22-75

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EMILEE CARPENTER, LLC D/B/A EMILEE CARPENTER PHOTOGRAPHY and EMILEE CARPENTER,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

On Appeal from the United States District Court for the Western District of New York, Case No. 6:21-CV-06303

BRIEF OF AMICI CURIAE STATES OF NEBRASKA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINIA IN SUPPORT OF APPELLANTS AND REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE

Amici curiae are the States of Nebraska, Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Oklahoma, South Carolina, South Dakota, Texas, Utah, and West Virginia. We submit this brief in support of Appellants pursuant to States' authority under Fed. R. App. P. 29(a)(2) to file amicus briefs "without the consent of the parties or leave of court."

Amici raise two important interests in this case. First, we seek to ensure that courts affirm the limited constitutional constraints placed on public-accommodation laws. Those laws are important tools to eliminate specific kinds of invidious discrimination. But the First Amendment's Free Speech Clause forbids States from using public-accommodation laws to compel the expression of citizens who create custom speech for a living. Amici States do not want to violate the constitutional rights of individuals and their businesses, and thus they desire to see courts continue to recognize this narrow constraint on public-accommodation laws.

Second, amici have an interest in courts properly establishing the contours of compelled-speech protection in the public-accommodation context. That protection applies here because Carpenter's custom wedding photographs are her speech and she objects to the messages that would be communicated through her photographs of same-sex marriages. The compelled-speech doctrine is irrelevant to other sales involving the

"innumerable goods and services that no one could argue implicate" speech. *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1728 (2018). Given this and other limitations on compelled-speech protection that are explained in this brief, a ruling for Carpenter would be "sufficient constrained" to ensure that States are still able to effectively enforce their public-accommodation laws. *Id.*

SUMMARY OF ARGUMENT

Plaintiff Emilee Carpenter, LLC and its owner Plaintiff Emilee Carpenter (collectively Carpenter) shoot, select, edit, and produce custom photographs for clients. One aspect of Carpenter's work is that she creates images telling the stories of clients' weddings. She does this because she wants to celebrate what she believes to be God's design for marriage—the uniting of a husband and a wife. And a corollary of her beliefs, which the Supreme Court has called "decent and honorable," *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015), is that she cannot create images celebrating same-sex weddings, though she otherwise serves LGBT customers.

New York interprets its public-accommodation law to forbid this. In its view, photographers who commemorate opposite-sex marriages must do the same for same-sex marriages, and refusing to do so subjects them to civil fines up to $100,000 and possible criminal prosecution. By taking this approach, New York has gone astray, for the First Amendment prohibits States from forcing individuals, including people who create

custom speech for a living, to speak in favor of same-sex marriage. Indeed, numerous courts have affirmed that very point. *E.g.*, *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019) (State cannot compel wedding videographer); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019) (City cannot compel artist who crafts custom wedding invitations); *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cty. Metro Gov't*, 479 F. Supp. 3d 543 (W.D. Ky. 2020) (City cannot compel wedding photographer).

The freedom against compelled speech applies in this case because Carpenter's custom wedding photographs are her constitutionally protected speech. Those images—which Carpenter carefully selects, edits, and compiles—tell the story of the wedding day from her perspective, and they do so better than words can. Because she speaks through her wedding photography, New York cannot force her to address the topic of same-sex marriage.

While compelled-speech protection applies to this specific application of New York's public-accommodation law, that happens only in limited commercial circumstances. Compelled-speech protection is implicated when, as here, a business owner creates custom speech for her clients, a prospective client requests custom speech, and the owner declines because she objects to the message that the speech would express. The compelled-speech doctrine is thus irrelevant to sales involving the "innumerable goods and services that no one could argue implicate"

speech. *Masterpiece Cakeshop*, 138 S. Ct. at 1728. Nor, under existing Supreme Court precedent, does that First Amendment protection apply when a (1) public-accommodation law has only an incidental effect on speech, (2) a business owner objects merely to hosting or providing a forum for another's speech (rather than to altering her own speech), or (3) a business owner flatly refuses to work for a protected class of people. Given these crucial limitations on compelled-speech protection, a ruling for Carpenter would be "sufficiently constrained" to ensure that States are still able to effectively enforce their public-accommodation laws. *Id.*

New York cannot prevail because it cannot satisfy the particularized strict-scrutiny analysis that applies in this case. The State lacks a compelling interest in forcing a creator of custom speech like Carpenter to express messages promoting same-sex marriage. The district court failed to consider this particularized interest, preferring instead to analyze New York's generalized interest in preventing sexual-orientation discrimination by businesses that provide goods and services. But under the more focused analysis that case law requires, New York cannot demonstrate a compelling interest.

Nor can New York establish narrow tailoring. Other States, including the amici States, already refrain from compelling speech, and that has not sacrificed their ability to enforce their public-accommodation laws. Also, many States, including New York, allow other important exemptions to their public-accommodation laws with no ill effects. All

this proves that New York can respect the compelled-speech rights asserted here without compromising its nondiscrimination goals.

The compelled-speech doctrine protects the freedom and intellectual integrity of people on all sides of polarizing issues. Just as it prevents the State from forcing Carpenter to speak in favor of same-sex marriage, it forecloses attempts to compel a lesbian photographer to create promotional photographs commemorating a religious event opposing same-sex marriage. But if the Constitution does not protect Carpenter, it does not shield the lesbian photographer either. Thus, by ruling for Carpenter, the Court ensures freedom of speech for all.

ARGUMENT

I. The First Amendment generally forbids States from compelling speech.

"Compelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command" and is "universally condemned." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018). That rule against compelled speech forbids New York from forcing its citizens to express messages they deem objectionable or from punishing them for declining to express such messages. *E.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795–801 (1988) (fundraisers cannot be forced to disclose the percentage of money that they give to their clients); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20–21 (1986)

(*PG&E*) (plurality opinion) (business cannot be forced to include another's speech in its mailing); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (citizens cannot be forced to display state motto on license plate); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (newspaper cannot be forced to print politician's writings); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (students cannot be forced to recite pledge or salute flag). Not even public-accommodation laws, as important as they are, can override this freedom. *E.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572–73 (1995) (parade organizers cannot be forced to include LGBT group's message); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (Boy Scouts cannot be forced to keep leader who contradicts group's messages).

The right to be free from compelled speech protects each person's conscience by shielding "the sphere of intellect" and the "individual freedom of mind." *Wooley*, 430 U.S. at 714–15. It ensures that the government cannot force individuals to be "instrument[s] for fostering public adherence to an ideological point of view [they] find[] unacceptable." *Id.* at 715. And it protects "individual dignity," *Cohen v. California*, 403 U.S. 15, 24 (1971), because "[f]orcing free and independent individuals to [express] ideas they find objectionable"—to "betray[] their convictions" in that way—"is always demeaning," *Janus*, 138 S. Ct. at 2464.

The Supreme Court's decision in *Hurley* demonstrates that public-accommodation laws must occasionally give way to freedom of expression. There, the organizers of Boston's St. Patrick's Day Parade qualified as a public accommodation because they invited members of the public to participate in their parade and accepted nearly every group that applied. *Hurley*, 515 U.S. at 562. Despite allowing LGBT people to participate as individuals, the organizers declined an LGBT advocacy group's request to march as a distinct contingent behind a banner. *Id.* at 572. They did so because of a "disagreement" with the group's message rather than an "intent to exclude homosexuals as such." *Id.*; *see also Dale*, 530 U.S. at 653 (organizers in *Hurley* did not exclude LGBT group "because of their [members'] sexual orientations," but because of what the group expressed "march[ing] behind a . . . banner").

The Massachusetts courts held that the parade organizers had engaged in unlawful discrimination and ordered them to include the LGBT group. *Hurley*, 515 U.S. at 561–65. But on appeal, the Supreme Court unanimously reversed. *Id.* at 581. It explained that the State applied its public-accommodation law "in a peculiar way," *id.* at 572, effectively declaring the parade organizers' "speech itself to be the public accommodation" and requiring them to alter their expression to accommodate "any contingent of protected individuals with a message," *id.* at 573. This violated the First Amendment right of speakers "to choose

the content of [their] own message," *id.*, and decide "what merits celebration," even if those choices are "misguided" or "hurtful," *id.* at 574. In short, *Hurley* establishes that States cannot apply public-accommodation laws to force individuals engaged in expression to alter what they communicate.

II. The First Amendment's freedom against compelled speech protects Carpenter's wedding photography.

The First Amendment's freedom against compelled speech applies in this case because Carpenter's wedding photographs are speech. "[T]he Constitution looks beyond written or spoken words as mediums of expression," *Hurley*, 515 U.S. at 569, and protects artistic expression. To qualify for First Amendment protection, artistic expression must convey some message, but it need not express a "succinctly articulable" or "particularized message." *Id.*

Consistent with these principles, the Supreme Court has repeatedly recognized that photographs are speech protected by the First Amendment. *E.g.*, *United States v. Stevens*, 559 U.S. 460, 468 (2010) (visual depictions "such as photographs" are protected "expression"); *Kaplan v. California*, 413 U.S. 115, 119–20 (1973) ("[P]ictures . . . have First Amendment protection"). This Court has likewise acknowledged that "photographs . . . are entitled to full First Amendment protection." *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996).

This makes sense. Pictures, after all, are some of the most effective "molders of opinion." W. Eugene Smith, *Photographic Journalism*, *Photo Notes* 4 (1948), *reprinted in Photographers on Photography*, 103, 104 (Nathan Lyons ed., 1966). They "trigger outrage" and "send messages of humor, happiness, and beauty" "in a way that words [often] can't." *Chelsey Nelson Photography*, 479 F. Supp. 3d at 557.

Carpenter's wedding photographs are no exception. They are undeniably expressive. She photographs "the wedding ceremony," including "the officiant delivering the homily, the couple exchanging vows, the couple kissing and embracing before the attendees, and the officiant announcing the couple." JA 29; *see also* JA 98. She also captures images of "the bride and her wedding party as they prepare for the ceremony." JA 98. And "[i]f the wedding has a reception," Carpenter "photograph[s] special moments from the reception such as the father-daughter dance, the mother-son dance, toasts, and the couple cutting their wedding cake." *Id.* In short, these images tell the story of the wedding day, and they do so far better than words can.

Not only are these wedding photographs speech, but also Carpenter (not just her clients) is speaking through the images. Her role in creating the speech is protected under the First Amendment. In fact, the Supreme Court has long held that businesses and individuals are constitutionally protected speakers when they create expression, even if the message originates with others and the business earns money for speaking. *E.g.*,

Riley, 487 U.S. at 795–98 (fundraisers paid to recite customers' messages are speakers); *Tornillo*, 418 U.S. at 258 (newspapers compiling others' writings are speakers); *see also Hurley*, 515 U.S. at 570 ("First Amendment protection [does not] require a speaker to generate, as an original matter, each item featured in the communication.").

"Protected artistic expression frequently encompasses a sequence of acts by different parties, often in relation to the same [item]. The First Amendment protects the artist who [creates] a piece just as surely as it protects" those who request it. *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015); *accord Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010). That is why tattooists who draw images that customers request, *id.*; *Buehrle*, 813 F.3d at 976; and "[p]ublishers" who "disseminat[e] the work of others" are protected by the First Amendment, *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 925 (6th Cir. 2003); *see also Hurley*, 515 U.S. at 574 (mentioning "professional publishers").

Stated differently, speech is not "a mantle[] worn by one party to the exclusion of another." *Buehrle*, 813 F.3d at 977. It "frequently encompasses . . . different parties." *Id.* The Supreme Court's decision in *Riley* demonstrates this. There, charities and the fundraisers who worked for them challenged a law requiring the fundraisers to speak unwanted messages about the charities. Although the fundraisers were speaking on the charities' behalf, the Court recognized the fundraisers' "independent

First Amendment interest in the speech." *Riley*, 487 U.S. at 794 n.8. The same is true here. Carpenter has an independent First Amendment interest in the photographs she creates for her clients.

That Carpenter is engaged in expression through her wedding photography is not up for debate. She decides which scenes to capture and which images to finalize, JA 31, 98–99, 104–07; and those choices ultimately determine the messages that her photographs express. For instance, a smiling flower girl stuffing her mouth with cake sends a much different message than a tearful embrace between a bride and her mother. It is Carpenter's decisions when to push the button on her camera and what captured images to discard that dictate which messages her photographs express.

Carpenter's editing work also determines the messages she conveys through her wedding photos. JA 31, 108–09. For example, a picture of the couple kissing with the ringbearer sticking out his tongue in the background sends a playful and humorous message. But cropping that image to omit the ringbearer and focus on the couple's kiss transforms the message to one of romance and love. It is the wedding photographer's editing that determines which message that image will convey.

And perhaps most importantly of all, Carpenter intends to express messages through the wedding images she creates. She seeks to "positively depict the beauty, commitment, intimacy, and love" embodied in the couple's union. JA 103; *see also* JA 28, 33. And she strives to

"communicate[] the love, intimacy, and sacrifice of God's design for marriage," JA 28, 108, which she believes is reflected only in a union "between one man and one woman," JA 35, 95. Were she to celebrate and positively depict a same-sex marriage through her images, she would be conveying through her photographs messages about marriage that are "contrary to [her] religious beliefs." JA 35, 122.

Because Carpenter is engaged in expression, New York cannot force her to create images that express messages about marriage contrary to her faith. Yet New York construes its public-accommodation law to require precisely that—backed by threat of "civil fines . . . up to $100,000" and possible "criminal penalties." JA 1122. That is compelled speech, pure and simple.

III. Only in narrow circumstances do commercial applications of public-accommodation laws implicate compelled-speech protection.

Public-accommodation laws "do not, as a general matter, violate the First or Fourteenth Amendments," *Hurley*, 515 U.S. at 572, which means that "most applications of antidiscrimination laws . . . are constitutional," *Chelsey Nelson Photography*, 479 F. Supp. 3d at 564. It is only in narrow circumstances that commercial applications of public-accommodation laws implicate compelled-speech protection. Specifically, that protection applies when, as here, a business owner creates custom speech for clients, a prospective client requests custom speech, and the owner declines because she objects to the message that the speech would communicate.

This protection implicates few business transactions because only a small percentage of commercial exchanges revolve around the creation of custom speech. The vast majority of transactions—clothing stores selling attire, landscaping companies mowing lawns, gas stations selling fuel, health clubs offering memberships, repair shops fixing cars, and restaurants selling sandwiches, to name just a few—will have no basis to claim compelled-speech protection. *See Masterpiece Cakeshop*, 138 S. Ct. at 1728 (recognizing that there are "innumerable goods and services that no one could argue implicate the First Amendment"). Even among wedding vendors, many of them—such as "the tailor for the tux," "the makeup artist," "the manicurist," "the travel agent for the honeymoon," and others—do not create speech for their customers. *Chelsey Nelson Photography*, 479 F. Supp. 3d at 558 n.118 (mentioning these as possible examples).

Moreover, an application of a public-accommodation law that only incidentally affects speech does not give rise to a First Amendment violation. *See Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006) (*FAIR*) (finding no constitutional violation because the "compelled speech" at issue was "plainly incidental to the . . . regulation of conduct"). So if a grocery-store employee objects to serving certain customers because she does not want to be forced to talk to them, that does not present a compelled-speech problem. Conversing with a customer is incidental to the sale of groceries, and groceries are not speech.

Here, however, there is nothing incidental about the speech that New York compels. It is the heart of the transaction between Carpenter and her wedding clients. The essence of what she does for those clients is to create photographs telling the story of their wedding. If she withheld that speech, there would be nothing left.

Nor does existing Supreme Court compelled-speech precedent shield a public accommodation that objects merely to "provid[ing] a forum for a third party's speech." *Masterpiece Cakeshop*, 138 S. Ct. at 1744–45 (Thomas, J., concurring) (discussing *FAIR*, 547 U.S. at 60–65, and *Prune-Yard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980)). Compelling a public accommodation to host another's speech is a far cry from "forc[ing] speakers to alter their *own* message," as New York does. *Id.* at 1745; *accord Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 n.10 (2008) (forcing the "[f]acilitation of speech" is unlike the compelled "co-opt[ing]" of a person's "own conduits for speech"); *Telescope Media*, 936 F.3d at 758 ("Rather than serving as a forum for the speech of others, [a wedding videographer's] videos will carry their 'own message.'").

Finally, the compelled-speech doctrine applies only when the compelled speaker objects to the message communicated through her expression. *See Hurley*, 515 U.S. at 580 (noting the absence of compelled-speech protections when allegedly compelled speakers do not "object[] to the content"); *PG&E*, 475 U.S. at 12 (plurality opinion) (same). Thus, if a

photographer flatly refuses to work for a protected class of people, regardless of the message that her images would convey, she would find no refuge in compelled-speech principles. This, of course, does not describe Carpenter at all. While she cannot celebrate same-sex weddings through her photography because of the messages that her images would express about marriage, she otherwise "create[s] photographs for gay [and] lesbian clients, such as LGBT business owners seeking branding photography." JA 124.

In sum, the compelled-speech protection that Carpenter seeks is limited, and a ruling for her would not be "a license to discriminate." *Chelsey Nelson Photography*, 479 F. Supp. 3d at 564. Indeed, even the district court recognized that "[f]or the vast majority of businesses, the obligation to serve a customer pursuant to antidiscrimination legislation does not implicate a cognizable First Amendment interest." JA 1135.

IV. New York cannot satisfy strict scrutiny.

Strict scrutiny is the appropriate constitutional standard in this case because New York applies its public-accommodation law to compel speech and it applies that law in a content-based manner. Yet New York cannot satisfy that stringent standard for the reasons explained below.

A. Strict scrutiny is the appropriate standard.

Strict scrutiny generally applies when States apply their public-accommodation laws to compel speech. *See Hurley*, 515 U.S. at 575 (distinguishing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), which

"applied only intermediate scrutiny"); *Dale*, 530 U.S. at 659 (acknowledging that *Hurley* "applied traditional First Amendment analysis" rather than intermediate scrutiny); *see also PG&E*, 475 U.S. at 19–20 (plurality opinion) (applying strict scrutiny in a case of compelled speech).

This is especially true here because New York applies its public-accommodation law based on the content of Carpenter's speech. It is Carpenter's decision to create photographs commemorating weddings between a husband and a wife that triggers the demand to photograph same-sex unions. *See Turner*, 512 U.S. at 653 (explaining that the law in *Tornillo* was content based because the obligation to speak was "triggered" by the content of the compelled speaker's prior expression). That sort of content-based application of New York's law demands strict scrutiny. *Telescope Media*, 936 F.3d at 753 (explaining that Minnesota's public-accommodation law "exacts a penalty on the basis of the content of speech" by treating videographers' "choice to talk about one topic—opposite-sex marriages—as a trigger for compelling them to talk about a topic they would rather avoid—same-sex marriages") (quotation marks omitted).

Compelled speech is among the worst of all free-speech violations. *Id.* at 752 (recognizing that "the right to refrain from speaking" is "perhaps . . . more sacred" than "the right to speak freely"). In fact, the Supreme Court has recognized that compelled speech is "always

demeaning" and that, to justify it, the government must point to "even more immediate and urgent grounds than a law demanding silence." *Janus*, 138 S. Ct. at 2464 (quotation marks omitted). Accordingly, strict scrutiny should be applied with rigor under these circumstances.

Under strict scrutiny, New York must show that requiring Carpenter to photograph same-sex weddings "[1] furthers a compelling interest and [2] is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015). But New York cannot satisfy either of these requirements.

B. New York does not have a compelling interest in forcing Carpenter to create speech expressing messages that violate her religious beliefs.

Strict scrutiny requires a particularized analysis. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) ("The [government] states [its] objectives at a high level of generality, but the First Amendment demands a more precise analysis."). That demanding level of scrutiny "look[s] beyond broadly formulated interests justifying the general applicability of government mandates" to see whether its standard "is satisfied through application of the challenged law" to "the particular" party. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). As *Hurley* illustrates, the analysis here focuses not on the public-accommodation law's general purpose of preventing "denial[s] of access to (or discriminatory treatment in) public accommodations," but on its "apparent object" when "applied to [the] expressive activity" at

issue. 515 U.S. at 578. Put differently, the question "is not whether [New York] has a compelling interest in enforcing its non-discrimination [laws] generally, but whether it has such an interest in denying an exception to [Carpenter]" in particular. *Fulton*, 141 S. Ct. at 1881.

New York, therefore, must show that it has a compelling interest in forcing Carpenter to violate her conscience by creating photographs that celebrate same-sex weddings. Unlike most applications of New York's public-accommodation law, this has the "apparent object" of forcing a wedding photographer to create speech and thus to "modify the content of [her] expression." *Hurley*, 515 U.S. at 578. But as *Hurley* said, permitting that would "allow exactly what the general rule of speaker's autonomy forbids." *Id.* New York thus cannot satisfy strict scrutiny because its particularized interest—namely, its interest in forcing Carpenter to engage in expression that she deems objectionable—is not compelling.

New York's interest in protecting the dignity of patrons does not change the analysis. *Hurley* established that this kind of concern, no matter its strength in other contexts, is *not* a compelling state interest when the harm is caused by a decision not to express a message. "[T]he point of all speech protection," *Hurley* explained, "is to shield just those choices of content that in someone's eyes are . . . hurtful." *Id.* at 574. Because the offensiveness of a decision to refrain from speaking cannot be the reason both "for according it constitutional protection" and for removing that protection, *Texas v. Johnson*, 491 U.S. 397, 409 (1989),

these dignitary concerns are not a compelling basis for infringing this First Amendment freedom. *See Masterpiece Cakeshop*, 138 S. Ct. at 1746–47 (Thomas, J. concurring) (collecting cases).

Another portion of the *Hurley* opinion is instructive on this point. The LGBT group there argued that the public-accommodation law advanced the State's "compelling interest" of "deter[ring] the deprivation of personal dignity." Brief for Respondent at 22, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995). But the Court necessarily rejected that interest as sufficient to compel speech when it concluded that no "legitimate interest [had] been identified" to justify requiring speech. *Hurley*, 515 U.S. at 578.

The district court's compelling-interest analysis is flawed because it characterized the relevant state interest at "a high level of generality." *Fulton*, 141 S. Ct. at 1881. The court broadly framed New York's interest as "ensuring that individuals, without regard to sexual orientation, have equal access to publicly available goods and services." JA 1138 (quotation marks omitted). But it should have focused, as we did above, specifically on the State's interest in compelling speech from wedding photographers such as Carpenter. *See Fulton*, 141 S. Ct. at 1881; *Hurley*, 515 U.S. at 578.

Notably, when the district court narrowed its analysis to business owners who create custom speech for a living, it suggested that their "unique goods and services are where public accommodation laws are

most necessary." JA 1148 (quoting *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1181 (10th Cir. 2021), *cert. granted in part*, No. 21-476, 2022 WL 515867 (U.S. Feb. 22, 2022)) (emphasis added). This has it exactly backward. States have the strongest interest in ensuring access to *essential* goods and services—not custom artistic creations. New York's legislature recognizes this—stating its intent to use its public-accommodation law to target "prejudice" that has "severely limited or actually prevented access to . . . *basic necessities of life*." 2002 Sess. Law News of N.Y. Ch. 2, § 1 (A. 1971) (emphasis added). States' interest in forcing business owners to create custom art is much less significant and of questionable constitutional legitimacy. The district court thus erred in elevating that goal to an impenetrable interest of the highest order.

The district court also dismissed *Hurley*'s guidance because that case involved nonprofit parade organizers rather than "a commercial transaction between proprietor and customer." JA 1144. Yet *Hurley* itself recognized that "the fundamental rule . . . that a speaker has the autonomy to choose the content of his own message" is "enjoyed by business corporations generally," 515 U.S. at 573–74, including for-profit speakers that collaborate with others on the "item[s] featured in the[ir] communication[s]," *id.* at 570. Nothing in *Hurley* suggests that the constitutional analysis transforms simply if money changes hands. On the contrary, the Supreme Court has affirmed that "the degree of First Amendment protection *is not diminished* merely because the . . . speech is sold rather than

given away." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) (emphasis added). It cannot be that "the commercial nature of [Carpenter's] business does not diminish [her] speech interest," yet that "same commercial nature allows [New York] to regulate it." *303 Creative*, 6 F.4th at 1203 n.8 (Tymkovich, C.J., dissenting).

C. The experiences of other States prove that New York cannot establish narrow tailoring.

To satisfy narrow tailoring, a State must demonstrate that it has no "less restrictive alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). But Amici States can attest that less restrictive alternatives exist. The most obvious is that New York can continue to apply its public-accommodation law to the vast majority of commercial transactions but refrain from applying it to force its citizens to create custom speech expressing messages that they deem objectionable. *See 303 Creative*, 6 F.4th at 1204 (Tymkovich, C.J., dissenting) ("[The State] could allow artists—those who are engaged in making expressive, custom art—to select the messages they wish to create").

Recent history has proven that observing this constitutionally required restriction on public-accommodation laws is a workable alternative. Existing circuit-level precedent already prohibits some States from applying their public-accommodation laws to compel a business owner to create custom speech, and no evidence suggests that the enforcement of those laws has been compromised in those States. For example, it has

been clear for well over two years that the States in the Eighth Circuit cannot apply their public-accommodation laws to force businesses to create custom speech. *See Telescope Media*, 936 F.3d at 758 (holding that a public-accommodation law cannot force a videographer to create films commemorating same-sex marriages). Despite this, Eighth Circuit States like Nebraska have not had any difficulty continuing to protect their citizens against invidious status-based discrimination.

More generally, other narrow exemptions to States' public-accommodation laws have not hampered enforcement efforts. Consider a few examples. For decades, Nebraska's public-accommodation law has exempted "private club[s]." Neb. Rev. Stat. § 20-138. And for the last five years, Mississippi has exempted businesses that "decline[] to provide . . . [p]hotography" services for "the solemnization, formation, [or] celebration" of same-sex marriages because their owners believe that "[m]arriage is . . . the union of one man and one woman." Miss. Code. Ann. §§ 11-62-3(a) & 11-62-5(5)(a); *see also 303 Creative*, 6 F.4th at 1204 (Tymkovich, C.J., dissenting) ("Or [the State] could exempt . . . artists who create expressive speech about or for weddings, as Mississippi does."). These exemptions are part of States' efforts to balance their goal of eradicating specific forms of invidious discrimination with other important interests. That States have had these kinds of statutory exemptions for many years with no ill effects proves that recognizing the narrow compelled-speech protection discussed above will not sacrifice public-accommodation laws.

Even New York has shown that narrow exemptions to its public-accommodation law do not harm the law's effectiveness. For over a decade, New York has exempted from liability religious entities that decline "to provide services" and "goods"—even publicly available goods and services—"for the solemnization or celebration" of same-sex marriage. N.Y. Dom. Rel. Law § 10-b(1). Yet this exemption has not thwarted the State's ability to enforce its public-accommodation law.

The district court was "not persuaded" that New York can allow business owners who create speech for a living to decline when asked for custom expression they deem objectionable. JA 1148. It reasoned that same-sex wedding customers cannot get "the *same* photographs" Carpenter would have produced and so New York must compel all creators of "unique goods and services" to "ensur[e] equal access." *Id.* This reasoning is deeply flawed. It paradoxically invokes "the very quality that gives [Carpenter's] art value—its expressive and singular nature—to cheapen it." *303 Creative*, 6 F.4th at 1204 (Tymkovich, C.J., dissenting). The court essentially held that "the *more* unique a product, the more aggressively the government may regulate access to it—and thus the *less* First Amendment protection it has. This is, in a word, unprecedented." *Id.*

Notice the district court's sleight of hand when moving from its compelling-interest discussion to narrow tailoring. For a compelling interest, it identifies the generic interest in "ensuring that individuals,

without regard to sexual orientation, have equal access to publicly available goods and services." JA 1138 (quotation marks omitted). It needed this broad framing because, as explained above, a particularized interest in forcing Carpenter to create speech she deems objectionable is not compelling. Yet the district court's narrow-tailoring analysis focuses specifically on access to Carpenter's photography rather than goods and services in general. JA 1148. The court cannot have it both ways.

The key question is not whether protecting Carpenter's speech rights will "undermine . . . the State's purpose" in a marginal way, JA 1148, but whether New York has shown that "its non-discrimination [laws] can brook no departures" for Carpenter, *Fulton*, 141 S. Ct. at 1882. New York has not made that showing. As mentioned, many amici States apply their public-accommodation laws to allow business owners to decline to create custom speech, and they have seen no ill effects. New York can do the same. Also, New York has demonstrated that it can permit exemptions from its public-accommodation laws to protect First Amendment values. Just as the State respects free-exercise rights by allowing religious organizations to decline requests for goods and services that celebrate same-sex marriage, *see* N.Y. Dom. Rel. Law § 10-b(1), New York can respect free-speech rights by allowing creators of custom speech to decline requests to express messages they deem objectionable.

The district court supported its narrow-tailoring analysis by "imagin[ing] the problems created where a *wide range* of custom-made services" are unavailable to customers celebrating same-sex marriages. JA 1148 (quoting *303 Creative*, 6 F.4th at 1181) (emphasis added). This reasoning fails on two fronts.

First, it is not enough to "imagine" that "a wide range" of custom wedding photography services will be unavailable for same-sex weddings. Evidence must support it—a mere "predictive judgment" "will not suffice." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799–800 (2011). This Court should thus reject the speculative and unsupported slippery-slope concern that many local business owners will follow in Carpenter's footsteps. *E.g.*, *Gonzales*, 546 U.S. at 435–36 (rejecting the government's "slippery-slope" argument that "[i]f I make an exception for you, I'll have to make one for everybody, so no exceptions"); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 732 (2014) (rejecting the government's argument about "a flood of religious objections" because it "made no effort to substantiate [its] prediction"). Judges must not "assume a plausible, less restrictive alternative would be ineffective." *Playboy*, 529 U.S. at 824.

Second, it is unreasonable to "imagine" that droves of business owners will decline services for same-sex weddings. An overwhelming majority of the population supports same-sex marriage. *See* Justin McCarthy, *Record-High 70% in U.S. Support Same-Sex Marriage*, Gallup (June 8, 2021), https://bit.ly/3tBAeFZ. And many people who do not

support same-sex marriage are nonetheless willing to provide services for it. Also, strong "[m]arket forces . . . discourage" business owners from declining customers' requests. *Att'y Gen. v. Desilets*, 636 N.E.2d 233, 240 (Mass. 1994). This is particularly true given the harassment, boycotts, and reprisals that many businesses face when they decline to help celebrate same-sex weddings. *See* Brief of Amici Curiae Law and Economics Scholars at 16–18, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). Speculating that people seeking services for same-sex marriages in New York will be relegated to an inferior market is simply unsupportable. The district court's narrow-tailoring analysis is thus unpersuasive from top to bottom.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment dismissing Carpenter's case and remand with instructions to enter the preliminary injunction that Carpenter requested.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2022, this brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(a)(5) and Local Rule 29.1(c) because, excluding the portions exempted by Fed. R. App. P. 32(f), this brief contains 5,989 words.

This brief also 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 14-point Century Schoolbook font.

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