No. 22-75

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, No. 6:21-cv-06303

BRIEF FOR AMICUS CURIAE MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest law firm organized under the laws of the state of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See*, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *303 Creative LLC v. Elenis*, — S. Ct. — (2022) (*amicus curiae* in support of petitioner).

SUMMARY OF THE ARGUMENT

Emilee Carpenter ("Appellant") has a First Amendment right not to be compelled to speak messages that violate her religious beliefs. *See Wooley v. Maynard*, 430 U.S. 705, 717 (1977) ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such

[1] Pursuant to Local Rule 29.1(b), *amicus* affirm that no party's counsel authored the brief in whole or in part; that no party or a party's counsel contributed money that was intended to fund preparing or submitting a brief; and no person—other than the *amicus*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

message."). In pertinent part, the Accommodation Clause of New York's Human Rights law reads

> It shall be unlawful discriminatory practice for any person, being the owner, . . . of any place of public accommodation, . . . because of . . . sexual orientation, gender identity or expression, . . . of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof[.]

N.Y. EXEC. LAW § 296(2)(a) (McKinney 2021).

To its credit, the District Court below correctly based its opinion on the idea that the Accommodation Clause challenged by Appellant compels speech, and correctly noted that all compulsion of speech is content-based. *Emilee Carpenter, LLC v. James*, No. 21-cv-6303, 2021 WL 5879090, at *10–12 (W.D. N.Y. Dec. 13, 2021). Nevertheless, the District Court concluded that New York's viewpoint-discriminatory speech compulsion is permissible, because it *satisfies* strict scrutiny. *Id.* at *17.

This case thus raises the question of whether compelling speech that expresses an ideological message contrary to the speaker's wishes—indeed, by engaging in viewpoint discrimination as part of the compulsion—is either (1) *per se* unconstitutional; or, (2) if the government may attempt to establish the validity of compelling the expression of specific viewpoints by satisfying strict scrutiny, whether forcing speakers to engage in ideological speech can ever be a cognizable "compelling interest."

The District Court reached the wrong conclusion. A wealth of authority suggests that the government's compulsion of ideological speech is *per se* unconstitutional. But even if such compulsion were subjected to strict scrutiny, New York could never satisfy that standard, because the compulsion of private, non-governmental speech expressing an ideology can *never* pass strict scrutiny. It is conceptually impossible for compulsion of ideological speech—which necessarily involves viewpoint discrimination—to satisfy strict scrutiny, because strict scrutiny *exists* to identify viewpoint discrimination and ensure that it is thwarted. A court that finds viewpoint discrimination justified by strict scrutiny has missed the very purpose that the test serves.

ARGUMENT

I. Compelling Appellant to speak should be treated as *per se* unconstitutional, as opposed to only triggering strict scrutiny.

Justice Jackson's famous formulation in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), is nearly a cliché by now:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. *If there are circumstances which permit an exception, they do not now occur to us*.

(emphasis added); *Id.* at 634 ("Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature *does not depend upon*

whether as a voluntary exercise we would think it to be good, bad or merely innocuous.") (emphasis added).

Indeed, the Court in *Barnette* was clear that it needed to separate the question of: (1) whether forcing students to recite the pledge of allegiance was of value, from (2) the question of whether doing so was constitutional. *Id.* ("[V]alidity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered *independently of any idea we may have as to the utility of the ceremony in question*.") (emphasis added).[2]

Separating the concepts of the *constitutionality* of compelled speech from the *value* of the speech at issue was not merely an organizational convenience in *Barnette*. Rather, the Court clearly worried that opening the door to some government compulsion would lead to disaster and tragedy:

> Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who

[2] At most, *Barnette* alluded only to potential "grave and immediate" dangers to the public. 319 U.S. at 639 ("[F]reedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent *grave and immediate danger* to interests which the state may lawfully protect.") (emphasis added). But even with this potential need in mind, the Court dismissed the idea that it could think of *anything*, even hypothetically, that would satisfy this test. *Id.* at 642 ("If there are any circumstances which permit an exception, they do not now occur to us.").

> begin coercive elimination of dissent soon find themselves exterminating dissenters. *Compulsory unification of opinion achieves only the unanimity of the graveyard*.

Id. at 641 (emphasis added); *Id.* ("It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.").

Subsequently, in the most definitive statement on this subject, the Court in *Wooley* held unambiguously that: "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest *cannot* outweigh an individual's First Amendment right to avoid becoming the courier for such message." 430 U.S. at 717 (emphasis added). Here, Appellant is being forced to be the courier of a message the State finds important—same-sex weddings. Appellant's case is therefore analytically identical to *Wooley*.

In *Wooley*, appellees objected to New Hampshire license plates that read "Live Free or Die" because "that motto [was] repugnant to their moral and religious beliefs." *Id.* at 707–08. The Court stated:

> Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life indeed constantly while his automobile is in public view to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

Id. at 715 (quoting *Barnette*, 319 U.S. at 642).

Appellant's case is also comparable to *Hurley*. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557 (1995). There, the issue was "whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." *Id.* at 559. The Court held that the government's compulsion of speech violated the fundamental protections of the First Amendment. *Id. at* 573 ("[T]his use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."); *see also Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012) ("The government *may not* prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves.") (emphasis added); *R.J. Reynolds Tobacco Co. v. FDA*, 845 F.Supp.2d 266, 275 n.14 (D.D.C. 2012) ("The Government's interest in advocating a message *cannot* and does not outweigh plaintiffs' First Amendment right to not be the Government's messenger.") (emphasis added). The First Amendment demands that Appellant must not be the State's messenger of a viewpoint repugnant to her religious convictions, no matter how acceptable the State deems the message.

The Supreme Court has repeatedly struck down government efforts to compel speech *without reference* to whether the government might establish that it meets strict scrutiny, as it did in *Barnette*. 319 U.S. 624 (1943). In *Wooley*, the Court did

not apply a rigorous strict scrutiny analysis to reject mandated government authorship or modification of an individual's message and construed the First Amendment broadly to "forbid" compelled speech like that at issue in *Hurley*. The Court stated:

> When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. *But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids*.

Hurley, 515 U.S. at 578 (emphasis added). *Hurley* also implied that setting the terms of public debate is *never* a "legitimate end" sufficient to squelch Constitutional rights. *Id.* at 581 ("Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others.").

Similarly, in *Nat'l Inst. of Family and Life Advocs. v. Becerra*, the Supreme Court determined that California's law compelled certain clinics to provide state-sponsored messages contrary to their beliefs. 138 S. Ct. 2361, 2371 (2018) (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) ("By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of petitioners' speech."). The Court did not analyze the strict scrutiny standard in *Becerra*, noting only that the

Ninth Circuit was wrong to apply a lesser standard to professional speech, and that the law failed even intermediate scrutiny. *Id.* at 2375. Nevertheless, in his concurrence, Justice Kennedy seemed to embrace a *per se* rule that would have invalidated the law. *Id.* at 2379 (Kennedy, J., concurring) ("Governments *must not be allowed* to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief.") (emphasis added).[3]

Lower courts have generally concurred with the idea that an individual's right *not* being forced to engage in expressive conduct is absolutely protected by the First Amendment, without regard to the interests the government purports to further by compelling speech. *See Oliver v. Arnold*, 3 F.4th 152, 159–60 (5th Cir. 2021) (applying *Barnette* in school case involving compelled writing of the Pledge of

[3] In *Janus*, the Court also cited language from *Barnette* that seemed to suggest that compelled speech might be subject to a more rigorous test than suppression of speech, although not to a *per se* rule against such compulsion. *Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) ("Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require *'even more immediate and urgent grounds' than a law demanding silence*.") (emphasis added). Yet the Court in *Janus*, 138 S. Ct. at 2463, also cited *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988), which stated, "[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is *without constitutional significance*[.]" 487 U.S. at 796 (emphasis added).

Allegiance, without either the majority or dissent referring to strict scrutiny); *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1255–56 (11th Cir. 2021) (quoting *Hurley*, 515 U.S. at 578, 573) (second brackets in 11th Cir. opinion) ("In the same way that the Council's choice of parade units [in *Hurley*] was expressive conduct, so too is Amazon's choice of what charities are eligible to receive donations through AmazonSmile. Applying Title II in the way Coral Ridge proposes would . . . instead 'modify the content of [Amazon's] expression'—and thus modify Amazon's 'speech itself[.]'"); *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (quoting *Rumsfeld v. Forum for Acad. And Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006)) (brackets in 10th Cir. opinion) ("Thus, the Supreme Court, starting with *Barnette*, has consistently '*prohibit[ed]* the government from telling people what they must say.]") (emphasis added).[4]

Additionally, in other First Amendment contexts, the Supreme Court has not paused to consider whether the importance of the government's preferred message could allow it to co-opt a person's expressive conduct. For instance, in *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000), the Court engaged in an extensive analysis

[4] Admittedly, other lower courts have issued opinions that conflate these issues. *See, e.g.*, *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) ("[T]here is no question that the government *cannot* compel an artist to paint, demand that the editors of a newspaper publish a response piece, or require the organizers of a parade to allow everyone to participate.") (emphasis added); *but see id.* at 754 ("Laws that compel speech or regulate it based on its content are subject to strict scrutiny[.]").

of compelled association. Without referring to strict scrutiny, it seemed to quickly weigh, but also quickly dismiss, the state's purported interest in compelling the Boy Scouts to convey a message contrary to their organization. *See id.* at 659 ("The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."). There was no analysis of whether New Jersey's efforts were narrowly tailored, nor of whether some other asserted interest could have justified New Jersey's "severe intrusion" into free association.[5] Like Appellant's case, *Dale* was decided against the backdrop of a state public accommodations law banning discrimination on the basis of sexual orientation.[6]

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[5] In another part of the opinion, the Court seemed to suggest that it might consider compelling state interests so long as the interest was "'unrelated to the suppression of ideas.'" *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). It did not return to this standard, however, when it evaluated the constitutionality of New Jersey's public accommodations law. Here again, though, the Court suggested that the "suppression of ideas" is an illegitimate interest. In Appellant's case, the state's interest in ensuring that same-sex couples can conscript artists into endorsement of their viewpoint is far from "unrelated to the suppression of ideas."

[6] Justice Thomas's concurring opinion in *Masterpiece Cakeshop* also seems to refer to a *per se* rule, although his opinion separately refers to compelled speech being subject to "the most exacting scrutiny." *Compare Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1741 (2018) (Thomas, J., concurring) ("While this Court acknowledged that the unit's exclusion [in *Hurley*] might have been misguided, or even hurtful, it *rejected the notion that governments can mandate* thoughts and statements acceptable to some groups or, indeed, all people as the antithesis of free speech.") (internal quotation marks and citations omitted) (emphasis added); *and id.* at 1744 ("The First Amendment *prohibits* Colorado from

Additionally, in the freedom of press context, the Supreme Court struck down compelled speech requirements imposed on newspapers, while also suggesting that there is no need to evaluate the government's interest or its means. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974).[7] In holding for the newspaper, the Court flatly rejected the idea that the government could compel newspapers to print certain pieces. *Id.* at 258. There was no evaluation of the government's interests or its tailoring. *See id.* ("It has yet to be demonstrated how governmental regulation of this crucial process *can be* exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.") (emphasis added).

Where the Supreme Court has suggested that parties may in fact be compelled to speak against their will if strict scrutiny is satisfied, those cases have not involved ideological speech. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 19 (1986) ("Notwithstanding that it burdens protected speech, the Commission's order could be valid if it were a narrowly tailored means of serving a compelling state interest."). However, *Pac. Gas & Elec. Co.* involved a speaker

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requiring Phillips to bear witness to these facts, or to affirm a belief with which he disagrees.") (internal quotation marks, citations, and brackets omitted) (emphasis added) *with id.* at 1746 ("In cases like this one, our precedents demand 'the most exacting scrutiny'") (internal quotation marks and citations omitted).

[7] *Tornillo* is also cited in *Wooley*, where the Court seemed to adopt a *per se* rule against government compulsion of ideological messages. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("A system which secures the right to proselytize religious, political, and ideological causes must also *guarantee* the concomitant right to decline to foster such concepts.") (emphasis added).

compelled to provide space for someone else's message—*not* compelled to endorse that message itself (in fact, the actual speaker in *Pacific Gas* was required to state that its messages were *not* the messages of the appellant being forced to provide space for its message). *Id.* at 6–7.

Here, there can be no dispute that Appellant is compelled to express ideological messages about same-sex marriage by way of her wedding photography services. Unlike the speaker in *Pac. Gas*, she would be compelled to endorse same-sex marriage since she "uses her photography services to celebrate and promote *her view* of marriage." *Emilee Carpenter, LLC*, 2021 WL 5879090, at *3 (emphasis added). And Appellant, unlike the speaker in *Pac. Gas*, cannot "explicitly advertise her business's limitations on her website" for fear of violating New York's Denial Clause. *Id.* at *4; N.Y. EXEC. LAW § 296(2)(a) (McKinney 2021). In short, the District Court improperly found that compelled private speech could satisfy strict scrutiny. *Emilee Carpenter, LLC*, 2021 WL 5879090, at *17. That conclusion is incorrect and should be reversed.

II. Courts apply strict scrutiny to flush out impermissible objectives such as viewpoint discrimination.

The First Amendment enshrines "the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc., V. FCC*, 512 U.S. 622, 641 (1994). Thus, the Supreme Court's jurisprudence applies strict scrutiny to any regulation or

compulsion of speech based on the speech's content. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) ("Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). To "require[] the utterance of a particular message favored by the Government" is to "contravene[] this essential right." *Turner*, 512 U.S. at 641.

Strict scrutiny of content-based regulation of speech is justified by the vital purpose it such scrutiny serves: exposing viewpoint discrimination, which the First Amendment exists to prevent, and which may be disguised by pretext. Content-based laws are thus rigorously scrutinized because they carry "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Id*. "The rationale of the general prohibition . . . [on content discrimination] is that [] [it] 'raises the specter that the [G]overnment may effectively drive certain ideas or viewpoints from the marketplace[.]'" *R.A.V. v. St. Paul, Minn.*, 505 U.S. 377, 387 (1992) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 505 U.S. 105, 116 (1991)) (fourth bracket alteration in *R.A.V.*).

Viewpoint discrimination, as *Turner* implies, is an illegitimate regulatory goal, and strict scrutiny exists to prevent its being pursued covertly.[8] Strict scrutiny accordingly requires the government to articulate a compelling interest and demonstrate that its actions are narrowly tailored as a way of proving that the government is in fact not discriminating on the basis of viewpoint. When the government can't carry that burden, it is more likely to be guilty of impermissible viewpoint discrimination. For example, the under-inclusiveness of the statute at issue in *Brown v. Entm't Merch. Ass'n* served to "raise[] serious doubts about whether the government [was] in fact pursuing the interest it invoke[d], *rather than disfavoring a particular speaker or viewpoint*." 564 U.S. 786, 802 (2011) (emphasis added).

Here, Appellant, a professional photographer, does not accept projects that celebrate "'anything immoral' or 'dishonorable to God.'" *Emilee Carpenter, LLC*, 2021 WL 5879090, at * 3 (quoting ECF No. 1 ¶ 113). Photographing a wedding for same-sex couples "'violates [Appellant's] religious beliefs[]'" *Id.* (quoting ECF No.

[8] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 451 (1996) ("The critical question is thus whether the distinction between content-based and content-neutral action—more specifically, the distinction among viewpoint-based, other content-based, and content-neutral action—facilitates the effort to flush out improper purposes. The distinction in fact serves just this function: it separates out, roughly but readily, actions with varying probabilities of arising from illicit motives.").

1 ¶¶ 130, 136) because she believes marriage is "'between one man and one woman'" *Id.* at *9 (quoting ECF No. 1 ¶¶ 47, 48, 57, 117). Such a belief is neither indecent nor dishonorable. *See Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.").

Pursuant to the Accommodation Clause, Appellant is *compelled* "to create artistic expression that celebrates same-sex marriages and to associate herself with same-sex marriages, contrary to her desires and beliefs." *Emilee Carpenter, LLC*, 2021 WL 5879090, at * 9. "Because compelled speech alters the content of one's speech, it is considered a 'content-based regulation' subject to strict scrutiny." *Id.* at *10 (quoting *Becerra*, 138 S. Ct. at 2371); *see also Reed*, 576 U.S. at 174 (Alito, J., concurring) ("Content-based laws merit [strict scrutiny] because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint."); *Id*. at 181 (Kagan, J., concurring) (Strict scrutiny serves "to ensure that the government has not regulated speech based on hostility—or favoritism—toward the underlying message expressed.") (internal quotation and citation omitted); *Id*. at 183 (Kagan, J., concurring) ("[T]he category of content-based regulation . . . exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints.").

To find that a regulation or compulsion of protected private speech is viewpoint-discriminatory, but nevertheless survives strict scrutiny, is a contradiction in terms, and fails to grasp the basis for applying of strict scrutiny, which, as Justice Kagan observed, exists to serve as a prophylactic against exactly what the law has already been found to do.

III. Engaging in viewpoint discrimination to compel the expression of ideological speech is never sufficient to satisfy strict scrutiny.

Viewpoint discrimination, when found, is effectively *per se* unconstitutional. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) ("In the ordinary case it is all but dispositive to conclude that a law is content based and, in practice, viewpoint-discriminatory."). In fact, *Sorrell*'s rhetorical hedge ("all but") notwithstanding, the Supreme Court has *never* concluded that a viewpoint-discriminatory restriction or compulsion of speech was permissible under the First Amendment because it satisfies strict scrutiny.

Indeed, the Supreme Court has cautioned that *even otherwise unprotected* categories of speech should not be subjected to viewpoint discrimination by the government. *R.A.V.*, 505 U.S. at 384–90 (explaining that the First Amendment does not permit the government to engage in viewpoint discrimination under the guise of regulating unprotected speech). "Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id*. at 384 (emphasis in original). Even regarding generally

unprotected "fighting words," "[t]he First Amendment does not permit . . . special prohibitions on those speakers who express views on disfavored subjects." *Id*. at 391.[9]

The government can have no compelling interest in discriminating against speech on the basis of its viewpoint; such an interest, being itself anathema to the First Amendment, is by definition *not compelling*. *See*, *e.g.*, *id.* at 386 ("The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."); *Cf. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 680 (2010) (noting that a "compelling [] interest[] . . . []related to the suppression of ideas" cannot satisfy strict scrutiny of restrictions on associational freedom) (internal quotations and citation omitted).

Here, the District Court did not disagree with the idea that Appellant is speaking as a private citizen through the lens of her camera, as a professional

[9] The bar on viewpoint discrimination against citizens' speech does not apply "where the government itself is speaking or recruiting others to communicate a message on its behalf[,]" because the First Amendment does not regulate government speech. *Matal v. Tam*, 137 S. Ct. 1744, 1768 (2017) (Kennedy, J., concurring in part). Thus, the government may speak "to enlist the assistance of those with whom it already agrees." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2330 (2013). "The government may enlist the assistance of those who believe in its ideas to carry them to fruition;" *Id*. at 2332 (Scalia, J., dissenting), but it "may not . . . compel the endorsement of ideas that it approves." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012). This case, of course, does not fall within that category.

photographer. However, her religious conviction, that marriage is "'between one man and one woman[,]'" does not align with the State of New York's viewpoint that promotes same-sex marriage. *Emilee Carpenter, LLC*, 2021 WL 5789090, at *9 (quoting ECF No. 1 ¶ 47, 48, 57, 117). New York is thus attempting to force her to promote its viewpoint by mandating that she photograph same-sex weddings.

The District Court found that New York's law survives strict scrutiny on the basis that a free-speech exemption would "'relegate [same-sex couples] to an inferior market' than that enjoyed by the public at large." *Id.* at *16 (brackets added in *Emilee Carpenter, LLC*) (quoting *303 Creative v. Elenis*, 6 F.4th 1160, 1180 (10th Cir. 2021)). But this premise, which itself is debatable, could never suffice to establish a compelling interest that overrides First Amendment protection against viewpoint discrimination. In other words, even if it were undeniably true that Appellant is the best photographer in the world, it still cannot be the case that avoiding relegating same-sex couples to other photographers justifies compelling Appellant's compelled speech and servitude. This is not the type of rigor that strict scrutiny demands.

The Supreme Court's treatment of viewpoint discrimination against protected private speech is clear: such discrimination is categorically impermissible. It is conceptually impossible for viewpoint discrimination to satisfy strict scrutiny

because viewpoint discrimination is the very thing that strict scrutiny of content-based speech restriction or compulsion exists to prevent.

IV. Recasting New York's viewpoint-discriminatory compulsion of speech as a market access issue cannot save it from being constitutionally impermissible.

The District Court's efforts to rescue New York's discrimination fails for two plain reasons. First, because, as the District Court conceded, Appellant does not turn away customers based on sexual orientation. *Emilee Carpenter, LLC*, 2021 WL 5879090, at *7 n.6. Second, because the District Court's own analysis is forced to concede that it is same-sex couples' purported interest *in forcing Appellant herself to speak*—not their access to wedding photography services in general—that is really at issue.

A. Appellant does not discriminate based on sexual orientation.

The District Court acknowledged that Appellant does not turn away clients based on sexual orientation—in fact, Appellant "has no qualms with photographing 'LGBT individuals' or working with them as clients in other contexts[.]" *Id.* at *3. The District Court noted, "[t]rue, [Appellant] alleges that her refusal to undertake such projects results from her religious objection to same-sex marriage specifically, rather than any sort of discriminatory animus to LGBT individuals more generally." *Id.* at *7 n.6 (citing ECF No. 1 ¶ 128–40). She would serve gay clients who nevertheless chose to enter traditional marriages, and she would refuse to serve

straight clients who chose to enter—whether in good faith or not—polygamous or same-sex marriages.

The District Court dismissed this fact without analysis in a footnote, asserting that it doesn't matter because of the "obvious, intrinsic link between same-sex couples and same-sex marriage[.]" *Id.* But the District Court's lack of rigor is not consistent with the law. The fact that Appellant does not discriminate based on sexual orientation contradicts the state's purported interest here, because Appellant's speech is perfectly consistent with "ensuring that individuals, without regard to sexual orientation, have equal access to publicly available goods and services." *Id.* at *12 (internal quotation and citation omitted).

Appellant creates videos celebrating traditional marriages, and gay people have the same access to that service that straight people do. To support its law, New York must have an interest in ensuring that artists who offer their services in celebration of traditional marriages also offer their services in celebration of same-sex marriages. *That*, however, plainly entails viewpoint-discriminatory compulsion of speech: artists who are paid to say something about traditional marriages that they believe is true must be forced to say the something about same-sex marriages that they believe is false, independently of the sexual orientation of any party involved.

The District Court's sleight-of-hand highlights, rather than disguises, the fact that it is precisely "the suppression of ideas or the codification of orthodoxy," that is

at stake in this case, since the District Court was only able to maintain the pretense of the law's ideological neutrality by explicitly disclaiming the facts alleged. *Id.* at *15.

B. The District Court's own narrow tailoring analysis confirms that the state's interest is not in market access, but in enforcing orthodoxy as a condition of market participation.

The District Court's argument that the law is narrowly tailored obliterates its assertion that the state has a compelling interest unrelated to the suppression of ideas or the codification of orthodoxy. The District Court sought to rescue New York's discrimination by recasting New York's interest as "ensuring that individuals, without regard to sexual orientation, have equal access to publicly available goods and services." *Id.* *12 (internal quotation and citation omitted). It argued that the "economic interest" in compelling Appellant to express a viewpoint with which she disagrees is "*unrelated* to the suppression of ideas or the codification of orthodoxy[.]" *Id.* at *15 (emphasis added). It concluded New York's law is narrowly tailored to serve this goal because expressive services are not fungible and because it applies to artists only if they sell their services to the public. The District Court not only concedes but *relies on* the fact that it is not wedding photography in general, but *Appellant's unique voice specifically*, which the state has a purportedly compelling interest in ensuring same-sex couples can commandeer as a mouthpiece for their own ideological message. *Id.* at *16.

The plain and inevitable conclusion is that the issue in this case is *not* about freedom from discrimination on the basis of sexual orientation (which, taking the facts alleged as true, Appellant does not do). Nor is it a right to equal access to goods and services (which same-sex couples in New York enjoy without any resort to compelling dissenters to mouth falsehoods). It is a right to exclude from the market artists who refuse lip service to an idea the New York and the District Court have deemed orthodox: the moral claim that marriage need not involve a man and a woman.

CONCLUSION

The State of New York is forcing Appellant to broadcast a message she cannot reconcile with her religious convictions. The First Amendment protects Appellant from the government's heavy-handed approach that makes her a billboard for the government's messages. Moreover, even if the correct standard to apply is strict scrutiny, it is impossible for strict scrutiny to be satisfied by compulsion of ideological speech without decimating the First Amendment. It is for these reasons this court should reverse the District Court's ruling.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *Brief for Amicus Curiae* complies with the type-volume limit of Local Rule 29.1(c) and Local Rule 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,610 words.

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DATED this the 14th day of March 2022.

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NOTICE OF APPEARANCE FOR SUBSTITUTE, ADDITIONAL, OR AMICUS COUNSEL

Short Title: Emilee Carpenter, LLC v. James Docket No.: 22-75

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CERTIFICATION

I certify that:

XX I am admitted to practice in this Court and, if required by Interim Local Rule 46.1(a)(2), have renewed my admission on OR

☐ I applied for admission on .

Signature of Counsel: ***/s/ William E. Trachman***

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