**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF NEW YORK**

**Emilee Carpenter, LLC d/b/a Emilee Carpenter Photography** and **Emilee Carpenter**,

Plaintiffs,

v.

**Letitia James**, in her official capacity as Attorney General of New York; **Johnathan J. Smith**, in his official capacity as Interim Commissioner of the New York State Division of Human Rights; and **Weeden Wetmore**, in his official capacity as District Attorney of Chemung County,

Defendants.

Case No. 6:21-cv-06303

**Memorandum of Law In Response to State Defendant's Motion to Dismiss**

Oral Argument Requested

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## Introduction

Emilee Carpenter is a photographer who wants to celebrate certain views about marriage through her photography and blogs and explain those views to the public. But New York's laws threaten her with $100,000 fines, injunctions, lawsuits, and jail time for publishing her desired statements and for speaking only those views she agrees with.

New York doesn't deny that its laws forbid Emilee's speech. New York instead defends its laws and declares its "compelling" need to apply them to Emilee. Mem. of Law in Supp. of State Defs.' Mot. to Dismiss ("MTD") 2, ECF No. 27-1. Yet New York calls Emilee's enforcement fears "speculative" because she hasn't yet been investigated (MTD 6), even though it simultaneously says Emilee would "unquestionably violate the law" if she operates her business as she wants. Mem. of Law in Opp. to Pls.' Prelim. Inj. Mot. ("MPI Resp.") 2, ECF No. 26.

But Emilee doesn't have to "drop the wrecking ball first and test [her] belief later" to protect her rights. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007). Emilee need only show that the law's text arguably forbids her desired activities. She's shown much more than that. New York has already enforced the law against those with beliefs like Emilee's, supported other officials in enforcing similar laws against other creative professionals, and proclaimed its need and intent to prosecute Emilee for following her religious beliefs.

New York does no better on the merits. Labeling Emilee's speech conduct, and calling her editorial discretion discrimination, New York plays word games to avoid accountability. But New York cannot disclaim compelling Emilee to speak while insisting she must create photography celebrating same-sex weddings. The First Amendment cares about reality and results, not rhetoric.

Emilee has shown here and elsewhere that she deserves a preliminary injunction on her Free Speech, Free Exercise, and Establishment Clause claims. *See*

Reply Br. in Supp. of Pls.' Prelim. Inj. Mot. ("MPI Reply") 2-8 (filed concurrently). So she necessarily meets the less demanding motion-to-dismiss standard. She need only show that her remaining claims are plausible. She has done so, and New York's motion to dismiss should be denied in full.

## Argument

New York first brings a Rule 12(b)(1) motion to dismiss for lack of standing. This motion may challenge standing facially—"*i.e.*, based solely on the allegations of the complaint" and its incorporated documents—or factually—i.e., based on "evidence" outside the complaint. *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56-57 (2d Cir. 2016). New York does not specify its challenge. *Compare* MPI Resp. 8-10 (citing affidavits to oppose standing) *with* MTD 5-7 (citing complaint only). But under either standard, Emilee's allegations must be accepted as true because they are undisputed. *See Carter*, 822 F.3d at 56-57.[1]

New York also brings a Rule 12(b)(6) motion to challenge Emilee's claims. To overcome this motion, Emilee must show plausible claims after viewing the complaint in her favor and taking all factual allegations as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009).

Emilee defeats both challenges. (I) Emilee has standing because New York's laws (A) credibly threaten and chill her expression; (B) burden her compared to her competitors; and (C) empower the Attorney General to prosecute Emilee without Eleventh Amendment immunity. (II) Emilee also pleads plausible claims because

[1] New York suggests that Emilee "likely conjured up" this case but offers no basis to support this offensive and incorrect accusation. MTD 6 n.3. Emilee's "religious beliefs shape every aspect of her life." Verified Complaint ("VC") ¶ 20, ECF No. 1. And New York's laws threaten her with crippling penalties for operating her business consistent with her beliefs. Mem. of Law in Supp. of Pls.' Prelim. Inj. Mot. ("MPI") 8-22, ECF No. 3-1. To protect herself from these penalties, Emilee filed this suit. *See infra* § I.A.

New York's laws (A) compel and restrict her speech; (B) burden her expressive association; (C) force her to participate in religious events and are not neutral or generally applicable; and (D) are vague, overbroad, and grant unbridled discretion.

## I. Emilee has standing to challenge New York's laws.

For standing, Emilee must show injury, causation, and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Emilee must also prove ripeness. *Susan B. Anthony List v. Driehaus* (*SBA List*), 573 U.S. 149, 157 n.5 (2014). But here, ripeness and standing blend together; "claims that [a]re sufficiently 'actual and imminent' to establish Article III standing [are also] ripe for adjudication." *Nat'l Org. for Marriage, Inc. v. Walsh* (*NOM*), 714 F.3d 682, 688-89 (2d Cir. 2013). Courts also apply "relaxed standing and ripeness rules" to First Amendment cases. *Id.* at 689. New York only challenges whether Emilee suffers an injury-in-fact (§ I.A-B) and whether the Attorney General causes that injury (§ I.C).

### A. Emilee has standing to challenge New York's laws because they credibly threaten and chill her expressive activities.

To prove standing, Emilee need only show a "substantial risk" of New York's laws harming her. *SBA List*, 573 U.S. at 158. Not a "certainty" of prosecution; only "an actual and well-founded fear that the law will be enforced against" her. *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000); *Hedges v. Obama*, 724 F.3d 170, 196 (2d Cir. 2013) (standing so long as prosecution fear not "wholly speculative") (cleaned-up).

Emilee has done that because she intends "to engage in a course of conduct arguably affected with a constitutional interest," her activities are "arguably" proscribed by New York's laws, and she faces a "credible threat of prosecution." *SBA List*, 573 U.S. at 159. Emilee meets this test because (1) New York actively enforces its laws that arguably cover Emilee's expressive activities; (2) many other

factors bolster this credible threat; and (3) Emilee need not prove a specific, certain, past, or future threat for standing.

### 1. Emilee faces a credible threat because New York's laws arguably cover her speech.

Emilee can prove a credible enforcement threat because New York's laws "arguably" proscribe her expressive activities and are "non-moribund." *Hedges*, 724 F.3d at 197 (cleaned-up); *Sorrell*, 221 F.3d at 383 (standing because plaintiff's statutory interpretation "reasonable enough"). This "low threshold" is "quite forgiving." *Hedges*, 724 F.3d at 197 (cleaned-up). *See also Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 70 (2d Cir. 2019) (when party is "an object of" statute, there is "ordinarily little question" that statute causes injury) (cleaned-up).

While New York disputes this standard, saying an official's statement "'that a statute prohibits a type of conduct … is usually insufficient'" for standing (MTD 6, citing *Jones v. Schneiderman*, 101 F. Supp. 3d 283, 291 (S.D.N.Y. 2015)), the Second Circuit disagrees. *Cayuga Nation v. Tanner*, 824 F.3d 321, 332 n.9 (2d Cir. 2016) (criticizing *Jones* and rejecting argument that plaintiffs must allege "that the threat of prosecution is directed specifically at them as individuals"). Indeed, the Supreme Court and Second Circuit have repeatedly applied an enforcement presumption against laws that arguably prohibit plaintiffs' desired activities. *SBA List*, 573 U.S. at 162; *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979); *Tong*, 930 F.3d at 70; *Hedges*, 724 F.3d at 197 (surveying cases adopting this presumption). Other circuits agree. *See N.H. Right to Life Pol. Action Comm. v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996) (applying same test).

This presumption applies here. Emilee wants to offer and create photographs and blogs celebrating only opposite-sex weddings, post an online statement saying this, adopt an editorial policy binding her company to do this, and ask potential clients whether they want her to create content contrary to her beliefs. MPI 8-22.

These activities are "arguably affected with a constitutional interest." *SBA List*, 573 U.S. at 159; MPI 5-22 (proving this). And New York's laws arguably forbid each activity. MPI 8-22 (explaining this point). Other officials interpret similar laws similarly. *Telescope Media Grp. v. Lucero* (*TMG*), 936 F.3d 740, 750 (8th Cir. 2019); *id.* at 769-70 (Kelly, J., dissenting).[2] New York never engages with this analysis.

But these laws do not just *arguably* prohibit Emilee's desired activities. According to New York, they *undisputedly* do—requiring Emilee to offer and provide the "same services" (photographs and blogs) to same-sex weddings as she does for opposite-sex weddings. MTD 19, 24; MPI Resp. 15-16; *id.* 24 (accusing Emilee of a "desire[] to discriminate"); Decl. of Jessica Clarke in Supp. of Defs.' Opp. to Pls.' Prelim. Inj. Mot. ("Clarke Decl.") ¶ 18 (same), ECF No. 26-3. They also ban Emilee's proposed statement and editorial policy as "facially discriminatory." MTD 20. *See id.* 17-18; MPI Resp. 12-13 (same). New York's admissions here are decisive.

And there's more. New York even announced its compelling need to regulate Emilee and inability to give her any exemption. MTD 23-24; MPI Resp. 13-15. It is "more than a little ironic that [New York] would suggest [Emilee] lack[s] standing and then, later in the same brief, label [Emilee] as a prime example of ... the very problem [its law] was intended to address." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 518 (D.C. Cir. 2009) (cleaned up). New York's deeds match its words. New York already prosecuted another public accommodation with policies like Emilee's and filed amicus briefs against similar public accommodations. VC ¶¶ 262, 272, 286-90; MTD 19, 24; MPI Resp. 15-16.[3]

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[2] *See also Brush & Nib Studio, LC v. City of Phoenix* (*B&N*), 448 P.3d 890, 898-900 (Ariz. 2019) (Phoenix); *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (2019) (Washington); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (New Mexico); *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't* (*CNP*), 479 F. Supp. 3d 543 (W.D. Ky. 2020) (Louisville).

[3] *See* Br. of Mass., et al. as Amici Curiae in Supp. of Resp'ts (NY Masterpiece Br.), *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719 (No. 16-111),

But don't just consider New's York's words and actions. Amici read New York's laws like New York does. *See* Br. of Amici Curiae States in Supp. of Defs. ("Mass. Br.") 8, ECF No. 55 ("There is no real dispute that Plaintiffs' stated intent … would violate New York's" laws); Br. of Amici Curiae N.Y. Civil Liberties Union & Am. Civil Liberties Union Supp. Defs. ("ACLU") 10, 14, ECF No. 51 (laws require providing "the same service to similarly situated customers" and banning Emilee's statements and policy as "discrimination"); Br. of Religious and Civil-Rights Orgs. as Amici Curiae Supp. Defs. 2, ECF No. 52 (interpreting laws to require providing service "on the same terms"). As do New York state courts. *Athenaeum v. Nat. Lawyers Guild*, Inc., No. 653668/16, 2018 WL 1172597, at *2-3 (N.Y. Sup. Ct. Mar. 06, 2018) (reading laws to require bar association to publish pro-Israeli and pro-Palestinian advertisements).

New York must (and does) ignore all these facts to say Emilee is "misstat[ing] the scope of" its laws and "basing her claims on misunderstandings." MPI Resp. 10. But ignoring reality does not change it, especially at the motion-to-dismiss stage. This point also explains why Emilee's case does not involve an "abstract disagreement" or call for "mere conjecture" or an "advisory opinion." MTD 7; MPI Resp. 10, 16. From prudential standing and ripeness perspectives, this case is fit for review because New York's position is clear, its position bars Emilee's desired expression, and Emilee's challenge is mainly legal. *See SBA List*, 573 U.S. at 167 (rejecting prudential ripeness argument); *NOM*, 714 F.3d at 691 (finding prudential standing). Indeed, New York and amici did not need any additional facts to proclaim

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2017 WL 5127307 (joined by New York's Attorney General; opposing cake artist); Br. for Mass., et al. as Amici Curiae in Support of Defs. at 12, *303 Creative LLC v. Elenis*, No. 19-1413 (10th Cir. Apr. 29, 2020) (joined by Attorney General James; opposing website designer and concluding public accommodations laws required her providing "the full range of a business's services") (excerpts attached as Exhibit A and judicially noticeable (MTD 12 n.6)).

Emilee's activities illegal. And New York cannot identify a single fact this Court lacks for it to rule. So this Court can and should address the merits.

**2. Many other factors confirm Emilee's credible threat.**

Although Emilee has standing because the laws arguably forbid her expression, several other factors bolster her standing.

First, New York does not disavow enforcement against Emilee. *See Knife Rts., Inc. v. Vance*, 802 F.3d 377, 385 (2d Cir. 2015) (non-disavowal supported standing). Second, New York actively defends its authority to prosecute Emilee and others like her. MTD 23-24; MPI Resp. 13-15; *Tanner*, 824 F.3d at 332 n.8 (relying on defense in briefs to support standing); *Harrell v. Fla. Bar*, 608 F.3d 1241, 1257 (11th Cir. 2010) ("an intent to enforce the rule may be inferred" from law's defense).

Third, New York welcomes, initiates, investigates, and prosecutes complaints against public accommodations, including 1,740 complaints against public accommodations from 2012-2018. VC ¶¶ 174-227. New York even prosecutes and files briefs against business owners with religious beliefs like Emilee's. *Id.* at ¶¶ 262, 272, 286-90, 295; *supra* n.3. So "proceedings are not a rare occurrence." *SBA List*, 573 U.S. at 164 (standing in part because commission processed 20-80 claims a year); *TMG*, 936 F.3d at 750 (standing when state had "already" prosecuted "wedding vendor who refused to rent a venue for a same-sex wedding").

Fourth, New York's laws allow "almost anybody" to file complaints. MTD 15. This includes aggrieved persons and organizations in New York or outside and also New York itself, which has already initiated complaints against public accommodations and used testers to investigate charges. VC ¶¶ 176-93, 220-23, 273-74. This broad "universe of potential complainants" supports standing. *SBA List*, 573 U.S. at 164.

New York, though, dismisses this threat, saying Emilee has given "no reason" to think she's been identified for investigation or targeted by testers. MTD 7. But that isn't necessary. *See, e.g.*, *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (standing before physicians had been "threatened with prosecution"). New York's argument just misses the point. Pre-enforcement lawsuits exist so that speakers don't have to violate the law, "bet the farm," and mail sue-me invitations to government officials before challenging a law. *MedImmune, Inc.*, 549 U.S. at 128-29. Once again, Emilee need not prove enforcement is "certain"; a "substantial risk" is enough. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013).

And New York's ample enforcement history and mechanisms make the risk of investigation and testers credible. Even on a national level, speakers like Emilee have been repeatedly targeted and sued for doing what she wants. *See supra* n.2 (identifying other lawsuits against speakers under laws like New York's); Am. Compl., *Scardina v. Masterpiece Cakeshop Inc.*, Case No. 2019CV32214 (Colo. Dist. Ct. June 5, 2019) (complaint against Masterpiece attached as Exhibit B); Notice of H'rg & Formal Compl., *Scardina v. Masterpiece Cakeshop Inc.*, Charge No. CP2018011310 (Colo. Civil Rights Div. Oct. 9, 2018) (same).

Finally, New York's laws carry stiff penalties including $100,00 fines and jail time. VC ¶¶ 180, 194-215. These penalties reasonably chill Emilee's speech. *SBA List*, 573 U.S. at 166 (standing with "threat of criminal prosecution"); *Sorrell*, 221 F.3d at 382 (standing with threat of $10,000 civil fine).

Put all these factors together and Emilee has overwhelming reason to fear enforcement. Indeed, the Second Circuit has found pre-enforcement standing on far fewer facts than those present here. *See Sorrell*, 221 F.3d at 383-84 (standing despite officials disclaiming enforcement); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 100 (2d Cir. 2003) (standing where officials claimed law did not cover "material posted on plaintiffs' websites"). These cases support standing here.

### 3. Emilee does not rely on independent actors or need to show a specific enforcement threat.

Because New York gets the jurisdictional standard wrong, New York puts unnecessary requirements on Emilee to prove standing.

For example, New York denies standing because Emilee does not allege "any past enforcement actions against her company" or "that an investigation will be started any time soon." MTD 6-7; MPI Resp. 9. But Emilee need not "first expose" herself "to actual arrest or prosecution" to challenge New York's laws. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Emilee has standing without showing past enforcement against or a specific threat directed at her. *See New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988) (hearing challenge to public accommodations law "before any enforcement proceedings"); *Babbitt*, 442 U.S. at 302 (standing where criminal penalty "has not yet been applied and may never be applied"); *Tong*, 930 F.3d at 70 (standing despite "no overt threat to enforce" law).

New York's theory also ignores that investigations alone would harm Emilee and chill her speech. VC ¶ 260. *SBA List*, 573 U.S. at 165-66 (threat of commission investigation created harm). And New York's investigative process is onerous with "multiple steps of careful examination …, including an intensive document review, site visits and interviews." MPI Resp. 9; VC ¶ 194. Emilee needs relief and clarity before going through all this.

Next, New York objects that Emilee's standing rests on "speculation about the decisions of independent actors…." MTD 6-7. Not so. Emilee alone controls whether she violates the law: whether to post her statement, how to operate her business, and whether to decline pending requests for same-sex wedding photographs. Defendants (and those they oversee like assistant attorneys general, commission officials, and testers) control whether to initiate enforcement on their own. VC ¶¶ 174-93, 216-25. These are not "independent actors not before the

court…." *Clapper*, 568 U.S. at 414 n.5. *Cf. Bennett v. Spear*, 520 U.S. 154, 168 (1997) (standing even where government "retains ultimate responsibility for determining whether and how a proposed action shall go forward"). To be sure, private third parties can file complaints and lawsuits *in addition* to defendants doing so. But New York has no choice but to investigate those complaints. VC ¶ 194. That bolsters standing. *SBA List*, 573 U.S. at 164 (standing to challenge law enforced by similar administrative system).

Nor does this Court need to speculate how defendants and their agents will act. They've made that clear, before and during this lawsuit. *See supra* § I.A.1. That is why so many other courts have found standing in cases like this one: when the government defended similar laws enforced using similar administrative systems when challenged by similar plaintiffs. *TMG*, 963 F.3d at 749-50; *B&N*, 448 P.3d at 900-02; *CNP*, 479 F. Supp. 3d at 549-52.

In contrast to these cases, New York cites unpublished, out-of-circuit cases that rejected standing based on facts absent there but present here. *See Updegrove v. Herring*, 2021 WL 1206805, at *3-4 (E.D. Va. Mar. 30, 2021) (no standing because challenged law never enforced, state never used "testers," plaintiff never asked to photograph same-sex weddings, and law lacked criminal penalties); *303 Creative LLC v. Elenis*, 2017 WL 4331065, at *5-6 (D. Colo. Sept. 1, 2017) (no standing because plaintiff not in wedding industry and had never been asked to create wedding websites).

The latter case even supports Emilee. While *303 Creative* denied standing to challenge Colorado's Accommodation Clause, it found standing to challenge Colorado's Publication Clause. *303 Creative LLC*, 2017 WL 4331065, at *5-6. And if Emilee has standing to challenge the Publication Clause, then she necessarily has standing to challenge the Accommodation and Discrimination Clauses because these clauses are intertwined—whether the Publication Clause can constitutionally

ban Emilee's desired statement depends on whether the two other clauses can constitutionally require her to photograph same-sex weddings. *See infra* § II.A.4 (explaining point). *Accord TMG*, 936 F.3d at 757 n.5; *B&N* 448 P.3d at 926; *CNP*, 479 F. Supp. 3d at 560-61. When issues are "invariably intertwined" like this, courts address the merits of those issues. *United States v. Paulino*, 850 F.2d 93, 96 (2d Cir. 1988) (cleaned-up). So far from undermining Emilee's standing, New York's cited cases highlight the important facts present here that justify the credible threat facing Emilee.

### B. Emilee has competitor and competitor-advocate standing because the laws burden her compared to her competitors.

In addition to standing based on enforcement and chill, Emilee has standing because New York's laws give her competitors an unfair advantage to compete in the marketplace and to advocate in the public arena. *See XY Plan. Network, LLC v. United States Sec. & Exch. Comm'n*, 963 F.3d 244, 251 (2d Cir. 2020) (summarizing competitor-standing doctrine); *Ctr. for Reprod. L. & Pol'y v. Bush*, 304 F.3d 183, 197 (2d Cir. 2002) (Sotomayor, J.) (same for competitor-advocate doctrine).

Specifically, New York's laws burden Emilee but not her direct competitors—other photographers in New York's wedding market. VC ¶¶ 306-313; *In re United States Catholic Conference*, 885 F.2d 1020, 1029 (2d Cir. 1989). For example, Emilee cannot operate her business efficiently because she cannot ask clients what type of services they seek or adopt an editorial policy to bind her company, and she loses time researching requests to avoid liability and lawsuits. VC ¶¶ 160, 229-45, 311-13. Emilee also cannot adequately advocate her religious views to the public because she cannot post a statement explaining her religious reasons for celebrating only opposite-sex weddings or explain these beliefs to persons who ask her to promote same-sex weddings. VC ¶¶ 93, 246-53, 306-313.

In contrast, other New York wedding photographers do not face these burdens because they photograph both opposite-sex and same-sex weddings and so can operate consistently with the law. VC ¶¶ 300-12. *See Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (competitor standing when law forces business to "lose sales to rivals" or to "expend more resources to achieve the same sales"). Emilee also cannot equally advocate for her views on marriage compared to other photographers who support same-sex marriage. VC ¶¶ 305, 309-10. *See Ctr. for Reprod. L. & Pol'y*, 304 F.3d at 197 (standing when government withheld benefit to abortion advocacy group that it provided to pro-choice advocacy groups). All of this gives Emilee another basis for standing to challenge New York's laws.

### C. The Attorney General causes Emilee's injuries and lacks Eleventh Amendment immunity.

To enjoin the Attorney General, Emilee must show "some connection" between that official and "enforcement of" the challenged laws. *Ex Parte Young*, 209 U.S. 123, 157 (1908). She can easily do so. The challenged laws explicitly empower the Attorney General to initiate, investigate, and prosecute complaints and lawsuits. VC ¶¶ 8-10, 175-78, 185, 195-96, 208, 216, 225. Even the District Attorney agrees. Mem. of Law in Supp. of Dismissal ("DA MTD") 8–9, ECF No. 24-2 (claiming Attorney General prosecutes "cases alleging violations of the Civil Rights Laws of New York").

Even so, New York denies the Attorney General's connection to its laws because they allow other people to enforce too. MTD 8. But that doesn't matter. Emilee needs to redress "a discrete injury," not her "every injury." *Chevron Corp. v. Donziger*, 833 F.3d 74, 121 (2d Cir. 2016) (cleaned-up). She can enjoin officials empowered to enforce the law without enjoining everyone empowered to do so. *See Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 901-02 (10th Cir. 2012) (harm redressable despite others' ability to sue); *281 Care Comm. v. Arneson*, 638 F.3d

621, 631 (8th Cir. 2011) (similar); *Bland v. Fessler*, 88 F.3d 729, 738 (9th Cir. 1996) (similar). That's because Emilee's "risk would be reduced to some extent" by enjoining the Attorney General. *Massachusetts v. E.P.A.*, 549 U.S. 497, 526 (2007).

Nor do any of New York's cases about Executive Law § 63(12) help New York with the laws challenged here. MTD 9. These cases involved statutes that did not name the Attorney General or give that officer enforcement authority. In those circumstances, courts refused to rely on § 63(12)'s general enforcement authority alone. Here, in contrast, New York's Civil Rights Law names the Attorney General and contemplates enforcement by her. N.Y. Civ. Rts. Law § 40-d; VC ¶¶ 10, 221-223. *See also People v. Fuller*, 590 N.Y.S.2d 159, 162 (Crim. Ct. 1992) (purpose of § 40-d's notice requirement is to give Attorney General "sufficient information to administer and protect" civil rights law). So does New York's Human Rights Law. VC ¶¶ 10, 185, 196, 208, 216.

There's more. The Attorney General has exercised its authority to prosecute public accommodations under New York's laws in the past. *See* VC ¶¶ 177-78; Clarke Decl. ¶¶ 13-15 (collecting cases). The Attorney General's website welcomes discrimination complaints.[4] And in a prior case against business owners who share Emilee's beliefs, the Attorney General even touted its "independent authority to enforce the Human Rights Law pursuant to N.Y. Exec. L. § 63(12)" because of its "strong interest in the proper interpretation and application of the statute." Br. for the Att'y Gen. of New York as Amicus Curiae in Supp. of Resp't at *1, *Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016), 2015 WL 13813477.

All of this proves the Attorney General's "demonstrated willingness" to enforce New York's laws against public accommodations. *HealthNow New York, Inc.*

[4] *See The Sexual Orientation Non-Discrimination Act*, NY Attorney General, https://on.ny.gov/2SCIR4L (last visited June 30, 2021) (complainants may "file a complaint with New York State Attorney General's Civil Rights Bureau").

*v. New York*, 739 F. Supp. 2d 286, 294 (W.D.N.Y. 2010) (citation omitted); *see also* DA MTD 8-9 (collecting cases). And that in turn proves standing and meets the *Ex Parte Young* exception necessary to enjoin the Attorney General.

## II. Emilee states plausible First Amendment claims.

Emilee states plausible claims that New York's laws (A) compel and restrict her speech; (B) compel and restrict her expressive association; (C) force her to participate in religious events and are not neutral or generally applicable; and (D) are facially vague, overbroad, and grant unbridled discretion. As to her as-applied challenges, New York's laws also do not pass strict scrutiny. *See* MPI 22-25 (explaining why laws must, but cannot, pass strict scrutiny); MPI Reply 6-8 (same).

### A. New York's laws compel and restrict Emilee's protected speech.

#### 1. The Accommodations and Discrimination Clauses compel Emilee to speak.

New York does not dispute the three-part test for identifying compelled speech (MPI 9), or that Emilee's photography and blogging constitute speech (MPI 6-7). The only dispute is whether New York's laws compel Emilee to speak a message she disagrees with. They do.

Emilee's claim is straightforward: her photographs and blogs are speech, New York's laws force her to create and post messages about marriage she disagrees with, and New York cannot compel her to do this—"to utter what is not in [her] mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943).

In response, New York claims that its laws "facially … regulate conduct … not speech." MTD 16. That's not true here. New York's "same services" rule regulates Emilee's speech because its laws require her to provide services conveying messages she disagrees with—i.e., to create photographs and blogs celebrating same-sex marriage. MTD 19. This application is not "speculative" or "made-up."

*Contra* MTD 16; MPI Resp. 16. New York, amici, and state court judges all agree that New York's laws require this. *Supra* §I.A.1; MPI Reply 3. So these laws apply here to "speech itself." *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995).[5] And applying even a facially neutral law this way triggers First Amendment scrutiny. *See Holder v. Humanitarian Law Project* (*HLP*), 561 U.S. 1, 28 (2010) (law "directed at conduct" triggered strict scrutiny as applied because "the conduct triggering coverage under the statute consists of communicating a message").[6]

To avoid *Hurley*, New York tries to limit it to non-profits. MPI Resp. 16-18; Mass. Br. 11; ACLU 11. But *Hurley* considered the application to parades "peculiar" (i.e. "speech itself"), not to non-profits. 515 U.S. at 557-58. Public accommodation laws often apply to non-profits. *Id.* at 580-81 (detailing examples). *Hurley* meanwhile extended protection to "business corporations generally" and "professional publishers." 515 U.S. at 574. And courts have applied *Hurley* to protect for-profits. *See Washington Post v. McManus*, 944 F.3d 506, 518 (4th Cir. 2019) (newspaper); *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 962 (9th Cir. 2010) (same); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 653 (7th Cir. 2006) (video-game company); MPI 10 (collecting other cases). Nor do courts distinguish "private artistic expression" from expressive services "offered to the

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[5] Although New York denies Emilee's ability to bring "a proper as-applied challenge" (MTD 11, 16), courts often hear as-applied pre-enforcement challenges. *HLP*, 561 U.S. at 15-16; *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 234, 248-49 (2010); *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410, (2006) (per curiam); *Steffel*, 415 U.S. at 475 (noting pre-enforcement challenge to statute's "constitutionality" is appropriate "on its face or as applied").

[6] *See also Cohen v. California*, 403 U.S. 15, 18 (1971) (breach of peace law applied to words on jacket); *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (disorderly conduct law applied to spoken words); *Cantwell v. Connecticut*, 310 U.S. 296, 303-07 (1940) (breach of peace law applied to playing record).

public on the open market" for First Amendment purposes. *Contra* MTD 19, 22; Mass. Br. 11; ACLU 11-12. The Supreme Court and the Second Circuit reject this distinction. *See* MPI 7-8 (collecting cases). So do other courts when considering speakers like Emilee. *See TMG*, 936 F.3d at 751-52; *B&N*, 448 P.3d at 913-14; *CNP*, 479 F. Supp. 3d at 557-59. There is no public-accommodation exception to the First Amendment.

Unable to distinguish *Hurley*, New York posits that equal-access rules never compel speech, citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006) and *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). MTD 21-22; MPI Resp. 16, 22; Mass. Br. 9-10; ACLU 13. But those cases considered compelled access to rooms and courtyards. And those spaces don't say anything. Photographs and blogs do. So the regulations in those cases didn't compel access to anything "inherently expressive." *FAIR*, 547 U.S. at 64. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 n.10 (2008) (distinguishing *FAIR* from situation when law forces someone "to reproduce another's speech against their will" or "co-opt[s] [their] own conduits for speech"); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring) (same); *TMG*, 936 F.3d at 758 (same); *B&N*, 448 P.3d at 908-09 (same); *CNP*, 479 F. Supp. 3d at 564 n.169 (same); *Netchoice, LLC v. Moody*, 2021 WL 2690876, at *9 (N.D. Fla. June 30, 2021) (same).

None of the other cases New York or amici cite help them either. Some (like those about hotel rooms, barbeque, and termination decisions) did not involve speech at all, while others (like those about non-expressive club membership and hiring decisions) did not involve compelled speech. MTD 17-19; MPI Resp. 15-17; ACLU 6-8. In the end, New York (and amici, ACLU 8) can only point to *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013). But *Elane* overlooks how the First Amendment protects paid speakers and how even facially neutral laws can

compel speech as-applied. *Id.* at 68 (finding that law could compel photographs because it "applies not to Elane Photography's photographs but to its business operation"). So *Elane* contradicts *Hurley* and the other cases cited above. Courts refuse to follow *Elane* for that reason. *TMG*, 963 F.3d at 752; *B&N*, 448 P.3d at 916–17; *CNP*, 479 F. Supp. 3d at 558. This Court should too.

New York makes one more last-ditch argument that no "reasonable observer" would think Emilee endorses same-sex marriage. MPI Resp. 18-19. But Emilee's alleged facts show otherwise. *See* VC ¶¶ 92-96. No matter. Compelled speech doesn't turn on third-party perceptions. No one thinks drivers endorse state license plate mottos or newspapers endorse all opinions they print, yet the Supreme Court found compelled speech in these scenarios anyway. *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977) (license plates); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (opinions).

While New York dismisses *Wooley*, saying Emilee "is free to remain silent" (MTD 21), free speech is not so cramped. New York cannot condition Emilee's right to speak her desired view on giving up her business, going to jail, or speaking messages she opposes. That's not freedom at all. *See Hurley*, 515 U.S. at 574 (First Amendment protects "speaking on one subject while remaining silent on another.").

**2. Emilee seeks the narrow right to decline to speak based on message, not status.**

New York asserts broad authority to regulate Emilee's speech while Emilee only seeks the narrow right to "choose the content of [her] own message." *Hurley*, 515 U.S. at 573. As Emilee already explained, she does not object to serving LGBT clients but to conveying certain messages. MPI 13-14. Other courts have accepted this message/status distinction. *Id.* (collecting cases). This Court should too.

But instead of grappling with this distinction or with Emilee's cases, New York accuses Emilee of "refus[ing] service to LGBT customers on the basis of their

protected characteristics." MTD 17. That ignores Emilee's allegations and argument. Emilee only considers the what, not the who—the message she's being asked to create, not who is asking her to create. VC ¶ 140. That's why Emilee would photograph an opposite-sex wedding if asked by a gay parent, friend, or wedding planner; a staged wedding shoot with LGBT models; and products for LGBT business-owners. *Id.* ¶¶ 130-34. It's also why Emilee would not photograph some opposite-sex weddings. *Id.* ¶¶ 116, 137-39.

For these reasons, Emilee's editorial choices do not turn on client "characteristic[s]," (MTD 17) or "the identity of the couple being served." ACLU 4. Emilee treats prospective clients equally; she declines messages, not people. *See Hurley*, 515 U.S. at 572 (approving parade's editorial freedom to decline messages when it did not "exclude homosexuals as such"). New York retorts that Emilee "scours social media" to divine client status. MTD 18. Not so. She reviews requests from everyone to "confirm the request is consistent with her religious views." VC ¶ 312; *id.* ¶¶ 50, 238-45. Messages requested, not persons requesting.

Emilee's practice distinguishes her from the hypotheticals New York and its amici fear. MPI 2 (lawyers, print shops, and consultants rejecting clients based on status); Mass. Br. 19 (hotels, hairdressers, and chefs based on race); ACLU 2, 12 (photographers refusing clients based on race, religion, and sex). These involve per-se refusals to serve entire groups or services that do not use editorial judgment like Emilee's. And protecting Emilee's freedom would not "swallow the entire law for broad swathes of 'expressive' services." MTD 19; ACLU 8. Emilee's approach strikes the right balance and applies "only in narrow circumstances." Br. of Amici Curiae 14 States Supp. Pls. 11-13 ("Neb. et al. Br."), ECF No. 22 (explaining the many limiting principles of Emilee's theory).

New York's concerns simply misunderstand Emilee's services. She does not offer a "standardized service to couples" or provide minimal expressive input

"incidental to the final product." MPI Resp. 18-19. Emilee carefully creates her highly customized blogs and photographs, not her clients. And though she works with clients, she "retains full editorial control over" her tailored works. VC ¶¶ 54-89, 99-104. This collaborative process is common for commissioned works and fully protected. *See Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015); MPI 7 (collecting cases explaining this principle).

Given this expressive process, Emilee's policy does not "restrict[] LGBT clients' menu of services." MTD 18; ACLU 4-5. Unlike chicken wings or pizza, Emilee's photographs and blogs convey celebratory messages about marriage. *See* VC ¶¶ 42, 90, 105-08. Changing the content in these photographs and blogs necessarily changes their message. *TMG*, 936 F.3d at 753. New York's "flawed assumption" is that Emilee's services "are fungible products, like a hamburger or a pair of shoes. They are not." *B&N*, 448 P.3d at 910. Because Emilee's works can convey different messages, Emilee can and does offer a menu with the same positive messages about opposite-sex marriages to everyone. She declines the same messages to everyone too. That's equal treatment.

New York and amici even agree with this message/status distinction—at least sometimes. Take the bakers who can decline "anti-LGBT cakes" or cakes with "racist messages" under New York law if they "refuse[] to make similar cakes for anyone." NY Masterpiece Br., 2017 WL 5127307, at *28-29, 29 n.15; ACLU 6 n.1 (same). Yet New York cannot tolerate Emilee declining photographs or blogs celebrating same-sex weddings for anyone. New York cannot explain the difference between Emilee and those bakers. Because none exists.

In the end, New York's legal theory offers only downsides. It allows the government to pick winners (those bakers) and losers (Emilee). Yet it empowers New York to compel countless messages by countless speakers (MPI 14-15), no matter how hard amici try to avoid this result. *Compare* ACLU 5 (discussing

*Athenaeum*) *with Athenaeum*, 2018 WL 1172597, at *3-5 (interpreting law to require pro-Palestinian bar association to publish pro-Israeli advertisement "in gross contradiction" of association's view). Emilee's approach charts a more manageable, constitutional path: allow all speakers "the autonomy to choose the content of" their "message." *Hurley*, 515 U.S. at 573.

#### 3. The Accommodations and Discrimination Clauses compel Emilee's speech based on content and viewpoint.

Although Emilee meets the three-part test for compelled speech, New York's laws go beyond that to compel Emilee's speech based on content and viewpoint. *See* MPI 15-17 (explaining this point).

In response, New York (and its amici) retread old ground, claiming its laws are neutral and regulate conduct. MPI Resp.19; MTD 23; ACLU 10 (stating question is "whether the *law itself* draws distinctions based on content"). Emilee already refuted these arguments. *Supra* § II.A.1. *See HLP*, 561 U.S. at 26-27.

But that does not stop New York and amici from embracing the content and viewpoint-based nature of New York's laws. As New York and its amici admit, these laws exempt bakers who refuse to make cakes with "anti-LGBT" or racist messages but punish Emilee for declining to celebrate same-sex weddings because of her religious beliefs. *Supra* § II.A.2. New York cannot allow some speakers to avoid speaking viewpoints offensive to them but force Emilee to speak viewpoints offensive to her. *Matal v. Tam*, 137 S. Ct. 1744, 1762-64 (2017). That violates the First Amendment.

#### 4. The Clauses restrict Emilee's speech based on content and viewpoint as New York admits.

Emilee wants to express her beliefs about marriage and why she cannot create photographs or blogs celebrating same-sex weddings by publishing a statement on her company's website and explaining these beliefs to prospective

clients. VC ¶¶ 246-51; VC Ex. 2. New York admits this statement is "speech" and forbidden because of its content. MPI Resp. 20-21; MTD 20-21.

Undeterred, New York defends itself by invoking its goal of stopping "discrimination." MPI Resp. 21; MTD 20. But the laws still restrict speech based on content and viewpoint as-applied; the Publication Clause even restricts "communications" on this basis facially. MPI 17-18. Their purpose does not matter. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) (rejecting purpose argument).

New York also jumps the gun by invoking its need to ban "discriminatory advertising." MTD 20. New York gets the application of this principle wrong. Laws may restrict speech that threatens to engage in illegal, *constitutionally unprotected* conduct. *United States v. Williams*, 553 U.S. 285, 298 (2008) (explaining this doctrine). But Emilee wants to make statements explaining her constitutional right to avoid speaking messages she disagrees with. New York cannot validly ban statements describing constitutionally protected activity like this. *See Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (invalidating restriction on abortion advertisement because "the activity advertised pertained to constitutional interests"); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 700-01 (1977) (same because "the information suppressed by this statute related to activity with which, at least in some respects, the State could not interfere") (cleaned up).

This reasoning distinguishes "White Applicants Only" signs and cases about discriminatory advertisements from newspapers and housing providers. MTD at 20; ACLU 14. Those involved advertisements threatening constitutionally unprotected activity (employment or housing discrimination), not constitutionally protected speech (Emilee's right to choose which photographs and blogs to create). In this sense, Emilee's right to post depends on her right to control her photography. *See supra* § I.A.3 (explaining intertwinement); Mass. Br. 13 (agreeing with intertwinement). She can do the latter; so she can do the former too.

Just as important, Emilee's statements are not commercial speech. *Contra* MPI Resp. 20-21; Mass. Br. 12-13. They do more than propose a commercial transaction and discuss her religious views. *Harris v. Quinn*, 573 U.S. 616, 648 (2014) (defining commercial speech). At the very least, her statements contain religious speech "inextricably intertwined with" commercial speech and that triggers strict scrutiny. *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796-97 (1988).

Even if deemed commercial speech, Emilee's statements would still "advertise[] an activity itself protected by the First Amendment" (creating photographs and blogs), which would require greater scrutiny. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 n.14 (1983). And New York's laws still restrict Emilee's speech based on viewpoint. That too triggers strict scrutiny even if her speech is commercial. *Matal*, 137 S. Ct. at 1767-69 (five justices agreeing that lower scrutiny did not apply to viewpoint-based restrictions on commercial speech); *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 39 (2d Cir. 2018) (interpreting *Matal* this way). So no matter how New York construes Emilee's statements, banning them violates the First Amendment.

### B. New York's laws compel and restrict Emilee's expressive association.

New York's laws force Emilee to associate in ways that undermine her message about marriage. This violates Emilee's First Amendment right "not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23 (1984). The Supreme Court uses a three-part test to evaluate this expressive association right. *Boy Scouts of Am. v. Dale*, the 530 U.S. 640, 648 (2000). Emilee meets this test.

First, Emilee "engage[s] in some form of expression." *Dale*, 530 U.S. at 648. She creates photographs and blogs celebrating her view of marriage. *See* MPI 6-8. Second, New York's laws "affect[] in a significant way" her "ability to advocate

public or private viewpoints." *Dale*, 530 U.S. at 648. New York's laws force Emilee to create photographs and blogs celebrating same-sex weddings. *See* § II.A. This in turn forces Emilee to (i) associate with others to create and distribute messages contrary to the messages she promotes elsewhere (celebrating opposite-sex marriage) and (ii) to publicly associate with messages contrary to those messages she promotes elsewhere. *See* VC ¶¶ 92-97, 162-63 (detailing Emilee's collaborative process and how she publicly associates with messages by posting photographs and blogs on her website); § I.A.1 (explaining New York's "same service" requirement). Third, forcing Emilee to associate fails strict scrutiny. *Id.* at 656-57; MPI 22-25; MPI Reply 6-8.

New York counters that "providing goods and services to a customer" does not "associate[] a business with that customer's protected status." MTD 23. But Emilee objects to associating with speech she is compelled to create, distribute, and put on her website. People would associate her businesses with that. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 564-66 (2005); *id.* at 568, (Thomas, J., concurring) (explaining that beef producers could establish First Amendment violation if forced to pay for beef advertisements attributed to them). This Court should agree, particularly because courts "give deference to [a plaintiff's] view of what would impair its expression." *Dale*, 530 U.S. at 653.

Next, New York tries to limit expressive association to membership in private nonprofit organizations. MTD 23; Mass. Br. 12. But this doctrine protects agencies when selecting clients, *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 178 (2d Cir. 2020), and for-profit organizations, *McDermott*, 593 F.3d at 962 (cannot force newspaper to hire certain editors because it was "bound to affect what gets published"); *Green v. Miss United States of Am., LLC*, 2021 WL 1318665, at *14 (D. Or. Apr. 8, 2021) (for-profit beauty pageant). So Emilee can invoke this doctrine too.

### C. New York's laws violate Emilee's free-exercise and establishment rights.

Emilee elsewhere explains why she will likely prevail on her Free Exercise and Establishment Clause claims about compelled participation, neutrality, and general application. *See* MPI 19-22; MPI Reply 2-6. For these same reasons, she states plausible claims under the more lenient motion-to-dismiss standard.

### D. The Unwelcome Clause is facially vague, overbroad, and grant officials unbridled discretion.

Unlike other parts of New York's laws, the Unwelcome Clause fails facially because it bans speech "to the effect that" a person is "unwelcome, objectionable or not acceptable, desired, or solicited." N.Y. Exec. Law § 296(2)(a). This language is vague, overbroad, and grants unbridled discretion.

*Overbreadth*: A statute is overbroad when a "substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotations omitted). The Unwelcome Clause is overbroad because terms like unwelcome, objectionable, and "not acceptable, desired, or solicited" are too elastic and ban too much speech. These terms could cover any critical statement related to protected classes on a public accommodation's website—statements like "Israel commits murder" or "Catholicism is wrong." By restricting core political and religious speech like this, the Unwelcome Clause bars too much. *See B&N*, 418 P.3d at 442-43 (striking "unwelcome," "objectionable," "unacceptable," and "undesirable" language as overbroad); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (Alito, J.) (policy banning "any unwelcome verbal … conduct which offends … an individual because of" protected characteristics was overbroad).

*Vagueness and Unbridled Discretion*: Due process requires laws to give adequate notice of what is prohibited and minimal guidelines for enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The First Amendment also forbids

laws that "delegate overly broad … discretion" to government officials or "allow[] arbitrary application," because "such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). But the Unwelcome Clause is vague because it fails to define words like "unwelcome" or "objectionable" and gives officials arbitrary power to enforce, as the examples above show.

Ignoring this, New York attacks Emilee's facial challenge because its law "unambiguously proscribes" her speech. MTD 25. But New York never specifies whether this conclusion applies to the Denial Clause, the Unwelcome Clause, or both. No matter, New York's argument does not bar vagueness challenges to laws that ban a "substantial amount of constitutionally protected conduct, particularly rights protected by the First Amendment." *Copeland v. Vance*, 893 F.3d 101, 111 (2d Cir. 2018) (cleaned-up). Nor does this argument apply when laws grant too much enforcement authority. *Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia*, 846 F.3d 391, 409-10 (D.C. Cir. 2017). So Emilee states plausible facial claims against the Unwelcome Clause.

## Conclusion

Emilee simply seeks the freedom to live consistent with her beliefs. Other courts and many states give artists and speakers the right to freely express their views. *See* Neb. et al. Br. New York does too for some speakers, just not Emilee. But New York's laws single out and ban Emilee's desired speech and let state officials pick and choose which messages to promote or punish as other states admit. *See* Mass. Br. The First Amendment doesn't tolerate this. Instead, speakers get to choose for themselves what to say and what not to say without the threat of civil or criminal penalties. The First Amendment guarantees Emilee that same choice. New York's motion to dismiss should be denied in full.

Respectfully submitted this 7th day of July, 2021.

By: s/ Jonathan A. Scruggs

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**Certificate of Service**

I hereby certify that on the 7th day of July, 2021, I electronically filed the foregoing document with the Clerk of Court and that the foregoing document will be served via the CM/ECF system on all counsel of record.

s/ Jonathan A. Scruggs
Jonathan A. Scruggs
*Attorney for Plaintiffs*

# EXHIBIT A

No. 19-1413

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

303 CREATIVE LLC and LORIE SMITH,

*Plaintiffs-Appellants,*

v.

AUBREY ELENIS, *et al.*,

*Defendants-Appellees.*

On Appeal from a Judgment of the United States District Court
for the District of Colorado (before the Hon. Marcia S. Krieger)
Case No. 1:16-cv-02372-MSK

# BRIEF OF AMICI CURIAE MASSACHUSETTS, CALIFORNIA, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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## INTERESTS OF AMICI

The *Amici* States—Massachusetts, California, Connecticut, Delaware, the District of Columbia, Hawai'i, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington—file this brief pursuant to Fed. R. App. P. 29(a)(2) because we share sovereign and compelling interests in protecting our residents and visitors from discrimination. Like Colorado, we support civil rights protections for LGBTQ people, including prohibitions on discrimination in places of public accommodation: the diners, stores, and other businesses that are part of daily life in a free society. Such public accommodations laws respond to the pervasive discrimination LGBTQ people have long suffered and continue to suffer today, ensuring equal enjoyment of goods and services and combatting the severe personal, economic, and social harms caused by discrimination.

The *Amici* States also share interests in upholding the rights protected by the First Amendment. We respect and do not seek to abridge the right to hold and express views regarding the nature of marriage, including views founded in religious faith. But neither the Free Speech Clause nor the Free Exercise Clause shields businesses from content-neutral, generally applicable civil rights laws like

the one 303 Creative LLC (together with its proprietor, Ms. Lorie Smith, "Appellants") proposes to violate.

Exempting businesses from public accommodations laws on the basis of the First Amendment would undermine the vital benefits these laws provide to residents and visitors. Many Americans would face exclusion from a host of everyday businesses or, at the very least, the ever-present threat that any business owner could refuse to serve them when they walk in the door—simply because of their sexual orientation, or their race, religion, or gender.

The *Amici* States therefore join Colorado in asking this Court to affirm the decision below.

## ARGUMENT

### I. States across the country have enacted laws to combat discrimination against LGBTQ people in public accommodations.

The States have sovereign and compelling interests in protecting their residents, and particularly members of historically disadvantaged groups, from the economic, personal, and social harms caused by invidious discrimination. *See Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984). Since the mid-nineteenth century, statutes focused on places of public accommodation have been a centerpiece of state efforts to combat discrimination. *See Romer v. Evans*, 517 U.S. 620, 627-28 (1996). These statutes have long been held constitutional as

*infra*. Twenty of those laws include terms similar to Colorado's provision barring advertising "that indicates . . . that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of" a protected characteristic. Colo. Rev. Stat. § 24-34-601(2)(a).[5] Prohibitions against discriminatory advertising are also commonly included in anti-discrimination measures directed at housing and employment. *See, e.g.*, 42 U.S.C. § 3604 (barring housing advertising that "indicates any preference, limitation, or discrimination based on" a protected characteristic); 42 U.S.C. § 2000e-3(b) (similar prohibition for employment advertisements).

## II. The First Amendment does not exempt businesses open to the public from state anti-discrimination laws.

There is no real dispute that Appellants' business plan to refuse services to LGBTQ customers would violate Colorado's anti-discrimination law: Appellants would "expand[] the scope of 303 Creative's services to include the design, creation, and publication of wedding websites" while categorically refusing to "create websites for same-sex marriages." App. 2-324 (¶ 77); *id.* 2-326 (¶ 91). An objection to two people of the same sex marrying cannot reasonably be divorced

[5] Of the list of twenty-two States' laws included in Table C, *infra*, only three States' public accommodations laws do not use similar "unwelcome" terms. *See* Mass. Gen. Laws ch. 272, § 92A; Mont. Code Ann. § 49-2-304(1)(b); Or. Rev. Stat. § 659A.409.

from the status of being LGBTQ. *See Christian Legal Soc. v. U.C. Hastings*, 561 U.S. 661, 689 (2010); *Lawrence v. Texas*, 539 U.S. 558, 583 (2003). Nor is it a defense to provide *other* graphic and web design services to LGBTQ people, *cf.* Appellants' Br. 32. Public accommodations laws exist to prevent not only outright exclusion, but also separate and unequal treatment. Otherwise, our country would be blighted by segregated businesses that serve in perniciously unequal ways, reserving some services only for customers who are members of preferred groups. *See Katzenbach v. McClung*, 379 U.S. 294, 296-97 (1964) (discussing restaurant that served African-American customers through a take-out window but refused to serve them in the dining area).

The First Amendment does not require permitting such unequal treatment by businesses that offer their services to the public. No matter the sincerity of a business owner's religious beliefs or other deeply held views, the Free Speech Clause does not allow a business to pick and choose its customers in violation of laws that prohibit discriminatory conduct. Nor does the Free Exercise Clause excuse a business from complying with neutral and generally applicable civil rights laws based on its owner's religious beliefs.

### A. State public accommodations laws do not violate the Free Speech Clause when applied to people with objections to serving LGBTQ customers.

The application of Colorado's content- and viewpoint-neutral public accommodations law to prevent a commercial business from denying the full and equal enjoyment of their services to LGBTQ customers does not violate the Free Speech Clause of the First Amendment.

#### 1. Prohibiting businesses from discriminating against customers does not compel speech.

Although the First Amendment prohibits States from "telling people what they must say" or requiring them to "speak the government's message," *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 61, 63 (2006) ("*FAIR*"), public accommodations statutes like Colorado's do neither.

Indeed, Colorado's public accommodations law does not regulate speech at all. In *FAIR*, the Supreme Court rejected the argument that a prohibition on law schools discriminating against military recruiters when providing campus access to outside employers regulated the law schools' speech. *Id.* at 60. The Court concluded that the prohibition regulated "conduct, not speech" given that "[i]t affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.*; *see also, e.g.*, *Meyers v. E. Okl. Cty. Tech. Ctr.*, 776 F.3d 1201, 1207-08 (10th Cir. 2015) (following *FAIR* in holding that

employee's act of disobeying employer's directive was not protected speech). That reasoning applies equally to this case. State anti-discrimination laws like Colorado's affect what public accommodations "must *do*"—provide equal access to LGBTQ people—"not what they may or may not *say*." *FAIR*, 547 U.S. at 60. In other words, Colorado's law does not require speaking or endorsing a government motto, pledge, or message. *See id.* at 62. Rather, the law simply prohibits refusing to "afford equal access" to the full range of a business's services to LGBTQ couples. *Id.* at 60.

Moreover, even assuming that creating and arranging for the hosting of wedding websites is a form of speech, Colorado law does not "compel" making websites or otherwise regulate the process of website development. Appellants are under no legal obligation to offer the creation of wedding websites as a service of the business, nor to produce websites in any particular way. Colorado law simply requires that businesses offering their services to the public make wedding websites for LGBTQ customers if, and to the extent that, they make wedding websites for other customers—just as under the Solomon Amendment at issue in *FAIR*, recruiting assistance involving "elements of speech" like posting notices of employer visits was "only 'compelled' if, and to the extent, the school" chose to assist "other recruiters." 547 U.S. at 61-62. This type of non-discrimination requirement is a "far cry" from laws "dictat[ing] the content of . . . speech." *Id.*

(distinguishing cases like *Wooley v. Maynard*, 430 U.S. 705 (1977)). As the Supreme Court noted in *FAIR* with an example apposite here, "prohibit[ing] employers from discriminating in hiring on the basis of race" does not compel speech, and "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).[6]

**2. The First Amendment does not protect advertisements giving notice that public accommodations will refuse service on the basis of a protected characteristic.**

Public accommodations laws' restrictions on discriminatory advertising do not violate the free speech rights of business owners who wish to post notices of their intent to deny services on the basis of a protected characteristic. As the District Court recognized with respect to Colorado's "Communications Clause," such advertisements may be prohibited for at least two reasons. App. 3-576-579.

[6] Public accommodations laws also leave businesses like 303 Creative free to disclaim any message they worry may be communicated by providing non-discriminatory service. So long as businesses treat all customers equally, they may, for example, create and disseminate a disclaimer stating that the provision of a service does not constitute an endorsement or approval of any customer or conduct. *See FAIR*, 547 U.S. at 64-65; *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 86-88 (1980).

First, to the extent the notices constitute commercial speech, they can be banned outright simply because they advertise unlawful, discriminatory activities. *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388-89 (1973) (employment discrimination ordinance validly prohibited newspaper from publishing sex-segregated employment advertisements).

Second, commercial speech doctrine aside, a state may prohibit such signs as part and parcel of, and incidental to, the public accommodations law's restriction on discriminatory conduct. Such laws in essence prohibit discriminatory refusals of service that are communicated preemptively in a notice, rather than only after service is requested by the customer. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("That is why a ban on race-based hiring may require employers to remove 'White Applicants Only' signs." (quoting *FAIR*, 547 U.S. at 62 (internal quotation marks omitted))); *cf. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977) ("If an employer should announce his policy of discrimination by a sign reading 'Whites Only' on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs."). Indeed, even the Eighth Circuit decision on which Appellants chiefly rely, *see* Br. 44, recognizes that, insofar as a state can constitutionally prohibit a discriminatory refusal to provide services, the state can also "forbid the [business owners] from advertising their intent to engage in discriminatory conduct."

Respectfully submitted,

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## CERTIFICATES OF COMPLIANCE AND SERVICE

## CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), because it contains 6,253 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman style, 14-point font.

/s/ Eric Gold
*Counsel of Record*

## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify to the following:

1. All required privacy redactions have been made per 10th Cir. R. 25.5.

2. If required to file hard copies, those documents will be an exact copy of the ECF submission.

3. The digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender Antivirus, most recently updated on April 29, 2020, and according to the program, it is free of viruses.

/s/ Eric Gold
*Counsel of Record*

**CERTIFICATE OF SERVICE**

I hereby certify that on April 29, 2020, I electronically filed the foregoing document with the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. All counsel of record are registered as ECF Filers and will be served by the CM/ECF system.

/s/ Eric Gold
*Counsel of Record*

# EXHIBIT B

| | |
|---|---|
| DISTRICT COURT, DENVER COUNTY, COLORADO<br>1437 Bannock Street<br>Denver, CO 80202 | DATE FILED: May 13, 2020 6:31 PM<br>FILING ID: 7AB1E497E5F57<br>CASE NUMBER: 2019CV32214 |
| **Plaintiff:** AUTUMN SCARDINA,<br>**v.**<br>**Defendants:** MASTERPIECE CAKESHOP INC. and JACK PHILLIPS | ↑ **COURT USE ONLY** ↑ |
| John M. McHugh, # 45456, jmchugh@rplaw.com<br>REILLY LLP<br>1700 Lincoln Street, Suite 2400<br>Denver, Colorado 80203<br>Phone: 303-893-6100 Fax: 303-893-6110<br><br>Paula Greisen, #19784, greisen@kinggreisen.com<br>KING & GREISEN LLP<br>1670 York St.<br>Denver, Colorado 80206<br>Phone: 303-298-9878<br><br>*Attorneys for Plaintiff Autumn Scardina* | Case No.: 2019CV32214<br><br>Div.: 275 Ctrm: |
| **AMENDED COMPLAINT** | |

Plaintiff Autumn Scardina states and alleges as follows:

## INTRODUCTION

1. This case concerns Masterpiece Cakeshop's and Mr. Phillips' continued discrimination against the LGBT community in violation of Colorado's Anti-Discrimination Act and the Colorado Consumer Protection Act. Specifically, Masterpiece Cakeshop and Mr. Phillips refused to sell a birthday cake to Ms. Scardina because she is transgender, despite repeatedly advertising that they would sell birthday cakes to the general public, including LGBT individuals.

2. In defending their prior, unlawful, decision to refuse to sell a wedding cake to a same-sex couple, Masterpiece Cakeshop and Phillips repeatedly represented and advertised to the public and to the courts of law (including the United States Supreme Court) that they would be happy to provide a variety of baked goods, including birthday cakes, to all members of the public, including LGBT individuals. Unfortunately, as this case shows, those representations and advertisements were false.

3. Instead, when Ms. Scardina ordered a birthday cake – one in a simple design that Defendants admit they would make for any other customer – Masterpiece Cakeshop and Mr. Phillips refused merely because Ms. Scardina is transgender.

4. Ms. Scardina therefore brings this lawsuit to vindicate her rights (and the rights of all the LGBT community) under Colorado's Anti-Discrimination Act ("CADA") and the Colorado Consumer Protection Act ("CCPA").

## PARTIES, JURISDICTION AND VENUE

5. Ms. Scardina is a resident of Arvada, Colorado.

6. Masterpiece Cakeshop Incorporated ("Masterpiece Cakeshop") is a Colorado corporation with its principal place of business in Lakewood, Colorado. Masterpiece Cakeshop is a business that is engaged in the sale of bakery goods to the public, including wedding cakes, birthday cakes, and cakes for other special occasions.

7. Jack Phillips is the owner and operator of Masterpiece Cakeshop and personally decides whether Masterpiece Cakeshop will refuse to do business with LGBT individuals. Upon information and belief, Mr. Phillips is a resident of Lakewood, Colorado.

8. The Court has jurisdiction over this matter under C.R.S. § 24-34-306 and C.R.S. § 6-1-103. Venue is proper in this Court because Defendants' refusal to sell Ms. Scardina a birthday cake in violation of CADA occurred, at least in part, in Denver. C.R.S. § 24-34-306. Similarly, a portion of the transaction involving Defendants' deceptive trade practice occurred in Denver. C.R.S. § 6-1-103.

9. As required by C.R.S. § 24-34-306, Ms. Scardina has exhausted all administrative remedies prior to instigating this action.

## GENERAL ALLEGATIONS

### Masterpiece Cakeshop Advertised on its Website and in the Media That It Would Be Happy to Make Birthday Cakes for LGBT Individuals

10. In July 2012, Masterpiece Cakeshop and Mr. Phillips refused to sell a wedding cake to a same-sex couple. Throughout the subsequent litigation and media campaign, Masterpiece Cakeshop and Mr. Phillips repeatedly declared they would be "happy" to sell other cakes to LGBT individuals, including specifically "birthday" cakes.

11. Ms. Scardina became aware of Masterpiece Cakeshop and Mr. Phillips because of the media campaign initiated by Masterpiece Cakeshop, Mr. Phillips and/or their counsel beginning in 2012. As further detailed below, this media campaign was designed, at least in part, to advertise, directly or indirectly, Masterpiece Cakeshop's business and to encourage the public, including the LGBT community, to purchase baked goods from Defendants. For example, in a July 22, 2015 video posted on USA Today (and linked from Masterpiece Cakeshop's website), Mr. Phillips stands before a number of cakes made by Masterpiece Cakeshop and identifies the location of the store and the types of baked goods that Defendants sell.

12. Masterpiece Cakeshop advertised on its website that it makes and sells birthday cakes. Ms. Scardina visited Masterpiece Cakeshop's website, including its pages dedicated to advertising birthday cakes, on multiple occasions prior to June 26, 2017.

13. Masterpiece Cakeshop's advertising regarding birthday cakes was directed to the general public, including the LGBT community. At no point during this relevant time did Masterpiece Cakeshop state that it would not provide birthday cakes for transgender individuals like Ms. Scardina.

14. On the contrary, between 2015 and June 26, 2017, upon information and belief, every page on Masterpiece Cakeshop's website included a "Donate" link. Masterpiece Cakeshop's website explained any donations were not for Masterpiece Cakeshop's legal fees, as its counsel was "covering [their] legal costs," but would be "considered sales." Masterpiece Cakeshop's "Donate" page further quoted Mr. Phillips as claiming that Masterpiece Cakeshop would make LGBT individuals "birthday cakes, shower cakes, or sell you cookies and brownies." Ms. Scardina visited Masterpiece Cakeshop's website on multiple occasions prior to June 26, 2017 and saw and reasonably relied upon its advertisements concerning Masterpiece Cakeshop's willingness to sell "birthday cakes" to the LGBT community.

15. As part of the above-mentioned media advertising campaign, in or around August 6, 2012, Phillips, speaking on behalf of himself and Masterpiece Cakeshop, told a reporter for Westword that the bakery is "happy" to supply LGBT customers with "birthday cakes and graduation cakes and everything else[.]"

16. In that same article, Mr. Phillips claims that the public attention created by Defendants' media campaign had resulted in an increase in Masterpiece Cakeshop's business, noting that they were "taking on four times the business it usually has this time of year[.]" Thus Defendants' plan to use the media attention to advertise their goods and to drive up their sales was working.

17. Further, the Westword article states that originally Mr. Phillips refused to speak to the paper, instead directing the paper to "make something up." Upon information and belief, Mr. Phillip's subsequent willingness to speak to Westword was tied to the realization that media coverage of the dispute increased Masterpiece Cakeshop's visibility, sales and revenue and his desire to advertise his company to the broader public through such media attention.

18. In or around August 6, 2012, Ms. Scardina read the Westword article and believed Defendants' advertisement that they would be "happy to supply gay customers with 'birthday cakes and graduation cakes and everything else[.]'" Consistent with its common usage, Ms. Scardina understood "gay customers" to indicate the greater LGBT community and not as a representation that Masterpiece Cakeshop would provide birthday cakes **only** to gay men and heterosexual/cisgender individuals.

19. Again, in or around January, 11, 2014, Ms. Scardina read an article from CRP news in which Mr. Phillips again advertised that Masterpiece Cakeshop would "make cakes" for LGBT people's "birthdays and sell them cookies and brownies." Again, Ms. Scardina reasonably believed this advertisement.

20. Similarly, in or around August 14, 2015, Mr. Phillips voluntarily sat for an interview on Fox Business in which he repeated the advertisement that Masterpiece Cakeshop would make birthday cakes for LGBT individuals, just not wedding cakes. That interview also includes video of Mr. Phillips decorating cakes and hugging customers as part of Defendants' goal of advertising Masterpiece Cakeshop's business and further advertised that Defendants treat "all [their] customers the same." Ms. Scardina saw this interview in or around the time it was aired and distinctly remembers Mr. Phillips using pink and blue frosting on one of the cakes he was decorating as those colors are significant to her. Around August 2015, Ms. Scardina heard and believed Mr. Phillips' advertisement that he would make birthday cakes for LGBT individuals and would treat all his customers the same.

21. Masterpiece Cakeshop and Mr. Phillips knowingly advertised their goods and services with the intent not to sell them, as advertised, to certain members of the public, namely the LGBT community. Masterpiece Cakeshop's claim that it was "happy" to sell the LGBT community birthday cakes was irrelevant to the complaint filed against it. Instead, upon information belief, the purpose of the statements on Masterpiece Cakeshop's website and as part of its media campaign was to advertise to and to convince and induce the broader community, including the LGBT community, directly or indirectly, to purchase baked goods from Masterpiece Cakeshop.

22. Masterpiece Cakeshop and Phillips also use "bait and switch" advertising by publicly advertising that they would sell baked goods, including birthday cakes, to the general public including the LGBT community, but then refused to sell those goods and provide those services to Autumn Scardina because of her status as a transgender woman.

Masterpiece Cakeshop Refused to Sell a Birthday Cake
to Ms. Scardina because of Her Status as a Transgender Female

23. Hopeful that Defendants' repeated advertisements that they would sell birthday cakes to the LGBT community were true, on June 26, 2017, Ms. Scardina called Masterpiece Cakeshop from Denver to order a birthday cake for her upcoming birthday.

24. The phone was answered by an employee of Masterpiece Cakeshop.

25. Ms. Scardina asked if Masterpiece Cakeshop made birthday cakes and was assured they did.

26. Ms. Scardina informed Masterpiece Cakeshop that her birthday was quickly approaching and was assured there was sufficient time to prepare a cake.

27. Masterpiece Cakeshop asked how many people the cake would need to serve and when told it would be 6-8 people, confirmed that they could accommodate that size.

28. Ms. Scardina informed Masterpiece Cakeshop that she wanted a pink cake with blue frosting. Again, Masterpiece Cakeshop assured her they could make that cake.

29. Ms. Scardina then informed Masterpiece Cakeshop that the requested design had personal significance for her because it reflects her status as a transgender female.

30. After Ms. Scardina identified herself as transgender, Masterpiece Cakeshop stated that they did not make cakes for "sex changes." Ms. Scardina explained to Masterpiece Cakeshop that the cake was for her birthday celebration and not a "sex change" celebration. Masterpiece Cakeshop again stated that they "do not make cakes for that" and terminated the call.

31. Unsure of whether the call has been disconnected or whether Masterpiece Cakeshop had merely hung up on her, Ms. Scardina called again.

32. A different employee answered the phone and Ms. Scardina stated that she was trying to order a pink cake with blue icing.

33. Masterpiece Cakeshop claimed that making such a cake violated their religious beliefs and refused to take Ms. Scardina's order. Again, the call was terminated by Masterpiece Cakeshop.

Proceedings before the Civil Rights Division

34. On July 21, 2017, Ms. Scardina filed a discrimination charge against Masterpiece Cakeshop and Mr. Phillips with the Colorado Civil Rights Division ("CCRD").

35. The CCRD initiated an investigative proceeding and on June 28, 2018, the CCRD found probable cause that Masterpiece Cakeshop and Mr. Phillips violated CADA.

36. On August 14, 2018, Masterpiece Cakeshop and Mr. Phillips filed a separate lawsuit in federal court against the head of the CCRD and other individuals.

37. On October 9, 2018, the Colorado Civil Rights Commission ("Commission") filed a Notice of Hearing and Formal Complaint against Masterpiece Cakeshop and Mr. Phillips based on their refusal to sell a birthday cake to Ms. Scardina.

38. Upon information and belief, on or about March 4, 2019, the Commission, Masterpiece Cakeshop and Mr. Phillips agreed to a settlement whereby Masterpiece Cakeshop and Mr. Phillips would voluntarily dismiss their federal lawsuit in exchange for the Commission dismissing their action against Masterpiece Cakeshop and Mr. Phillips.

39. On March 22, 2019, the Commission formally closed the charge of discrimination against Masterpiece Cakeshop and Mr. Phillips and determined that Ms. Scardina had exhausted all administrative remedies required under C.R.S. § 24-34-306. As the Attorney General's office explained, the Commission's decision "does not affect the ability of Autumn Scardina, the complainant in the state administrative case, to pursue a claim on her own."

40. Throughout both the federal and administrative law proceedings, Mr. Phillips for himself and on behalf of Masterpiece Cakeshop, confirmed that they would happily make the exact same cake requested by Ms. Scardina for other customers.

**FIRST CLAIM FOR RELIEF**
Violation of Colorado Anti-Discrimination Act C.R.S. § 24-34-600 *et seq.*
(Masterpiece Cakeshop and Phillips)

41. Ms. Scardina incorporates all other paragraphs of this Complaint.

42. Masterpiece Cakeshop is a place of public accommodation as defined by C.R.S. §24-34-601 because it is a place of business engaged in sales to the public.

43. Mr. Phillips is a person as defined by C.R.S. § 24-34-601. As the owner of Masterpiece Cakeshop, Mr. Phillips is responsible for providing the full and equal enjoyment of its goods and services to the public regardless of transgender status.

44. Masterpiece Cakeshop, at the direction of Phillips, refused to sell a birthday cake to Ms. Scardina because of her status as a transgender woman.

45. Before learning she is transgender, Masterpiece Cakeshop had agreed to make and sell a pink birthday cake with blue frosting to Ms. Scardina. It was only upon learning of her status as a transgender woman that Masterpiece Cakeshop refused to sell her a birthday cake.

46. Masterpiece Cakeshop and Mr. Phillips have admitted they would sell a cake with the precise design requested by Ms. Scardina to other customers who were not transgender.

**SECOND CLAIM FOR RELIEF**
Deceptive and Unfair Trade Practices in Violation of C.R.S. § 6-1-101, *et seq.*
(Masterpiece Cakeshop and Mr. Phillips)

47. Defendants' repeated representations and advertisements that they would be "happy" to sell birthday cakes to LGBT individuals were false at the time they were made.

48. Defendants' made these representations and advertisements in the course of their business and with the intent to encourage consumers to purchase baked goods from them.

49. Defendants widely publicized that they would sell baked goods, including birthday cakes, to the public, including the LGBT community. Defendants' refusal to sell these goods and provide these services as advertised had and continues to have a negative and significant impact on the public as actual or potential consumers of Defendants' baked goods. Defendants' refusal to serve Plaintiff based on her gender identity and Defendants' widespread media campaign to legitimize its discriminatory conduct also has a significant harmful impact on the citizens of Colorado, who have determined that it is the public policy of this State to protect the rights and dignity of all its citizens, including the LGBT community.

50. Due to Defendants' deceptive trade practices, Ms. Scardina experienced illegal discrimination when, believing these representations and advertisements to be true, she ordered a birthday cake from Defendants who then refused to supply the cake because of her status as a transgender female.

51. Ms. Scardina suffered actual damages as a result of Defendants' false representations.

## PRAYER FOR RELIEF

Wherefore, Ms. Scardina requests the following relief:

A. Judgement in her favor and against Defendants on all claims;

B. Damages in an amount to be proven at trial;

C. Exemplary damages;

D. Payment of any civil penalty authorized by Colorado law;

E. Statutory and moratory interest;

F. Reasonable attorneys' fees and costs; and

G. Any additional legal or equitable relief that the Court deems just and proper.

## JURY DEMAND

Ms. Scardina demands a jury on all issues so triable.

Dated this 13th day of May, 2020.

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| STATE OF COLORADO<br>COLORADO CIVIL RIGHTS COMMISSION<br><br>AUTUMN SCARDINA,<br>Complainant,<br><br>v.<br><br>MASTERPIECE CAKESHOP INCORPORATED and JACK PHILLIPS,<br>Respondents. | ▲ COURT USE ONLY ▲<br><br>Charge No. CP2018011310<br><br>Case Number: CR 2018_____ |
|---|---|

**NOTICE OF HEARING AND FORMAL COMPLAINT**

**YOU ARE HEREBY NOTIFIED** pursuant to § 24-34-306(4) C.R.S., that a hearing will be held before an Administrative Law Judge at 9:00 a.m. on **Monday February 4, 2019** on the fourth floor at the Office of Administrative Courts, 1525 Sherman Street, Denver, Colorado 80203, to determine whether Respondents violated § 24-34-601 *et seq.*, C.R.S. (2018) by denying Complainant Autumn Scardina (Scardina) the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations at its place of public accommodation because of Scardina's sexual orientation (transgender status).

Pursuant to the authority set forth in §§ 24-34-305(1)(d) and 24-34-306(4), C.R.S. (2018), the Colorado Civil Rights Commission (Commission), having determined that the circumstances warrant a hearing, hereby charges and alleges as follows:

1. Respondent, Masterpiece Cakeshop Incorporated (Masterpiece or "the bakery"), is a bakery that engages in sales of goods and services to the public. Masterpiece is a place of public accommodation as defined by § 24-34-601(1), C.R.S., and is therefore subject to the jurisdiction of the Commission.

2. Respondent, Jack Phillips (Phillips) is the owner and operator of Masterpiece, and is a person as defined by §24-34-301(5)(a), C.R.S. As Masterpiece's owner, Phillips is responsible for providing the full and equal enjoyment of its goods and services to the public regardless of protected class, and is therefore subject to the jurisdiction of the Commission.

3. Timeliness and all other jurisdictional and procedural requirements of title 24, article 34, parts 3 and 4 have been satisfied.

4. Upon information and belief, on June 26, 2017, Scardina contacted Masterpiece by telephone to order a cake to celebrate her birthday. Scardina asked if the bakery sold made-to-order birthday cakes. The individual on the phone answered in the affirmative and asked for the date of her birthday. Scardina responded that it was on July 6th and asked if that would be enough time to make the cake. Masterpiece's representative indicated that that the bakery could accommodate that timing.

5. Upon information and belief, Scardina requested a cake with a blue exterior and a pink interior, and indicated that she would need a cake big enough to serve 6-8 people.

6. Upon information and belief, Masterpiece's representative stated that the bakery would make the cake as requested by Scardina. Scardina then mentioned that the design was a reflection of the fact that she had transitioned from male to female and that she had come out as transgender on her birthday. Masterpiece's representative then stated that the bakery would not make the cake as requested by Scardina because it does not make cakes to celebrate a sex-change and terminated the call.

7. Upon information and belief, Scardina called Masterpiece back and spoke to a different individual about the exchange that took place during her initial call and confirmed that the cake she had ordered was to celebrate her birthday. Masterpiece's representative responded that the bakery would not make a cake for Scardina and terminated the call.

8. On July 20, 2017, Scardina filed a charge of discrimination with the Colorado Civil Rights Division alleging that Respondents discriminated against her in a place of public accommodation based on her sex (female) and/or sexual orientation (transgender status).

9. During the Colorado Civil Rights Division's investigation of the charge, Phillips affirmed his employees' decision to not fulfill Scardina's order, and cited his religious beliefs as the reason why the bakery would not do so.

10. Upon information and belief, the bakery sells made-to-order birthday cakes to non-transgendered individuals.

11. On June 28, 2018, following the investigation, the Division Director's authorized designee found probable cause for crediting the allegations of the charge

that Masterpiece discriminated against Scardina in a place of public accommodation based on her sexual orientation (transgender status).

12. As required by § 24-34-306)(2)(b)(II), C.R.S. (2018), the Division Director's authorized designee ordered the parties to attempt amicable resolution of the charge by compulsory mediation.

13. Upon information and belief, efforts to resolve the matter amicably through the ordered mediation have been unsuccessful.

14. On October 2, 2018, the Commission voted to notice this matter for a hearing and to file this formal complaint.

15. The Commission alleges that Masterpiece denied service to Scardina based on her sexual orientation (transgender status), as defined by § 24-34-301(7), C.R.S. (2018), in a violation of § 24-34-601(2)(a), C.R.S. (2018).

16. The Commission further alleges that Masterpiece is not a place that is principally used for religious purposes, as contemplated by § 24-34-601(1), C.R.S. (2018).

The Commission seeks the following relief:

1. That Masterpiece and Phillips be ordered to allow Scardina and all customers that seek goods and services from the bakery, the full use and enjoyment of the goods, services, facilities, privileges, advantages, and/or accommodations of this place of public accommodation, regardless of their sexual orientation.

2. That Masterpiece and Phillips be ordered to cease and desist their practices of discriminating against persons based on their sexual orientation and to immediately discontinue their policy and practice of refusing to provide goods and services to persons due to their sexual orientation.

3. That Masterpiece and Phillips be ordered to adopt a corrective policy which will allow Scardina and other similarly situated persons the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations provided by the bakery regardless of their sexual orientation.

4. That Masterpiece and Phillips be ordered to report to the Commission all remedial action taken to eliminate the discriminatory practices until such time as it has been established that all discriminatory practices have ceased.

5. That Masterpiece and Phillips be ordered not to retaliate against Scardina in any way.

6. That Masterpiece and Phillips be ordered to provide any other relief which may be available to Scardina by virtue of operation of law and any other relief the Commission deems just and proper.

Masterpiece and Phillips may file a verified answer prior to the date of the hearing. The hearing will be conducted pursuant to sections 24-34-306 and 24-4-105, C.R.S. (2018). Failure to answer the complaint at hearing may result in entry of default judgment against Masterpiece and Phillips.

Dated this 4th day of October, 2018.

BY THE COMMISSION:

COMMISSIONER

## CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **NOTICE OF HEARING AND FORMAL COMPLAINT** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 9 day of October, 2018 addressed as follows:

Autumn Scardina
7779 Everett Way
Arvada, CO 80005

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Jacob Warner, Esq.
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By interdepartmental mailing services, copies were sent to:

Matthew Azer
Director/Chief ALJ
Office of Administrative Courts
1525 Sherman St, 4th Floor
Denver, CO 80203

Michelle Brissette Miller
First Assistant Attorney General
Employment/Personnel & Civil Rights Unit
Civil Litigation & Employment Law Section
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Denver, CO 80203

By Hand Delivery for filing on October 9, 2018:

Office of Administrative Courts
1525 Sherman St, 4th Floor
Denver, CO 80203

Adriana Carmona