UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

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

Defendants.

Case No. 6:21-cv-06303

Plaintiffs' Reply in Support for Preliminary Injunction

Oral Argument Requested

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Introduction

Emilee Carpenter wants the freedom to select what to say and which ceremonies to participate in. But New York won't allow it. Instead, New York chastises Emilee for "straw-man statutory constructions" that mistake "the scope of" New York's laws. Mem. of Law in Opp. to Pls.' Prelim. Inj. Mot. ("MPI Resp.") 2, 21, ECF No. 26. Yet New York then says its laws require Emilee to "offer the same services" to celebrate same-sex weddings that she offers to opposite-sex weddings. Mem. of Law in Supp. of State Defs.' Mot. to Dismiss ("MTD") 15, ECF No. 27-1; MPI Resp. 15-16, 20. New York even defends this requirement as essential. MTD 23-25. That's decisive—and confirms what Emilee said all along: these laws stop her from posting certain statements online and force her to create photographs and blogs celebrating same-sex weddings. Mem. of Law in Supp. of Pls.' Prelim. Inj. Mot. ("MPI") 8-22, ECF No. 3-1. That violates Emilee's First Amendment rights and causes her irreparable harm. Protecting her rights, however, serves the public and creates no problems. This Court should grant her requested injunction.

Argument

Emilee meets the typical preliminary-injunction elements. *See* MPI 4. While New York demands that Emilee meet a higher "clear or substantial likelihood" standard (MPI Resp. 3), that standard only applies to mandatory injunctions. *Yang v. Kosinski*, 960 F.3d 119, 128 (2d Cir. 2020). *Cf. Bimbler's Delwood, Inc. v. James*, 496 F. Supp. 3d 760, 771 (W.D.N.Y. 2020) (seeking "mandatory preliminary injunction"). And Emilee seeks a prohibitory injunction because New York is not currently enforcing its laws against her. *Fair Hous. in Huntington Comm. Inc. v. Town of Huntington*, 316 F.3d 357, 365 (2d Cir. 2003). So she just wants New York to refrain from acting, not take a "positive act." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 89 (2d Cir. 2006). That means Emilee need only show she is "likely" to suffer irreparable harm and either likely success or a sufficiently serious merits

question. *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996); *Mastrovincenzo*, 435 F.3d at 89-90. Emilee can do that (and meet the mandatory injunction standard) because New York's laws violate her constitutional rights.[1]

In making this determination, two presumptions apply. First, Emilee's facts should be taken as true because New York does not dispute them. *SEC v. Frank*, 388 F.2d 486, 490 (2d Cir. 1968) (When "there is no serious dispute about the facts … argument is what the judge requires."). Second, the likely success and irreparable-harm factors "merge into one" because Emilee will likely succeed on her First Amendment claims. *Turley v. Giuliani*, 86 F. Supp. 2d 291, 295 (S.D.N.Y. 2000). This loss of "First Amendment freedoms … unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). *See Tunick v. Safir*, 209 F.3d 67, 70 (2d Cir. 2000) (noting this irreparable harm presumption); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (same). New York has no answer to these cases. And so Emilee addresses the merits first.

I. Emilee raises sufficiently serious questions on the merits of her First Amendment claims and is likely to succeed.

A. The Accommodations, Discrimination, and Publication Clauses unconstitutionally compel and restrict Emilee's speech.

Emilee incorporates her discussion elsewhere about why she should prevail on her compelled-speech and restricted-speech claims. *See* MTD Resp. 14-23.

B. The Accommodations and Discrimination Clauses compel Emilee to participate in religious ceremonies.

New York's laws also force Emilee to participate in and attend sacred ceremonies she objects to. *See* MPI 19-20 (explaining this point and the law).

[1] Emilee also has standing. *See* Mem. of Law in Resp. to State Defs.' Mot. to Dismiss ("MTD Resp.") 3-14 (filed concurrently).

In response, New York resorts to word games, accusing Emilee of adopting "a twisted reading of" the law. MPI Resp. 21. But New York imposes a "same service" rule on Emilee. *Id.* at 15-16, 20; MTD 15. This rule forces Emilee to sing, pray, and celebrate at same-sex weddings because she offers and does these activities as part of her paid services for opposite-sex weddings. Verified Complaint ("VC") ¶¶ 67-74, ECF No. 1.[2] Moving to the facts, New York and amici claim that Emilee just "snap[s] photos." MPI Resp. 22; Br. of Religious and Civil-Rights Orgs. as Amici Curiae Support. Defs.' Mot. to Dismiss ("AU") 12-13, ECF No. 52. But that ignores what Emilee does, her undisputed religious beliefs about weddings, her approval of weddings she attends, and her participation in those ceremonies. VC ¶¶ 67-74; Decl. of Emilee Carpenter ("Decl.") ¶¶ 196-215, ECF No. 3-5.

The cases New York and amici cite do not prove otherwise. MTD 15; AU 12-13. They involved *voluntary* attendance (*Town of Greece v. Galloway,* 572 U.S. 565, 590 (2014); *Fields v. City of Tulsa*, 753 F.3d 1000, 1010-12 (10th Cir. 2014)) or a non-religious event (*Newdow v. Peterson,* 753 F.3d 105, 109-10 (2d Cir. 2014)). But Emilee must attend the whole wedding to photograph it and weddings are religious events, especially those with prayers. *See* VC ¶¶ 61, 63, 196-215; MPI 20. If Emilee photographed same-sex weddings, she would feel coerced to approve of them. VC ¶ 120. So New York's laws improperly force Emilee to join in religious events. *See Marrero-Méndez v. Calixto-Rodríguez*, 830 F.3d 38, 45 (1st Cir. 2016) (forcing officer to "merely" attend events with prayer violated First Amendment).

[2] If New York does exempt Emilee from being forced to "sing, pray, or worship with the celebrants…" (MTD 15; MPI Resp. 22), that would undermine any need to compel Emilee's other activities. *See infra* § I.D (discussing strict scrutiny).

C. New York's laws violate Emilee's free-exercise rights because they are not neutral or generally applicable.

New York's laws also violate Emilee's free-exercise rights because they are not neutral or generally applicable in operation. *See* MPI 21-22. New York counters that its laws are "facially neutral toward religion," do not evince "anti-religious hostility," and treat secular and religious activities the same. MTD 9-15; MPI Resp. 22-25. But this ignores how New York interprets and applies its laws and how these laws work.

As for "facial neutrality," that "is not determinative" because courts look to "the effect of a law in its real operation." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534-35 (1993). Government action triggers strict scrutiny anytime it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (laws not "neutral and generally applicable …whenever they treat *any* comparable secular activity more favorably than religious exercise.").

New York interprets its laws to do just that. They exempt parades, symphonies, and "a documentary film opposing same-sex marriage." MPI Resp. 18-19. New York also exempts bakers who refuse to create cakes with "anti-LGBT" or racist messages. Br. of Mass., et al. as Amici Curiae in Supp. of Resp'ts at *27–28, 29 n.15, *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (No. 16-111) (U.S. Oct. 30, 2017), 2017 WL 5127307 (joined by New York's Attorney General). Amici agree this practice exists. Br. of Amici Curiae N.Y. Civil Liberties Union & Am. Civil Liberties Union Supp. Defs. ("ACLU") 6 n.1, ECF No. 51.

Nor does it matter that Emilee has not (yet) been the subject of "past enforcement actions" or that she has not (yet) "identified a history of enforcement actions enacting that 'interpretation.'" MTD 6, 11. New York's "formal system" or

"formal mechanism" for exemptions matters, not past applications. *Fulton*, 141 S. Ct. at 1879 ("availability of exceptions" problematic "regardless whether any exceptions have been given…"); *Lukumi*, 508 U.S. 535-40 (finding law not neutral or generally applicable in pre-enforcement case). New York has created this formal system as its briefs and friendly amici show.

In any event, New York has already applied its laws to allow businesses to deny requests for secular reasons and to prosecute businesses for denying requests for religious reasons. VC ¶¶ 290-93. New York tries to distinguish these cases by arguing "*no discrimination had taken place*." MPI Resp. 23. But that's the point. New York treats religion unfairly by allowing secular justifications for denying services and then condemning religious objections to celebrating same-sex marriage. MPI 21 (alleging this practice). Nor does this practice "lack any factual basis." MTD 11. Emilee's allegations quoted directly from New York's briefs.

Likewise, it doesn't matter that New York's laws ban religious discrimination or sometimes treats religion fairly. *Contra* MPI Resp. 5-7; MTD 11 n.5. These laws trigger strict scrutiny because they *sometimes* treat religious activity worse than secular activity and because they create a formal system allowing exceptions. *Tandon*, 141 S. Ct. at 1296 ("It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."); *Fulton*, 141 S. Ct. at 1879 (formal system enough).

Beyond its formal practice though, New York's laws also contain *written* exemptions that allow individualized assessments. For example, these laws allow sex discrimination by public accommodations when based on "bona fide considerations of public policy." N.Y. Exec. Law § 296(2)(b). New York dismisses this exemption as applying only to sex-based denials to physical locations, not sexual orientation-based denials to services. MPI Resp. 24; MTD 14. But courts gauge a laws' generality by assessing how they apply to comparable secular conduct

"judged against the asserted government interest that justifies the regulation." *Tandon*, 141 S. Ct. at 1296; *Fulton*, 141 S. Ct. at *5 (same); *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 480 (6th Cir. 2020) (measuring "the *interests* the State offers in support of its restrictions," not "whether the religious and secular conduct involve similar forms of activity.").

New York says its laws (1) ensure access to public accommodations and (2) uphold its citizens' dignity. MPI Resp. 19; MTD 23. But the "bona fide" exemption undermines both interests. It allows public accommodations to deny access to an entire class of persons because of their sex, based on a vague and discretionary standard. And such denials could offend the dignity of that class by making them feel unworthy or unwelcome. New York never claims that it has a stronger interest in ending sexual-orientation discrimination than sex discrimination. *Cf.* N.Y. Exec. Law § 296(2)(a) (prohibiting both types equally); N.Y. Civ. Rts. Law § 40-c (same). Nor does New York claim that sex discrimination "pose[s] a lesser risk" to these two asserted interests. *Tandon*, 141 S. Ct. at 1297. So this exemption undermines New York's stated interests and triggers strict scrutiny. *See Lukumi*, 508 U.S. at 544-45 (city law supposedly protecting public health not generally applicable when state law undermined city's interest).

D. The Clauses fail strict scrutiny as applied to Emilee.

New York's laws violate Emilee's constitutional freedoms so they must serve a compelling interest in a narrowly tailored way. MPI 22-25. They do not.

New York cites stopping discrimination as its interest. MPI Resp. 14, 19-20; MTD 24. But this is too broad. New York must do "a more precise analysis" and

justify its "interest in denying an exception" to just Emilee. *Fulton*, 141 S. Ct. at 1881. It has not.[3]

First, New York can respect Emilee's rights and still ensure access to photography; many New York photographers will photograph same-sex weddings. VC ¶ 126. And Emilee does not tell "LGBTQ people" to "just go elsewhere." *Contra* Br. of Amici Curiae States in Supp. of Defs. 16, ECF No. 55. Instead she politely tells everyone asking her to promote certain messages to speak elsewhere. *See Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 572, 577-78 (1995) (suggesting that LGBT group could have "obtain[ed] a parade permit of its own"). Nor must New York worry about stigmatizing its citizens. That interest doesn't justify compelling speech and Emilee doesn't discriminate anyway. *See* MPI 11-14. People can easily understand and respect speakers like Emilee who want the freedom to control what they say. *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) ("[G]ay persons could recognize and accept without serious diminishment to their own dignity and worth" declining to speak or participate in weddings). New York has no response.

Second, New York's exemptions undermine its interests. *See* MPI 22-25; *Fulton*, 141 S. Ct. at 1882 ("system of exceptions" undermined city's argument that its law "can brook no departures"); *Contra* ACLU 20 (claiming "[e]very instance of discrimination" causes dignitary harm). This conclusion holds even though some exemptions appear in other laws. *Contra* MPI Resp. at 23-24; AU 7-8. An exemption's effect matters, not its location. *See Lukumi*, 508 U.S. at 544-45 (failure to regulate restaurant garbage disposal undermined interest for laws that only regulated killing animals); *Monclova*, 984 F.3d at 480 (similar).

[3] The Establishment Clause does not forbid religious exemptions. *Contra* AU 13-17. *Employment Division v. Smith* acknowledges that laws may contain religious exemptions. 494 U.S. 872, 890 (1990).

New York also misses the mark calling the restrictions on Emilee "minimal" and "modest" because they allow her to speak elsewhere. MPI Resp. 20; MTD 24. This has never justified compelled speech or content-based regulations. *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 541, n.10 (1980) (rejecting this alternative-avenues argument); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (same for compelled speech).

Elsewhere, New York invokes unlikely hypotheticals and slippery slopes to argue that protecting Emilee will cause widespread discrimination. *See, e.g.*, MPI Resp. 2. But New York must prove this risk is likely. It has not. New York instead offers mere "speculation [which] is insufficient to satisfy strict scrutiny…" *Fulton*, 141 S. Ct. at 1882. *See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435-36 (2006) (rejecting slippery-slope argument for this reason). In fact, other states adopt Emilee's proposals with no trouble. Br. of Amici Curiae 14 States Supp. Pls. 17-19, ECF No. 22. So New York's fears are not just speculative; they've been disproven. That doesn't satisfy strict scrutiny.

II. The remaining preliminary-injunction factors favor granting relief.

The other preliminary-injunction factors favor Emilee. Start with irreparable harm. While "conjectural chill" does not cause irreparable harm (MPI Resp. 11), objective chill does. MTD Resp. 3-11 (showing this objective chill). And this chill exists without any "enforcement action," complaint, or "an investigation" (MPI Resp. 10) because the law still threatens "serious penalties …" (MTD 1) like $100,00 fines and jailtime. VC ¶¶ 212, 215. *Compare Latino Officers Ass'n v. Safir*, 170 F.3d 167, 171 (2d Cir. 1999) (no irreparable harm for requiring mere notification and "summary of [speakers'] comments after-the-fact"). Emilee faces many other threats too. MTD Resp. 3-12 (explaining ongoing injuries). These threats would chill any reasonable person. *Id.*

And these threats cause many ongoing injuries. First, Emilee cannot post her desired website statement. VC ¶¶ 246-53; MPI 17-19. Second, Emilee cannot bind her company to an editorial policy consistent with her beliefs. VC ¶¶ 229-34. Third, Emilee cannot be transparent and share her beliefs about marriage with prospective clients (something she's religiously motivated to do) or ask them certain questions. VC ¶¶ 125, 236, 248, 309. Instead, she must ignore *pending* requests to avoid prosecution. *Id.* ¶¶ 241-45, 266-67. This ongoing chill causes irreparable harm through a "recurrent invasion[n] of [Emilee's] rights." *CRP/Extell Parcel I, L.P. v. Cuomo*, 394 F. App'x. 779, 781 (2d Cir. 2010).

Fourth, Emilee faces other compliance costs besides chill. For example, Emilee researches each request she receives to determine if it violates her beliefs. VC ¶¶ 238-39 (Emilee reviews the request for the potential message requested (VC ¶ 140), not to "determine[e] the clients' sexual orientation," as New York suggests (MPI Resp. 12)). If Emilee cannot confirm that she can fulfill the request, she must ignore it to limit her exposure to New York's laws. VC ¶¶ 238-45. This causes Emilee to forgo prospective clients, makes her less competitive, limits her ability to create photography, and causes reputational harm. VC ¶¶ 244-45, 310-13. *See Register.com Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (irreparable harm for "loss of reputation, good will, and business opportunities"); *Jacobson & Co., Inc. v. Armstrong Cork Co.*, 548 F.2d 438, 444-45 (2d Cir. 1977) (irreparable harm for "threatened loss of good will and [potential] customers"). New York says Emilee should just keep researching clients. MPI Resp. 12. But other photographers don't have to. Emilee shouldn't be penalized for exercising her rights. VC ¶ 312.

On top of all that, Emilee operates in constant fear of prosecution. She faces a growing threat of prosecution with each request she ignores and those requests are piling up, many in the last year. VC ¶¶ 241-45, 261, 266-68. Money cannot "appropriately compensate[]" for peace-of-mind. *Register.com Inc.*, 356 F.3d at 404.

Nor did Emilee wait too long to bring this suit. *Contra* MPI Resp. 12. Emilee timely sought this injunction when her risk became intolerable and threats against her became ripe. *See* Mem. of Law in Resp. to Def. Wetmore ("Resp. to DA") 9-11 (filed concurrently) (explaining this point). So she's unlike a company seeking a TRO months after losing trade secrets or an employee suing a year after a transfer. MPI Resp. 11 (citing cases like this). In any event, New York is speaking out of both sides of its mouth, saying Emilee's claims are unripe because she filed too soon (MTD 5-7) and then denying her irreparable harm because she filed too late. MPI Resp. 11-12. New York can't have it both ways. *See* Resp. to DA 9-11 (collecting cases on this point). She took timely legal action and suffers ongoing irreparable harm.

Emilee meets the other factors too. "[S]ecuring First Amendment rights is in the public interest." *N.Y. Progress and Prot. PAC*, 733 F.3d 483, 488 (2d Cir. 2013). And New York suffers no harm from being forced to act constitutionally. *Id.* To manufacture harm though, New York exaggerates the relief Emilee seeks. MPI Resp. 13-15. But she seeks narrow, as-applied protection, not a "broad exemption from New York's antidiscrimination laws." *Id.* 13. New York already grants many exemptions—including for weddings and bakers—without causing any parade of horribles. *See supra* § I.C; MPI 22-24. And New York can continue to deter discrimination because Emilee doesn't discriminate. She chooses messages, not clients. So these other factors also justify Emilee's requested relief.

Conclusion

All Americans want to live consistent with their deeply held beliefs. Other courts already give speakers in the wedding field the freedom to express their views. This Court should too by granting Emilee's requested injunction to halt the ongoing violation of her First Amendment rights.

Respectfully submitted this 7th day of July, 2021.

By: s/ Jonathan A. Scruggs

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Certificate of Service

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

s/ Jonathan A. Scruggs
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