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; **Denise Miranda**, in her official capacity as Commissioner of the New York State Division of Human Rights,

Defendants.

Case No. 6:21-cv-06303-FPG-CDH

Reply in Support of Plaintiffs' Renewed Preliminary Injunction Motion

Oral Argument Requested

Table of Contents

Table of Authorities

Cases

Statutes, Codes, and Regulations

Other Authorities

Introduction

Emilee Carpenter and her studio (Carpenter) create engagement and wedding images and blogs consistent with her beliefs. She chooses the photographs to take, how to edit them, and then curates a final compilation that celebrates her view of marriage. As another service, Carpenter posts a blog. The images and blogs are Carpenter's speech. But New York pushes an unprecedented theory that would make most photographs and artwork unprotected and would overrule multiple precedents, including *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023)—all without offering evidence to justify violating Carpenter's constitutional rights. New York should be enjoined from enforcing its laws against Carpenter as the case proceeds.

Argument

Carpenter deserves a preliminary injunction because New York's laws (I–II) compel her photographs and blogs and (III) flunk heightened scrutiny. She also suffers irreparable harm from chilling her speech. And she did not "delay." *Contra* N.Y. Br. 25. She learned about the laws in 2019, kept receiving requests to promote same-sex weddings, and sued when the threat was credible. Carpenter Decl. ¶¶ 392–403, 425–30. Plus, New York cannot argue undue delay when it also alleges the claims are too early. Answer ¶ 15, ECF No. 80. Enjoining the laws serves the public interests and harms no one because the laws are unconstitutional here.

I. The First Amendment protects Carpenter's photographs.

Carpenter is likely to win under the two-part test for compelled speech. MPI 6 (describing test). First, New York's laws regulate her speech. Second, the laws force her to change her message about marriage. New York does not dispute that this is the test. Nor does New York seriously contest that its laws force her to change her message *if* her photographs are speech. In passing, New York says the viewpoint-discrimination claim is out. N.Y. Br. 19. Not so. Carpenter's compelled-

speech claim alleges viewpoint discrimination. Compl. ¶¶ 329–32. The Second Circuit remanded that entire claim and tasked this Court with evaluating whether the laws forced Carpenter to "propound a point of view contrary to her beliefs." *Emilee Carpenter, LLC v. James* (*ECP II*), 107 F.4th 92, 105 (2d Cir. 2024).

New York focuses on arguing that Carpenter's photographs are not speech by (A) injecting requirements foreign to the First Amendment and (B) turning a blind eye to Carpenter's editorial control over her photographs. Both arguments fail.

A. Carpenter's photographs are protected speech.

The Second Circuit describes photography as "presumptively expressive" and as "automatically" triggering the First Amendment. *See ECP II*, 107 F.4th at 104; *Mastrovincenzo v. City of New York*, 435 F.3d 78, 93 (2d Cir. 2006); *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996); MPI 6–7. Photographs "*always* communicate *some* idea or concept to those who view it." *Bery*, 97 F.3d at 696 (emphasis added). Under this precedent, New York has the burden to show Carpenter's photographs *do not* fit that presumption. It cannot.

First, New York likens Carpenter to an unmonitored "video camera at the end of the aisle." N.Y. Br. 14. The facts paint another picture. Carpenter times her movements, adjusts her camera, takes "candid" shots, gives "ideas," edits thousands of images, and makes other decisions that affect each photograph. Carpenter Decl. ¶¶ 188–95, 218–42; Rothman Decl. ¶ 18; Nisinzweig Decl. ¶ 11.

Next, New York imposes three unprecedented rules. The State demands that photographs (i) express a uniformly understood message; (ii) be shown publicly; and (iii) not "document" events. New York is wrong three times over.

Uniform message. New York claims Carpenter's photographs must "convey" a "specific message comprehensible by outside observers." N.Y. Br. 9–11. But speakers need not have "a particularized message," "isolate an exact message," or

express a "discern[able]" message with "any specific expressive purpose." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 563, 569, 574 (1995) (cleaned up). If a "succinctly articulable message" were required, the First Amendment would not cover armbands, music, paintings, or poetry. *Id.* at 569.

To be sure, Carpenter has a general message. She celebrates "the joy of marriage between one man and one woman." Carpenter Decl. ¶ 172. Others agree—her photographs "reflect the love" and "joy" between spouses, celebrate a "special wedding day," depict the couple's "love" for "one another," and showcase guests' and the couples' "happiness." Rothman Decl. ¶¶ 28, 34; Nisinzweig Decl. ¶¶ 13–15, 22.

Ignoring that, New York isolates two photographs of wedding guests, denying any clear message. N.Y. Br. 11. But that is like saying *To Kill a Mockingbird* is about Andrew Jackson because his name appears on the book's first page. Harper Lee, *To Kill a Mockingbird* 1 (1960). For Lee, each word conveys ideas, but the whole book tells the story. For Carpenter, each image communicates ideas, but the images together emphasize the point. N.Y. Ex. H 376:16–379:3. Carpenter does not offer *only* one-off images of guests; she only offers to photograph *the entire* wedding celebration. Carpenter Decl. ¶¶ 150–76. From thousands of raw photographs, she produces images that together tell the story of and celebrate the engagement or wedding. *Id.* at ¶¶ 222–57.[1] That is protected speech. If not, the government could ban all wedding photography—or just photographs of same-sex weddings.

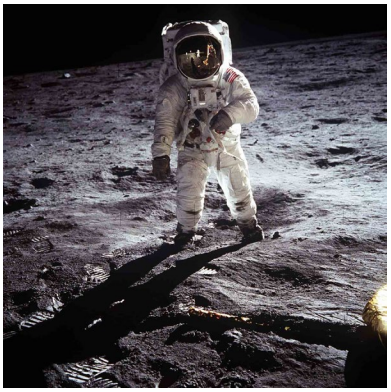
Dissemination. Next, New York shortchanges Carpenter's photographs by positing that she intends them "for a private audience." N.Y. Br. 15. But the First Amendment protects private communications. *See Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 129 (2d Cir. 2013) (collecting cases protecting "privately" "communicated" speech). Otherwise, New York could ban letters, text messages, and phone calls.

[1] Carpenter did not even include one of the images New York identifies in the final compilation she delivered to the client. Carpenter Supp. Decl. ¶ 8.

Regardless, Carpenter publishes her photographs on her blog and fully expects and intends for clients to show them around—as her clients admit they do. Rothman Decl. ¶¶ 19, 29. *Porat v. Lincoln Towers Community Association* is different because the plaintiff conceded his photographs were "non-communicative" and were only meant for his "own personal use." 2005 WL 646093, at *4 (S.D.N.Y. Mar. 21, 2005).

Documentation. Finally, New York claims Carpenter's photographs are not speech because they "document" events "beyond [her] control." N.Y. Br. 13–14. But so do many photographs, like the ones below—e.g., the photographer did not pose Mohammad Ali. In New York's view, these images lack First Amendment protection because they "'just documented what was naturally happening.'" N.Y. Br. 14.





But their documentary nature does not matter to the First Amendment. *E.g.*, *Brown v. Kemp*, 86 F.4th 745, 782 (7th Cir. 2023) (protecting "documenting and monitoring hunting activity"). Photographers still chooses what, when, and how to photograph.

Carpenter also exercises all kinds of control over her images to celebrate the wedding. Carpenter Decl. ¶¶ 144–291. New York's witnesses agree. Carpenter takes "candid" shots, she gives ideas on "best lighting," she sent clients "a gallery" of images without their input, and clients like her "grainy, … earth tone" "style" of photographs. Rothman Decl. ¶¶ 13, 17–19, 24; Nisinzweig Decl. ¶ 11. Carpenter's discretion does not change if she photographs moments "common to almost every American wedding." N.Y. Br. 13. Most stories have a beginning, middle, and end. Authors do not lose First Amendment coverage by following that pattern.

B. Carpenter's photographs are *her* speech.

Carpenter's photographs are her speech because she makes editorial decisions before, during, and after the engagement or wedding shoot—like deciding which events to photograph, creating (or having others create on the studio's behalf) original images, and curating photographs, editing them, and selecting which images to produce to clients. MPI 6–10 (explaining this process).

New York says the "communication is the client's." N.Y. Br. 16. The Supreme Court has rejected this claim in the wedding context, *303 Creative*, 600 U.S. at 588, and even in different contexts when the speaker only curates others' speech.

In *Hurley*, the parade followed a "lenient" admissions policy and "each contingent[]" had its own "expression." 515 U.S. at 569, 574. Still, the parade acted as a "private speaker" through "[t]he selection of contingents." *Id.* at 569–70, 574. The social-media platforms were less selective in *Moody*—they "never … reviewed" "well north of 99% of the" posted content. *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1091 (N.D. Fla. 2021). And even though the posts "originate[d] with third parties," the platform's "choices about whether—and, if so, how—to convey posts" were "expressive choices." *Moody v. NetChoice, LLC*, 603 U.S. 707, 738, 740 (2024).

Better than parades or platforms, Carpenter is not a conduit for others' speech. She creates *original* content. Carpenter does not lose that role because she hires third-party photographers. She chooses them based on quality, gives them guidance, and they photograph on her studio's behalf. Carpenter Decl. ¶¶ 199–207; N.Y. Ex. H 327:13–329:18. Carpenter then owns the raw photographs. App. 137–38. She decides how to edit the photographs and controls the final images given to the client. Carpenter Decl. ¶¶ 208–13. Carpenter's choice to sometimes outsource initial edits of original images changes nothing either. She always reviews those edits, often tweaks them, sets editing parameters, and has final authority over whether those edits get compiled and produced to the client. Carpenter Decl. ¶¶ 259–91.

Against this backdrop, New York plucks four words from Carpenter's deposition ("not executing my vision") out of context. N.Y. Br. 1, 5, 13, 15. There, Carpenter was referencing the couples' selection of wedding themes, location, and size. App. 794–803, 807. Couples make those choices—like location, décor, and other details. N.Y. Br. 16. But there is a difference between the wedding and the photographs. While Carpenter does not control the wedding theme, she decides whether to photograph the wedding. Carpenter Decl. ¶¶ 81–112. Once hired, clients defer to her skill for which photographs to take, how to edit them, and which final images to compile to celebrate their union. *See id.* at ¶¶ 154–58, 237; Rothman Decl. ¶¶ 18–19, 24 (mentioning "edited" images "gallery," lighting "ideas," and "'ambiance' photos"). That is why Carpenter clarified that she is hired "as a visual storyteller" and "professional" and that it would be "a reductive" and "overly reductive statement" to say she is merely "execut[ing] [the client's] vision." App. 801–03.

II. New York's laws apply to Carpenter's blog, which is her speech.

New York's laws apply to Carpenter's blog as an "advantage[] … or privilege[]" she offers to the public. N.Y. Exec. Law § 296(2)(a). New York does not dispute that the laws violate the First Amendment if they apply to her blog.

New York's laws apply broadly. App. 465. New York's "no limited menu" logic prohibits any difference in service. *Id.* at 687. New York admitted at oral argument and in discovery that Carpenter must offer the blog for same-sex unions if she does for opposite-sex weddings. *Id.* at 395, 408. And New York's enforcement guide references this case—when it held Carpenter's blogs were a service. *Id.* at 483.

Under these standards, New York's laws apply to Carpenter's blog. She always offers blogs to clients and offers no wedding package without blogs. App. 727–28; N.Y. Ex. D 144:8–16. The blogs also provide a unique value to clients. Carpenter Decl. ¶¶ 303–08; App. 736; N.Y. Ex. D 48:8–9.

New York jettisons this history by claiming Carpenter's blog is neither a "good[]" nor a "service[]" she offers to the public. N.Y. Br. 18. New York's newly minted stance contradicts settled state law and its own legal theory. For example, New York's argument that the blogs are only "advertising" (N.Y. Br. 18) conflicts with holdings that the laws cover advertisements. *See Athenaeum v. Nat'l Lawyers Guild, Inc.*, 2017 WL 1232523, at *5–7 (N.Y. Sup. Ct. Mar. 30, 2017); *Camp-Of-The-Pines v. New York Times Co.*, 184 Misc. 389, 398 (N.Y. Sup. Ct. 1945). And the laws apply to a website that offers a "free" service while "deriving its revenue" elsewhere, as here. *Sullivan v. BDG Media, Inc.*, 146 N.Y.S.3d 395, 402 (N.Y. Sup. Ct. 2021). New York's theory also refutes its "no limited menu" logic and its asserted interests. With New York's revisions, the Yankees could advertise a promotional giveaway to the first ten thousand fans and refuse to give that gift to black or Jewish fans. After all, the baseball game—not the gift—is "what's on offer." N.Y. Br. 18.

New York's attempt to avoid the result of its laws through a declaration is insufficient. The signing attorney does not make probable-cause determinations, speak for the Attorney General, or mention the Civil Rights Law. And non-binding assurances from "currently available information" do not alleviate Carpenter's current or future credible threat. *FBI v. Fikre*, 601 U.S. 234, 242 (2024).

Shifting gears, New York tries to blame Carpenter by falsely suggesting "the blogs are a contrivance."[2] N.Y. Br. 18. But Carpenter surveyed the wedding industry in 2019, believed blogging could help her business and provide a service to clients, and started working with a brand and website designer. Carpenter ¶¶ 45–54. When the website was ready, Carpenter launched the blog. *Id.* at ¶ 59.

[2] Relatedly, Carpenter accurately testified about her contracts. *Contra* N.Y. Br. 18 n.3. She testified that she "believe[d]" she drafted the contracts. *See* N.Y. Ex. D 113:8–11. And she did. App. 837–39. It is no surprise that a client consulted with her attorneys during the contract-drafting process.

III. New York's laws fail scrutiny as applied to Carpenter's speech.

New York's laws violate the First Amendment here. New York protests that its laws are not per se unconstitutional because the history and tradition test does not apply "outside of the Second Amendment context." N.Y. Br. 24 n.5. Not true. *See Vidal v. Elster*, 602 U.S. 286, 301 (2024) (applying history and tradition test).

At a minimum, strict scrutiny controls because New York's laws compel Carpenter's speech based on its content and viewpoint. MPI 17–18. Even if intermediate scrutiny applied (it doesn't), the laws still fail. New York never meets its "obligation to identify evidence" of its interests or alternatives. *Cornelio v. Connecticut*, 32 F.4th 160, 171–72, 177 (2022). Applying strict scrutiny, New York's laws do not (i) serve a compelling interest in (ii) a narrowly tailored way.

Compelling interest. New York has the burden to justify its interests. MPI 18. With shifting interests, no evidence, and many exemptions, the State falls short. New York first claims Carpenter "cherry-pick[s] instances" of its sliding interests. N.Y. Br. 21. But New York's discovery responses speak for themselves. *Compare* App. 400–01 *with id.* at 411. The legislative record New York points to offers no more clarity (or evidence)—the record ends in 2002 and raises yet more interests.

Even accepting New York's current alleged interests, they are not compelling.

New York's discrimination interest does not apply to Carpenter. She decides which projects to accept based on what she will communicate, not who asks about the project. Carpenter Decl. ¶¶ 357–78. And Carpenter provides photography services to LGBT persons. *Id.* at ¶¶ 363–78; Nisinzweig Decl. ¶¶ 13–14. This is not "status-based discrimination," as New York claims. N.Y. Br. 24. The Supreme Court rejected this exact argument by recognizing distinctions between "message" and "status" and authorizing the former. *303 Creative*, 600 U.S. at 594, 595 n.3.

New York's access interest also misfires because there is no lack-of-access evidence. MPI 19. Over a thousand photographers are available to photograph

same-sex weddings. App. 762, 774–75. One same-sex couple who contacted Carpenter found another photographer. Nisinzweig Decl. ¶ 20.

New York's "stigma and humiliation" interest cannot save its laws either. Carpenter's theory does not "vitiate" the laws because it only applies to speech. *Cf.* N.Y. Br. 22. And other public accommodations post signs limiting their services and make derogatory remarks without consequence. App. 820–29.

New York misunderstands the compelling-interest analysis employed by *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021). N.Y. Br. 22 n.4. The Supreme Court often finds that exemptions undermine a law's application in the free speech world. MPI 20 (collecting cases). *Fulton* follows this rule. And because the test is the same for free speech and free exercise, its reliance on "exemptions" controls. 593 U.S. at 541. New York is right about one thing: the Supreme Court has not "applied this analysis to a compelled speech claim like Plaintiffs' here." N.Y. Br. 22. In those cases, the analysis is unnecessary—laws serve no "legitimate interest" when they compel speech as here. *Hurley*, 515 U.S. at 578; *303 Creative*, 600 U.S. at 585–87.

New York's analogy to "homicide" proves why exemptions undermine interests. N.Y. Br. 22. New York's homicide laws do not—and would never—exempt benevolent orders or distinctly private organizations because preventing murder is a top-level interest which permits of no blanket exceptions. But New York exempts these entities—and more—from its public-accommodation laws. Those exemptions erode the State's alleged interests and show those interests are not compelling here.

One final point on exemptions. If New York's legal gerrymander to avoid the blog is credited, the omission obliterates its interests in regulating photographs. She offers blogs to the public to promote opposite-sex weddings. Carpenter Decl. ¶ 293; App. 727–28. But Carpenter would decline to create a blog celebrating a same-sex wedding. If New York permits this as to her blogs, it has no reason to refuse to allow her to create photographs consistent with her religious beliefs.

Narrow tailoring. New York's narrow-tailoring analysis lacks evidence. New York has no evidence about how exempting Carpenter under Domestic Relations Law § 10-b would affect its interests even though some of the entities exempted by that rule engage in "public commercial activities." App. 832. New York suggests the exemption must exempt "wedding photography." N.Y. Br. 23. Not so. Exemptions are measured against interests, not activities. In any event, section 10-b exempts *more* than photography. It exempts *any* "services" or "privileges" that "celebrat[e]" a "marriage" and undercuts New York's interests by allowing *more* of what the State calls "discrimination." N.Y. Dom. Rel. Law § 10-b(1).

New York claims that exempting Carpenter would "open the door to" discrimination. N.Y. Br. 23. Real-world experience says otherwise. New York applies the First Amendment in the housing context without issue. App. 594. New York has no evidence of applying the First Amendment in other enforcement actions. *Id.* at 435–36. And New York exempts discrete choices by hospitals, insurance companies, talent agencies, law firms, and airlines. App. 808–19.

New York stays silent on most of Carpenter's proposals. The State never addresses its "bona fide considerations of public policy" exemption. Nor does New York grapple with how nineteen states, Chemung County, and some statutes exempt speech like Carpenter's without compromising their goals. *See* MPI 21–23. New York's failure to reference these proposals is fatal. A state cannot meet its "obligation" to establish an "alternative will be ineffective" if it never considers the alternative. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000).

Conclusion

Carpenter's photographs and blogs are her speech. New York never contests that forcing Carpenter to promote same-sex marriage violates her beliefs and alters her desired message about marriage. Carpenter's motion should be granted.

Respectfully submitted this 3rd day of April, 2025.

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Certificate of Service

I hereby certify that on the 3rd day of April, 2025, I electronically filed the foregoing document with the Clerk of Court using the ECF system which will send notification of such filing to all counsel of record who are registered users of the ECF system.

s/ Bryan. D. Neihart
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