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

REPLY BRIEF OF APPELLANTS

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

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

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

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Like most artists, Emilee Carpenter serves everyone; she just cannot promote messages that contradict her core beliefs. Because Emilee believes marriage is the union of one man and one woman, she cannot promote different views through her custom photography and blogs. But New York's laws compel Emilee to do exactly that, contrary to her faith, while they also forbid Emilee from publicly explaining the religious reasons for her content choices. At this stage, New York has no evidence to justify this immense trespass on Emilee's freedom of mind.

With no evidence from the State, the district court upheld New York's laws under strict scrutiny based on a new tailoring theory that New York never proposed. In its view, the government can *always* compel a unique artist's speech. But that rule is as dangerous as it is novel. It threatens all speakers—from poets who identify as gay to mainstream newspapers, from liberal speechwriters to conservative filmmakers. Not even New York defends this.

If left to stand, the ruling below would undermine the free-speech and free-exercise rights of every commissioned speaker in New York. A state that can compel Emilee can compel the artist who identifies as gay, too. This Court should reverse the lower court, allow Emilee's suit to proceed, and order an injunction to issue.[1]

[1] This Court should not delay resolving this appeal. *Accord* NY.Br.2n.1.

ARGUMENT

I. Emilee plausibly alleged that New York's laws violate her free-speech, expressive-association, and religious-exercise rights.

Emilee plausibly alleged that New York's laws (A–C) compel and restrict her speech based on its content and viewpoint; (D) alter her expression by compelling association; (E) punish her religious beliefs; and (F) require her to participate in religious ceremonies she objects to.

A. The Accommodations and Discrimination Clauses compel Emilee's speech.

Emilee plausibly alleged that the Accommodations and Discrimination Clauses must pass strict scrutiny because they directly compel her speech—(1) not her conduct, (2) not speech incidental to conduct, and (3) not her client's speech. Nothing changes even though Emilee (4) sells her photographs and blogs. And (5) Emilee's theory draws clear boundaries.

1. The Clauses compel Emilee's speech, not her conduct.

As Emilee alleged, and the district court assumed, New York's laws compel her to speak against her conscience through her photographs and blogs. New York counters that its laws "regulate conduct" not speech. NY.Br.26; Cnty.Br.4. Not so. New York's same-service rule targets Emilee's speech. Emilee.Br.12–14 (explaining rule).

And while New York focuses on Emilee's photographs, the rule applies equally to Emilee's blogs because she always includes them to clients as a "complimentary" service. JA.26, 32; *Sullivan v. BDG Media, Inc.*, 146 N.Y.S.3d 395, 402 (Sup. Ct. 2021) (applying law to website that offered readers free content). For that reason, New York's laws treat Emilee's photographs and blogs—her pure speech—as public accommodations. JA.40, 1136–37.

Hurley v. Irish-America Gay, Lesbian & Bisexual Group of Boston proves the point. 515 U.S. 557 (1995). The public-accommodation law there did not target speech "on its face" but applied in a "peculiar way" to the parade organizers' "speech itself." *Id.* at 572–73. *Accord Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000) (similar when law "interfere[d] with" expressive "choice[s]").

Applying *Hurley*'s logic here—and its undisputed three-part test for compelled speech, Emilee.Br.23–24—leads to the same result. The district court agreed. JA.1135–37. No one disputes that Emilee's photographs and blogs are speech. Emilee.Br.24–25; NY.Br.31 (wedding photographs convey "a joyful affair."). And New York's laws require Emilee "to produce" same-sex "wedding photographs … that she would not otherwise choose to create." NY.Br.24. That is compelled speech.[2] *Hurley*, 515 U.S. at 573–75; Emilee.Br.26–27 (collecting cases).

[2] The County (Cnty.Br.3) whispers *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003). But that case lacks speech "compulsion." *Id.*

Put differently, although New York's laws typically and facially target "conduct," *their application* "alter[s]" Emilee's "expressive content," *Hurley*, 515 U.S. at 572–73, and are "trigger[ed]" by Emilee "communicating a message," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). So strict scrutiny applies. *Id.* (distinguishing *United States v. O'Brien*, 391 U.S. 367 (1968)); *Dale*, 530 U.S. at 659 (same).

Indeed, courts frequently apply strict scrutiny to otherwise conduct-focused laws in this situation. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1917–18 (2021) (Alito, J., concurring) (listing examples); *Cohen v. California*, 403 U.S. 15, 18 (1971) (breach of peace law unlawful as applied to words on jacket); *Cantwell v. Connecticut*, 310 U.S. 296, 303–07 (1940) (same as to playing record).

New York ignores these cases and clings to a lonely outlier: *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013). But *Elane* made New York's mistake by confusing facial validity with as-applied constitutionality. The *Elane* court overlooked how the public-accommodation law affected photographs' content by focusing only on how the law typically regulated the photography studio's "business operation." *Id.* at 66–68. That oversight conflicts with *Hurley*. *See Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 916–17 (Ariz. 2019);

---

at 91.

Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't, 479 F. Supp. 3d 543, 558 (W.D. Ky. 2020).

Properly focusing on how New York's laws regulate Emilee's speech—not her conduct—undercuts New York's other arguments. For example, New York denies that its laws "dictate what message" Emilee conveys. NY.Br.30. But the same-service rule compels Emilee to create photographs and blogs celebrating same-sex weddings if she does so for opposite-sex weddings. NY.Br.30; Emilee.Br.26. That indisputably changes the message. It's irrelevant that the laws don't also control how Emilee captures "color, lighting, posing, and emotion." NY.Br.30. The law in *Hurley* didn't orchestrate the parade float's color, size, or shape. But it still unlawfully "require[d] speakers to modify the content of their expression." 515 U.S. at 578.

Next, New York says its equal-access rules "dictate what an entity must *do* rather than what it must *say*," citing *Rumsfeld v. FAIR*, 547 U.S. 47 (2006). NY.Br.22. But *FAIR*'s equal-access policy merely required schools to host recruiters. The schools were "not speaking when they host[ed]." 547 U.S. at 64–65. *FAIR* took care to distinguish between compelling access to non-expressive property (like empty rooms) and compelling access to speech (like parades and newspapers). *Id.* at 63. Under *FAIR*, equal-access rules are unconstitutional when they "affect[]" speech or "interfere[] with a speaker's desired message." *Id.* at 63–64. New York's laws do both here. So *FAIR* supports Emilee's

claim. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 n.10 (2008) (distinguishing *FAIR* from situation where someone was forced "to reproduce another's speech" or have their speech conduits "co-opt[ed]").

2. The Clauses regulate Emilee's constitutional speech, not speech incidental to illegal conduct.

New York's laws directly compel Emilee's speech by requiring her to create photographs and blogs celebrating same-sex weddings "that she would not otherwise choose to create." NY.Br.24. Even so, New York relies on cases where the government burdened speech as an incidental byproduct of legitimate conduct regulations. Those cases are distinguishable. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 1013 (2016) (distinguishing speech-integral-to-illegal-conduct cases from cases like Emilee's "where speech itself violates a ban on conduct").

For example, in *FAIR*, law schools had to host military recruiters and therefore also had to send factual emails. 547 U.S. at 61–62. But those emails were incidental to hosting—i.e., speech necessary to effectuate some other conduct (hosting) the government could require. That makes sense. Governments can require factual speech to effectuate legally compelled conduct.

Governments can also restrict speech that threatens illegal conduct. That's what happened in *Jews for Jesus, Inc. v. Jewish*

Community Relations Council of New York, Inc., 968 F.2d 286 (2d Cir. 1992). There, New York's laws punished unprotected conduct "designed to secure an unlawful objective"—an economic boycott. *Id.* at 297. Because the laws properly regulated some illegal and constitutionally unprotected conduct, they could regulate speech integral to that conduct.

As applied to Emilee though, New York's laws operate differently. They require her to do more than input cold facts—she must create custom works positively depicting same-sex weddings. JA.42; Eugene Volokh, *The Law of Compelled Speech*, 97 Tex. L. Rev. 355, 392 (2018) (distinguishing factual emails from emails containing "expressions of opinion"). And far from regulating conduct like hosting or boycotts, New York's same-service rule *only regulates speech* when applied to Emilee's photographs and blogs. *See, e.g.*, NY.Br.24, 30 (laws require Emilee to "photograph same-sex weddings if she photographs opposite-sex weddings"). There is no conduct to which that speech is incidental *to*. New York converts Emilee's photographs and blogs themselves into "public accommodations." That's improper, as *Hurley* said.

3. The Clauses compel Emilee's speech, not her clients' speech.

New York's laws compel Emilee's speech, even though she works with couples to create photographs and blogs.

Emilee retains "full editorial control" over her artwork. JA.28, 33. She curates the content. JA.28–30. *See also* JA.103–11. She rejects objectionable requests. JA.33. And she alone makes final decisions about how best to portray the couple in a positive and romantic way to upliftingly reflect God's design for marriage. JA.28, 33. So New York is wrong to suggest that the couple dictates "the content of the photographs." NY.Br.31.

This control makes it irrelevant that Emilee collaborates with others to create her speech. Speakers need not "generate, as an original matter, each item featured in the communication." *Hurley*, 515 U.S. at 570. After all, the First Amendment protects cable operators and newspapers disseminating third-party content. *Id.* at 570–71; Neb.Br.10–11. Emilee does even more—she creates the speech herself to craft "visual narratives" celebrating opposite-sex marriages. JA.27.

Nor does Emilee's right to speak her message about marriage turn on whether the public would think Emilee's artwork conveys her personal beliefs. *Compare* NY.Br.30–31 *with Frudden v. Pilling*, 742 F.3d 1199, 1204–05 (9th Cir. 2014). If it did, New York could compel Democrat ghostwriters to write biographies for Donald Trump. As this illogical result shows, third-party perceptions are sufficient, not necessary, for compelled speech. That's why the state cannot force drivers to display license-plate mottos or require newspapers to publish editorials even though no one would attribute those views to the driver

or newspaper. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *id.* at 721 (Rehnquist, J., dissenting) (complaining majority never discussed whether drivers "would be considered to be advocating … views"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). *Accord Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.* (*PG&E*), 475 U.S. 1, 6–7, 15 n.11 (1986) (plurality) (finding compelled speech even with "disclaimer" of compelled "messages").

In any event, Emilee's photographs and blog posts about same-sex weddings "would likely be perceived" as coming from her "customary determination" that messages supporting same-sex weddings were "worthy of presentation and quite possibly of support as well." *Hurley*, 515 U.S. at 575. Emilee chooses her projects. People know it. JA.32. So third-party perceptions help Emilee here.

4. The Clauses compel Emilee's speech even if she operates on commission.

New York's laws compel Emilee's speech even though she operates her business for a profit. But New York says compelled speech is just the cost "of doing business." NY.Br.28.

That's wrong. *Hurley* held that even public-accommodation laws cannot compel "business corporations generally," "professional publishers," or parades that charge for admission to speak—like the parade in *Hurley* itself. 515 U.S. at 574; Emilee.Br.45–46 (citing *Hurley* state court opinion discussing fees). Even generally applicable tort laws

cannot be applied to punish a business's magazine parodies sold for money. *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56–57 (1988). This explains why courts regularly protect for-profit entities like filmmakers, photographers, newspapers, and internet companies from laws that compel speech. Emilee.Br.46 (collecting cases).

New York does not even try to distinguish these cases. Instead, it blames Emilee for "sell[ing] her expressive services to the public," suggesting that she should limit herself to hobby, private, or "stage[d]" photography. NY.Br.29. But that restricts Emilee's speech in new ways by pressuring her to leave the public square and preventing her from using her public business to "persuade viewers" that opposite-sex marriage "should be pursued and valued." JA.34. New York cannot force Emilee to "opt to change [her] message" or "refrain from speaking altogether." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 739 (2011).

New York's theory gives Emilee a take-it-or-leave-it choice. She can decline to create messages that contradict her faith by forgoing "the privilege of doing business in New York" or keep that privilege by forsaking her faith. NY.Br.28. That's like saying public-school students must say the pledge because they can attend private school or drivers must display ideological mottos because they can take the bus. *Contra* NY.Br.29. The First Amendment does not tolerate this choice; speech is speech whether public, private, paid, or pro bono. *See Riley v. Nat'l*

Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795–96, 801 (1988) (fundraiser); *Tornillo*, 418 U.S. at 249, 254–58 ("big business" newspapers); *PG&E*, 475 U.S. at 5–8 (utility company).

5. Emilee's theory is workable; New York's threatens all speakers.

Emilee's test—the same one the Supreme Court applied in *Hurley*—provides workable boundaries for determining when public-accommodation laws compel speech. *See* Emilee.Br.23–24; Neb.Br.12–15.

New York and some amici, though, say this test creates "line-drawing problems" between speech and conduct. *See* NY.Br.50; Mass.Br.23; Amalgamated.Br.4–10. But courts have "long drawn" this "line." *NIFLA v. Becerra*, 138 S. Ct. 2361, 2373 (2018). *See* Emilee.Br.27 (collecting cases). They do so by asking if a work objectively "communicate[s] ideas" and comparing it to other protected mediums. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011). Even in "difficult" cases, parsing the distinction is necessary lest "all visual expression" be placed beyond "the First Amendment's protective arm." *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996). *See* Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. Chi. L. Rev. 873, 884 (1993) (defending "speech/conduct line").

In any event, the line is clear here. Emilee's photographs and blogs are speech. Emilee.Br.24–25. That distinguishes this case from

amici's examples—hotels, pools, gun ranges, hairdressers, and the like. New York can require fast food restaurants, hardware stores, and factories to "transact with customers." NY.Br.27. Hot dogs, hammers, and heavy machinery aren't speech. So the state can more freely regulate those products. Emilee's photographs and blogs communicate ideas, and Emilee need not create all messages requested.

That raises another point—Emilee happily "transacts with customers" regardless of their status. JA.36–38. That practice contrasts with amici's hypotheticals about photographers refusing to photograph women, Muslims, or other protected groups. Those involve per-se status refusals to serve entire groups. Emilee does no such thing. She only objects to the message, not the person. JA.36–38, 122–25.

Another limiting feature is that New York can enact "generally applicable economic regulations"—like tax laws, health regulations, and labor codes—because those don't normally affect expression. *Contra* NY.Br.26–27 (cleaned up). *Cf. Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (antidiscrimination law could apply to law firm's hiring decisions because firm never showed that its "expression" rights "would be inhibited"). Laws can regulate business's conduct—tattoo artists must follow health rules. But they cannot regulate the content of custom-made expression—tattoo artists need not create all tattoos.

On the other side, New York's theory has no limits. It's a speech black hole with a strong gravitation pull. After all, New York defines

public accommodations "broadly." NY.Br.5. And its logic would allow compelling a commissioned LGBT website designer to create websites promoting the Westboro Baptist Church, a black t-shirt designer to design shirts saying "Our Lives Matter More" for a white supremacist march, and countless other unacceptable outcomes. Emilee.Br.57. Emilee's approach is better. Under it, speakers may decline to speak messages that violate their conscience while antidiscrimination laws may prohibit discriminatory conduct that have nothing to do with speech.

B. The Accommodations and Discrimination Clauses compel Emilee's speech, not conduct, because of its content and viewpoint.

Emilee plausibly alleged that the Accommodations and Discrimination Clauses trigger strict scrutiny because they compel her speech based on content and viewpoint. *Reed v. Town of Gilbert*, 576 U.S. 155, 164–65 (2015). New York admits that the Clauses do so in the four ways Emilee described. Emilee.Br.32–33. They (1) alter Emilee's speech, NY.Br.24 (Emilee must create content she "would not otherwise … create"); (2) are triggered by Emilee's speech choices, NY.Br.30 (Emilee must "photograph same-sex weddings if she photographs opposite-sex weddings"); (3) award unique access based on viewpoint, NY.Br.46 (noting Emilee "may be the only photographer whose work suits" the

"taste" for a same-sex wedding); and (4) disfavor Emilee's views on marriage by permitting only opposing views, NY.Br.30, 60–61.

Even so, New York says that Emilee's decision to offer public services—not her speech—trigger the laws. NY.Br.34. That's wordplay. The newspaper's decision to publish select op-eds triggered *Tornillo*'s right-of-reply statue. 418 U.S. at 256. If the newspaper never published any op-eds, the law wouldn't have applied. But the law was still content-based—it forced the newspaper to publish some op-eds because the newspaper chose to publish others. So too here. The laws force Emilee to photograph and blog about same-sex weddings *only because* she does so for opposite-sex weddings.

Relatedly, New York's same-service rule forces Emilee to develop content *celebrating* same-sex weddings. Emilee's photographs and blogs always depict weddings positively. JA.27–29, 33. So Emilee must positively depict same-sex weddings to provide her services on "equal terms." That distinguishes Emilee from a landscape photographer. *Contra* NY.Br.34–35; ACLU.Br.14. New York's laws do not regulate the *content* of landscape photographs—such photographers need not develop deep blue sea images if they shoot clear blue skies. But New York's laws force Emilee to create images and text celebrating same-sex weddings because she does so to celebrate opposite-sex weddings. That distinction turns on content.

New York's remaining arguments repeat the County's incorrect assumption that the laws regulate conduct because they are facially neutral. NY.Br.32–33; Cnty.Br.4. Although New York cites *Turner Broadcasting System, Inc. v. F.C.C.* for this, the must-carry provisions there were "content neutral in application"—they depended "only on the operator's channel capacity." 512 U.S. 622, 644, 655 (1994). So the operators could not avoid the rules "by altering the[ir] programming." *Id.* at 644. But Emilee can avoid photographing same-sex weddings by declining all wedding photography. NY.Br.34, 44. The must-carry provisions also were not "activated by any particular message" and did not force operators to "alter their own message." *Turner*, 512 U.S. at 655. As explained, New York's laws do both here.

Christian Legal Society v. Martinez offers no more help. 561 U.S. 661, 695 (2010). *Contra* NY.Br.32. The "all-comers" policies there regulated conduct (membership access), facially and as-applied. Not so here. So New York's citations miss the mark.

C. The Accommodations, Discrimination, and Publication Clauses restrict Emilee's speech about protected activities, not about unprotected conduct.

Emilee plausibly alleged the Accommodations, Discrimination, and Publication Clauses trigger strict scrutiny because they are content-and-viewpoint-based restrictions. *Reed*, 576 U.S. at 164–65.

Rather than dispute this, New York retreads old ground, saying they regulate conduct. NY.Br.36; Cnty.Br.5. That's wrong. *Supra* §§ I.A–B.

Shifting gears slightly, New York claims it can restrict Emilee's speech because it proposes "unlawful conduct." NY.Br.36; Cnty.Br.5. Wrong again. The First Amendment protects Emilee's editorial discretion, so she can explain her religious reasons for that discretion. Emilee.Br.35–36 (explaining this principle); JA.1150 (explaining intertwinement). New York can no more ban Emilee's editorial statements than it can forbid parades from posting guidelines that prohibit floats from promoting certain content.

Nor does this logic jeopardize laws banning speech about *illegal* and constitutionally *unprotected* activities. Buffer zone restrictions unrelated to demonstrators' content and bans on discriminatory housing and employment advertisements still stand. *Contra* NY.Br.27–28, 35. But here, the laws wrongfully prohibit speech proposing activities protected by the Constitution.

D. The Accommodations and Discrimination Clauses alter Emilee's desired messages by forcing association.

Emilee plausibly alleged the Accommodations and Discrimination Clauses trigger strict scrutiny because they interfere with her expressive association in two ways. Emilee.Br.36–37.

First, the Clauses compel Emilee to associate with messages about marriage contrary to those she promotes elsewhere. Emilee.Br.37. New York counters that Emilee did "not allege" clients "intend to express a message" about marriage. NY.Br.54. But, as New York recognizes, couples only ask for wedding photographs to communicate that their wedding "was a joyful affair." NY.Br.31. That allegation permeates the complaint. JA.27–28, 32–33. And Emilee blogs about weddings "to allow the couple to associate" with her business. JA.32.

Second, the Clauses compel Emilee to work with others to create content celebrating same-sex weddings. Emilee.Br.37. New York says this is a non-issue because Emilee works with couples "on a time-limited basis." NY.Br.54. That makes no difference. Even sexennial political campaigns for Senate seats still receive protection. *Krislov v. Rednour*, 226 F.3d 851, 860–61 (7th Cir. 2000) (protecting Senate candidate's associational freedoms). Emilee's association also extends past the nuptials as her blogs remain on her website. JA.32.

More broadly, New York denies that Emilee can expressively associate as a "commercial business." NY.Br.54. But neither *Dale* nor *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) limited this right to non-profits. The *Roberts* concurrence *criticized* the majority for hindering states' ability to regulate "access to commercial opportunities." *Id.* at 632 (O'Connor, J., concurring in part). And expressive association depends on free speech, which protects for-profit businesses. § I.A.4. So

expressive association can sometimes protect for-profit businesses too. *IDK, Inc. v. Clark Cnty.*, 836 F.2d 1185, 1194 (9th Cir. 1988) (listing publishers, newspapers, and others as right-holders); *Green v. Miss United States of Am.*, LLC, 533 F. Supp. 3d 978, 995–96 (D. Or. 2021) (protecting for-profit beauty pageant).

E. The Accommodations, Discrimination, and Publication Clauses punish Emilee for her religious beliefs.

Emilee plausibly alleged that New York's laws trigger strict scrutiny because they are not generally applicable. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

New York concedes that laws lack general applicability if they treat religious activities worse than secular comparators or permit individualized exemptions. NY.Br.57–58. But New York misapplies these standards.

Start with comparability. That depends on the government's interests. Emilee.Br.39. New York claims an interest in ending discrimination by ensuring some "groups have equal access" to goods and services and preventing dignity harm. NY.Br.17; JA.988. New York says that "exempting a single business" undermines this "goal." NY.Br.46.

But New York then exempts sex and gender-identity discrimination for "bona fide" reasons. N.Y. Exec. Law § 296(2)(b);

Lukumi, 508 U.S. at 542–46. Assuredly, this exemption may be justified by "unique policy considerations." NY.Br.60. But if New York can offer "bona fide" exemptions for sex and gender-identity discrimination without undermining its access or dignity interests, then it must offer a comparable exemption for Emilee's faith. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam).

Next, New York says the text of its laws have no individualized exemptions. NY.Br.60. But "[a]part from the text, the effect of a law in its real operation is strong evidence of its object." *Lukumi*, 508 U.S. at 535. Colorado's public-accommodations law lacked general application when it required a religious cake artist—but not secular ones—to create custom cakes conveying messages he disagreed with regardless of its text. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1730–31 (2018).

New York's laws repeat the same problem. Some artists, parades, and organizations can decline to create messages; businesses can make business-related refusals; physicians can make medical-related referrals. NY.Br.51n.8, 60; Emilee.Br.38. Emilee cannot. New York can only respond that its laws "define certain conduct as not being discrimination." NY.Br.60. But that's the point. Some may decline services for secular reasons because that's "*not* discrimination." NY.Br.61. Meanwhile, New York says Emilee discriminates by declining to create photographs and blogs with messages about

marriage that she would not create for anyone. These unwritten polices create a "formal mechanism" for disfavoring Emilee. *Fulton*, 141 S. Ct. at 1879.

New York also criticizes Emilee for not identifying an example of it approving secular-based objections to celebrating same-sex marriage. NY.Br.58–59. But that's not necessary. Emilee.Br.39. And New York has now provided comparable examples anyway. New York admits that parades and the Boy Scouts have valid, secular-based objections to promoting homosexuality. NY.Br.51n.8. These exemptions are especially damaging because New York thinks that giving "First Amendment protection [to non-profits] would be even more harmful than according such protection to strictly commercial organizations." Br. of N.Y., et al. as Amici Curiae in Supp. of Resp't, at *20, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99–699), 2000 WL 339875. That New York exempts parades, Boy Scouts, and other secular artists, but not Emilee, proves the laws lack general applicability.[3]

[3] By contrast, amici cite cases involving vaccine policies that were (mostly) generally applicable. *Contra* AU.Br.15–16. But one arbitration policy lacked general application because it allowed discretionary exemptions, just like the laws here.

F. The Accommodations and Discrimination Clauses force Emilee to participate in religious ceremonies under New York's same-service rule.

Emilee plausibly alleged strict scrutiny applies because the Accommodations and Discrimination Clauses coerce Emilee to participate in religious ceremonies. *Lee v. Weisman*, 505 U.S. 577, 595–96 (1992) (rejecting "considerable" interest in prayers at graduation).

New York counters that its laws do not obligate Emilee to attend religious ceremonies. NY.Br.63; Cnty.Br.8. Instead, New York faults Emilee for opening her photography studio and "assum[ing] the risk" of participating in weddings that conflict with her faith. NY.Br.63. But business owners need not leave their faith at home when they go to work. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 711–12, 714–15 (2014) (collecting free-exercise cases with commercial entities). New York's theory allows it to force a commissioned atheist singer to sing George Bennard's *The Old Rugged Cross* at a church service if he would croon Frank Sinatra's *My Way* at a nightclub.

Emilee's coerced participation is at least plausible. JA.42, 68–69. New York's same-service rule requires Emilee to do the same things at same-sex and opposite-sex weddings, which may include "assisting" at same-sex weddings. Emilee.Br.12–14, 42–43. Anything less could (at least plausibly) be an "indirect[]" denial of an "advantage[]." N.Y. Exec. Law § 296(2)(a). *See* JA.988 (laws require services "on an equal footing"). Emilee can only photograph a wedding by attending it, and

she believes her attendance "acts as a witness before God." JA.29–30. These limits—personal participation plus faith-based beliefs about the ceremony—mean that exempting Emilee will not lead to New York's parade of horribles.

Unable to dispute Emilee's allegations, New York labels them conclusory and unbelievable. NY.Br.65. But Emilee alleged that officiants direct their pronouncements at Emilee based on her photography experience at weddings. JA.30. And New York cannot substitute its views on "social pressure" for Emilee's well-pled feelings of being "coerced … to express her approval of the wedding." JA.35–36.

This coercion is different from the town hall meetings in *Town of Greece v. Galloway* where officials never "allocated benefits and burdens based on participation." 572 U.S. 565, 589 (2014). Here, Emilee faces fines, jailtime, and other penalties if she does not equally attend and participate in same-sex and opposite-sex weddings. JA.49–50.[4]

[4] Seeking to distance itself from its laws' indefensible consequences, New York says Emilee can tell prospective clients that she will not "participate in the religious aspects of" their weddings and decline couples who pressure her to do so. NY.Br.66. If true, this newly-minted theory undermines New York's refusal to give *any* other exemption to Emilee.

II. New York's laws fail any level of heightened scrutiny.

New York cannot prove its laws pass heightened scrutiny at the motion-to-dismiss stage. New York (A) offers no evidence, (B) lacks a compelling interest here, and (C) fails to narrowly tailor its laws.

A. New York's laws trigger strict scrutiny but fail any heightened scrutiny without evidence.

New York's laws trigger strict scrutiny. *Supra* §§ I.A–F (citing cases applying strict scrutiny to similar claims); Neb.Br.15–17 (same). New York responds that intermediate scrutiny applies because, in its view, the law targets conduct not speech. NY.Br.39. But, as explained, that's wrong. Regardless, Emilee alleged plausible claims under intermediate scrutiny. And laws that trip on this lower-level tumble at strict scrutiny. *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014) (plurality) (applying intermediate scrutiny because law "fail[ed] even under" that less demanding "test").

Dismissing claims like Emilee's—where New York's laws assumedly compel speech and expressive association—"will rarely, if ever, be appropriate at the pleading stage." *Cornelio v. Connecticut*, 32 F.4th 160, 172 (2d Cir. 2022) (cleaned up). That's because heightened scrutiny requires the government to prove (with evidence) that its ends justify the means. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 817–26 (2000) (requiring evidence for strict scrutiny); *Edenfield v. Fane*, 507 U.S. 761, 770–73 (1993) (same for intermediate). This

evidence cannot be developed at the motion-to-dismiss stage. Emilee.Br.53–54 (collecting cases).

But the district court dismissed Emilee's claims by finding the laws passed strict scrutiny without evidence from New York. SA.32–34. New York concedes as much. NY.Br.52n.9 (alternatively asking for remand so district court can "take and weigh" evidence). That was reversible error.

The district court compounded that error by "suppl[ying] the reasons for why it thought" New York's laws passed strict scrutiny. *Cornelio*, 32 F.4th at 177. While the court thought the laws were narrowly tailored because of Emilee's "unique, nonfungible" expressive services (SA.34), New York never raised that justification. JA.988–89 (the State justifying narrow tailoring with one sentence); JA.578 (the County "making no statement" on merits). So the court erred twice-over—it "cannot supply a justification that the government fails to provide." *Cornelio*, 32 F.4th at 177.

Plugging unattended holes in the government's argument "undermines the protections of the First Amendment by watering down [heightened] scrutiny." *Id.* (cleaned up). That's damaging at the motion-to-dismiss stage. And it is especially devastating here where the court assumed that New York's laws compel Emilee to create messages against her conscience. JA.1136–37.

B. New York's interests are not compelling as applied to Emilee.

New York cannot demonstrate "compelling" or "significant" interests to pass strict or intermediate scrutiny. *See Reed*, 576 U.S. at 163; *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). A law's underinclusivity—its failure to prevent harms that diminish the government's asserted interests—is relevant under both tests. *See Brown*, 564 U.S. at 802; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (law failed intermediate scrutiny because of "exemptions and inconsistencies" in labeling ban).

New York claims an interest in ending discrimination by ensuring access to goods and services and preventing "daily affront and humiliation." NY.Br.40–41. This interest applies uniformly to many types of discrimination. N.Y. Exec. Law § 291(2); N.Y. Civ. Rts. Law § 40-c. But neither interest suffices here, and New York's laws are massively underinclusive as to those interests.

For starters, Emilee does not discriminate. She declines photographs and blogs based on the requested content, not the requester's status. JA.37–38; 1135–36; Emilee.Br.30–31. Rather than deny this, New York simply assumes the key premise in its argument—that Emilee offers the "same services" for same-sex and opposite-sex weddings, declines the former, and therefore discriminates based on status.

But Emilee offers the same service to and conveys the same *message* for everyone: photographs and blogs celebrating opposite-sex weddings. No other messages are on the menu. *Contra* NY.Br.49. That's different from "turning away subjects because" of their status. NY.Br.34. In fact, New York usually treats an artist's inability to create a message for everyone as "*not* discrimination." NY.Br.61.

Focusing on Emilee's message-based objection proves New York's interest insufficient here. The Supreme Court rejects compelling interests for compelled *expression* as opposed to coerced *conduct*. *Compare Dale*, 530 U.S. at 657–59; *Hurley*, 515 U.S. at 578–79 *with Roberts*, 468 U.S. at 626 (no "serious burdens" on expression); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249 (1964) (hotel rooms). *Cf. Jews for Jesus*, 968 F.2d at 295 (boycott).

But New York claims a compelling interest in applying its law to Emilee anyway because any exemption somehow threatens "First Amendment-based exemptions" for others. NY.Br.47–48. New York, though, has no evidence to support this slippery-slope argument, and courts cannot accept "speculation or conjecture" over evidence. *Edenfield*, 507 U.S. at 770. True, New York now cites legislative history. NY.Br.7–8. But that history never mentions how one exemption would cause systematic market shrink.[5] Neither does that history nor

[5] New York also cites a 1986 task force report (NY.Br.8) but didn't submit it below or in the record on appeal. New York never even

any amici detail the "special problem" New York presupposes here—a New York photographer denying wedding photography services because of sexual orientation. *FEC v. Cruz*, 2022 WL 1528348, at *9 (U.S. May 16, 2022). "[G]eneralized assertion[s]" of "past discrimination in an entire industry" do not count as evidence. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989). *See Turner*, 512 U.S. at 666–68 (scrutinizing legislative history for "substantial evidence" at summary-judgment stage for intermediate scrutiny and finding none).

New York also lacks evidence to support its hypothesis that exempting Emilee will lead to "widespread" "dignitary harm." NY.Br.43. In truth, allowing Emilee to politely decline requests that violate her conscience would cause no such harm. Such content objections are "decent and honorable," *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015), which "gay persons could" recognize "without serious diminishment to their own dignity and worth," *Masterpiece*, 138 S. Ct. at 1727. Furthermore, New York already allows businesses to decline services for various reasons without evidence that these declines cause harm. Emilee.Br.38 (listing examples).

In contrast, preserving Emilee's freedom to follow her conscience "is essential in preserving [her] own dignity." *Burwell*, 573 U.S. at 736 (Kennedy, J., concurring). New York discounts Emilee's dignity by

---

discusses the report's specific content or asks this Court to judicially notice it.

repeating its blame game. New York blames "the 'demeaning' character of compelled speech" on Emilee's choice to offer her expressive services to the public. NY.Br.44. Of course, Emilee is religiously-motivated to persuade the public to cherish opposite-sex marriage through her photographs and blogs. JA.34. But those public views aren't worthy in New York—they should be banished to "distinctly private" quarters. NY.Br.44. New York also says Emilee assumed the risk of "dignity harm" by operating a public business because Emilee "can never ensure that she will photograph only aesthetics and actions she endorses." NY.Br.44–45. Not so. The First Amendment protects those editorial decisions.

New York's "dignity" justifications would allow it to compel any expression in the name of preventing personal offense. LGBT jewelers must inscribe Quranic texts criticizing same-sex relationships. Christian tattoo artists must ink Pentagrams. That makes little sense.

Worse still, New York's laws are fatally underinclusive. New York exempts countless activities and constitutionally protected expression. Emilee.Br.46–47; NY.Br.50–51. New York claims these exemptions don't undermine its anti-discrimination interest for public accommodations, but also admits that they apply to public accommodations. NY.Br.50–51n.8 (citing *Hurley* and *Dale* which involved public accommodations). There's no reason to deny Emilee these exemptions when New York cannot pinpoint a single problem

arising from them. This just proves New York's laws lack narrow tailoring. *Infra* § II.C.

New York also dismisses the exemptions that appear in other laws. NY.Br.51. But courts evaluate the real-world effects of exemptions wherever they appear. The city ordinance in *Lukumi* was underinclusive because a separate provision in an incorporated state law exempted nonreligious conduct that endangered the city's interests. 508 U.S. at 545. *Rubin*'s labeling ban was underinclusive because exemptions in "[o]ther provisions of the FAAA and its regulations" meant the ban would "fail to achieve [its] end." 514 U.S. at 488–89.

New York asserts that exempting even "a single business" undermines its antidiscrimination interests. NY.Br.46. But these many exemptions erode that interest. That dooms the laws here.

C. New York's laws lack narrow tailoring, and New York never considered alternatives.

Equally problematic, New York's laws lack narrow tailoring. New York never addresses or refutes two of Emilee's proposed alternatives—exempting public accommodations from providing business-altering services or extending a bona-fide-public-policy exemption to editorial choices. Emilee.Br.48–49. That failure is decisive.

It is also decisive that New York never considered (or rejected as ineffective) less restrictive alternatives. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1279–80 (2022) (requiring this); *Playboy Ent. Grp.*, 529 U.S. at

816 (same); *McCullen*, 573 U.S. at 494 (same). What's more, many other states allow businesses to decline to create custom speech without undermining their antidiscrimination interests. Neb.Br.21–26; JA.556–58. New York needed to produce evidence that this approach would be ineffective in New York. *See McCullen*, 573 U.S. at 494 (mandating government consider "other jurisdictions"); *Edenfield*, 507 U.S. at 771 (same when "21 States" experienced no problem with no rule).

New York instead substitutes grievance for evidence. New York complains that some proposed alternatives would burdensomely require it to analyze whether businesses are expressive, small, or wedding-related. NY.Br.50. No evidence justifies this gripe. New York already demarcates "distinctly private" and one-hundred-member clubs, small-time landlords, and other constitutionally-protected businesses. N.Y. Exec. Law §§ 292(9), 296(5)(a)(4)(i); NY.Br.51n.8. Next, New York complains that Emilee asks it to "weigh" public-accommodations' interests against its interest in preventing discrimination. NY.Br.52. *Exactly*. New York must consider alternatives and *prove* them insufficient. It is not enough to "*say* that other approaches have not worked." *McCullen*, 573 U.S. at 496 (emphasis added).

Left with nothing else, New York adopts the district court's novel "unique, nonfungible" tailoring analysis. NY.Br.46; Cnty.Br.8. Emilee and supporting amici already dismantled that logic. Emilee.Br.54–58; Publishers.Br.9–19; Econ.Br.15–17. New York offers little more,

reiterating that this unprecedented analysis wins the day without evidence. NY.Br.52. But that allows the government to trample fundamental rights by having courts bless bureaucratic whims based on their mere say-so. This threatens every American—from religious, feminist, and liberal publishers (Publishers.Br.20–21); to poets, musicians, and speechwriters (Econ.Br.12–13); to other artists too (Emilee.Br.56–58). New York never disputes these consequences. It just ignores them. But ignoring consequences doesn't change them. This Court should correct the mistakes below and allow Emilee's claims to proceed.

III. Emilee plausibly alleged that the Unwelcome Clause is facially unconstitutional.

Emilee alleged facial claims against the Unwelcome Clause.

Overbreadth. Emilee plausibly alleged that the Unwelcome Clause is overbroad by banning "a substantial" amount of religious speech. *United States v. Stevens*, 559 U.S. 460, 473 (2010). She explained that the Unwelcome Clause never defines its terms and prevents her from explaining her religious beliefs about marriage or asking prospective clients questions. JA.43, 53, 71. Emilee then provided examples illustrating why the Unwelcome Clause's speech ban is plausibly overbroad. Emilee.Br.59.

Ironically, New York answers that Emilee didn't brief this issue adequately. But New York never asked the district court to dismiss

Emilee's overbreadth facial challenge. JA.578, 989. And Emilee discussed this claim in detail, unlike the cases New York cites where parties buried claims in a footnote or single sentence. *Contra* NY.Br.39.

Vagueness and unbridled discretion. New York objects to Emilee's vagueness claim because the Unwelcome Clause clearly prohibits Emilee's statement. NY.Br.66. Not so, for two reasons. *First*, this principle doesn't apply to unbridled-discretion claims (a point New York never addresses). Emilee.Br.61–62. *Second*, it is unclear what parts of Emilee's statement the Unwelcome Clause bans. New York tries to clarify this vagueness by pointing to "patronage" and a case about displaying offensive goods. NY.Br.68. Neither help. Anyone (including testers) can file a complaint based on their subjective feelings after seeing Emilee's statement. JA.46, 57. New York must then promptly investigate that complaint through a burdensome process. JA.47. This threat chills Emilee's speech. JA.55.

IV. This Court should grant Emilee's requested preliminary injunction because she's likely to succeed, she faces irreparable harm, and it benefits the public.

This Court should instruct the district court to enter Emilee's requested injunction on remand. She meets the preliminary-injunction factors. Emilee.Br.63–65. *First*, she's likely to win on the merits. § I–II. *Second*, she faces irreparable harm because New York's laws directly compel and restrict her speech and religious exercise. *Id*. In fact, New

York touts a "compelling interest" in enforcing the laws against Emilee—including their criminal penalties. NY.Br.39–52; Cnty.Br.3. *Third*, society benefits when constitutional rights win. Emilee.Br.65. *Finally*, New York has no evidence that protecting Emilee will lead to "equal access" problems for anyone. *Contra* NY.Br.70.

Aside from these factors, New York never disputes this Court's authority to order an injunction. Emilee.Br.65–68 (detailing authority). New York just asks for a remand so it can "submit evidence." NY.Br.70. That would be inappropriate for the reasons Emilee gave already. Emilee.Br.66–67. And the government "may not enter new evidence on remand" when it knows "of its obligation to present evidence and fail[s] to do so." *United States v. Archer*, 671 F.3d 149, 168 (2d Cir. 2011). New York knew of, but disregarded, its evidentiary burden below. It shouldn't get "a second bite at the apple." *Id.* (cleaned up).

CONCLUSION

Emilee only wants the freedom to choose what she says as she serves everyone, no matter who they are. New York allows that freedom to other artists if it favors their views. New York has no evidence or legitimate reason for not extending that same freedom to Emilee. This Court should reverse the lower court, allow this suit to proceed, and instruct the lower court to enter an injunction protecting Emilee.

Respectfully submitted,

/s/ John J. Bursch
John J. Bursch
Counsel for Appellants

May 23, 2022

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 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.

/s/ John J. Bursch
John J. Bursch
Counsel for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Local Rule 32.1(a)(4)(B) because, excluding the portions exempted by Fed. R. App. R. 32(f), this brief contains 6,999 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ John J. Bursch
John J. Bursch
Counsel for Appellants

Dated: May 23, 2022