretion. *Id.* at 53. Emilee contemporaneously filed a preliminary-injunction motion. *See id.* at ECF Nos. 3, 3–1.

4. Several courts around the country have recently agreed that public-accommodations laws like New York’s violate the First Amendment when they apply in similar ways. *E.g.*, *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247 (11th Cir. 2021); *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019); *Green v. Miss United States of Am., LLC*, 533 F. Supp. 3d 978 (D. Or. 2021); *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov’t*, 479 F. Supp. 3d 543 (W.D. Ky. 2020).

5. New York nonetheless moved to dismiss Emilee’s complaint under Federal Rule of Civil Procedure 12(b)(6) and other grounds. Dist. Ct. No. 21–cv–6303, ECF Nos. 25, 27.

6. The district court ruled nine months after Emilee filed her complaint and preliminary-injunction motion. *Id.* at ECF No. 68. The court agreed that New York’s laws “compel[] her to create artistic expression that celebrates same-sex marriages and to associate herself with same-sex marriages, contrary to her desire and beliefs.” *Id.* at 18. But the court nonetheless concluded the laws passed strict scrutiny anyway because Emilee’s “photography is the product of her unique artistic style and vision,” and New York’s laws regulate Emilee’s “unique, nonfungible services.” *Id.* at 34. The court dismissed Emilee’s

other claims, granted New York’s Rule 12(b)(6) motions to dismiss, and denied Emilee’s preliminary-injunction motion as moot. *Id.* at 46.

Argument

7. Local Rule 31.2 established the Expedited Appeals Calendar to quickly resolve complaints dismissed for “failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).” 2d Cir. LR 31.2(b)(1)(B). After receiving the benefit of Rule 12(b)(6) below, New York now seeks to deprive Emilee of the expeditious appellate review process for such dismissals. New York makes three arguments. None warrant removing this case from the Expedited Appeals Calendar.

8. *First*, New York argues that this case presents “complex and important” constitutional issues. That is true—and it confirms that this case should remain on the Expedited Appeals Calendar. New York cannot threaten Emilee’s “important” constitutional rights, then plead that the importance of those rights weighs *against* speedy resolution.

9. The Expedited Appeals Calendar exists to get cases “back on track with as little disruption [as possible] to the flow of the litigation.” Jodi S. Balsam, *The New Second Circuit Local Rules: Anatomy and Commentary*, 19 J.L. & POL’Y 469, 518 (2011). Staying on “track” is especially critical here because New York’s laws are irreparably harming Emilee by violating her constitutional rights now and on an ongoing basis. *See, e.g., Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67,

71 (2d Cir. 1996). New York’s laws are causing Emilee to chill her expression to avoid prosecution. Dist. Ct. No. 21–cv–6303, ECF No. 1 at 33–41. Consistent with her religious beliefs, Emilee is also “currently refusing requests to photograph same-sex weddings.” *Id.* at ECF No. 68 at 7. With each passing day, Emilee increases her exposure to New York’s penalties, which include fines up to \$100,000, uncapped compensatory damages, criminal prosecution, and losing her business license. *Supra* ¶ 2. Waiting for amicus briefs that may or may not be filed is no reason to delay hearing this appeal with these looming penalties. *Contra* 2d Cir. No. 22–75, ECF. No. 39 at 6.

10. Emilee’s constitutional claims also support remaining on the Expedited Appeals Calendar because the “threshold dismissal[] involve[d] no evidentiary record and the legal issues have been thoroughly briefed ... in the district court.” Jon O. Newman, *The Second Circuit’s Expedited Appeals Calendar for Threshold Dismissals*, 80 BROOK. L. REV. 429, 433–34 (2015). The parties so thoroughly briefed the issues below that the district court “thank[ed] all involved for their thorough submissions” and was impressed by “[t]he magnitude of these briefs.” Dist. Ct. No. 21–cv–6303, ECF 68 at 3–4. The court also found Emilee’s “claims are primarily ones of law.” *Id.* at 45. That favors review under the Expedited Appeals Calendar.

11. *Second*, New York argues for removing this case from the Expedited Appeals Calendar because the lower court “dismissal was

based on an extensive review of the merits of [Emilee’s] constitutional claims and application of substantive law rather than a review of whether the allegations of the complaint satisfy basic pleading standards.” This argument also supports Emilee’s plea to stay on the Expedited Appeals Calendar.

12. The Expedited Appeals Calendar grew from “concerns that district courts might overreact to the new pleading standard[s]” announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Newman, *supra* at 429. *See also Irrera v. Humpherys*, 859 F.3d 196, 197 n.2 (2d Cir. 2017) (same). The Expedited Appeals Calendar addresses these concerns by giving “expedited treatment” to “threshold dismissals” under Rule 12(b)(6) “so that complaints deemed to have been improperly dismissed could be quickly returned to a district court.” Newman, *supra* at 429–30. By admitting that the district court dismissed Emilee’s complaint based on the “merits” rather than “basic pleading standards,” New York concedes that the complaint was improperly dismissed and that this appeal fits the Expedited Appeals Calendar bill.

13. *Third*, New York argues for Expedited Appeals Calendar removal because of the pending certiorari petition in *303 Creative LLC v. Elenis*. But where “[j]urisdiction exist[s],” federal courts have a “virtually unflagging” duty to hear cases properly before them. *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013). *See also Klein v.*

Adams & Peck, 436 F.2d 337, 339 (2d Cir. 1971) (“The right to proceed in court should not be denied except under the most extreme circumstances.”). *Cf. Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (stays only rarely appropriate). Exercising that duty consistent with the Expedited Appeals Calendar is appropriate here.

14. For one thing, waiting for *303 Creative* would cause an indeterminate delay. *Lair v. Murry*, 871 F. Supp. 2d 1058, 1068 (D. Mont. 2012) (“[A]ny stay would necessarily be indefinite because the Court cannot predict when the U.S. Supreme Court will resolve [a pending case].”). There is no guarantee or timeline for the Supreme Court to grant the petition or, if the petition is granted, to issue a merits opinion. Consider *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). That petition was filed on July 22, 2016. *See* No. 16–111 Docket, Supreme Court of the United States, <https://bit.ly/3HDpGfi> (last visited Feb. 3, 2022). But the Supreme Court did not grant that petition until June 26, 2017 and did not decide the case until June 4, 2018. *Id.* Even if the Supreme Court accepts *303 Creative* soon, that Court will not hear arguments until October 3, 2022. Supreme Court Calendar, Supreme Court of the United States, <https://bit.ly/3ryTjJv> (last visited Feb. 3, 2022). And the Supreme Court may decide the *303 Creative* case as late as “the end of June” 2023. The Court and Its Procedures, Supreme Court of the United States, <https://bit.ly/3HtnOFV> (last visited Feb. 3, 2022).

15. In that scenario, this Court would still need to review the district court's decision and the Supreme Court's decision and write its own opinion. And this delay—which could be more than two years after Emilee filed her complaint—would contradict 42 U.S.C. § 1983's purpose of “interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law.” *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). All the while, Emilee suffers irreparable harm and exposure to jailtime and other severe penalties. *Supra* ¶¶ 2, 9. In “balanc[ing] the equities ... the risk of irreparable harm weighs most heavily” on Emilee. *Blum v. Caldwell*, 446 U.S. 1311, 1315 (1980) (Marshall, J., in chambers) (discussing stay pending disposition of a petition for certiorari). For this reason, Emilee's “constitutional rights” should not be held “hostage to the outcome and timing” of a separate case. *Phelps v. Hamilton*, 59 F.3d 1058, 1069 (10th Cir. 1995).

16. For another thing, as New York admits, the district court dismissed Emilee's complaint by using the wrong pleading standards. This Court should reverse the district court's decision on that basis alone regardless of the outcome in *303 Creative*.

17. Alternatively, New York requests a 30-day extension—through Monday, May 9, 2022—to file their response brief. 2d Cir. No. 22–75, ECF No. 39 at 8. New York's counsel never conferred with

Emilee's counsel about this request. But as a matter of professional courtesy, Emilee consents to a 14-day extension, through Friday, April 22, 2022.

Conclusion

For these reasons, Appellants ask the Court to deny Appellees' motion to remove this appeal from the Expedited Appeals Calendar.

Dated: February 4, 2022

Respectfully submitted,

s/ John J. Bursch

JOHN J. BURSCH
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

JONATHAN A. SCRUGGS
BRYAN D. NEIHART
JACOB P. WARNER
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
jscruggs@ADFlegal.org
bneihart@ADFlegal.org
jwarner@ADFlegal.org

RAYMOND J. DAGUE
DAGUE & MARTIN, P.C.
4874 Onondaga Road
Syracuse, NY 13215
(315) 422-2052
rjdague@daguelaw.com

Attorneys for Appellants

Certificate of Service

I hereby certify that on February 4, 2022, a copy of this response was filed electronically with the Clerk of the Second Circuit Court of Appeals. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

s/ John J. Bursch

John J. Bursch

Attorney for Appellants