

No. 21-35228

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ANITA NOELLE GREEN,
Plaintiff-Appellant,

v.

MISS UNITED STATES OF AMERICA, LLC,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
The Honorable Michael W. Mosman
Case No. 3:19-cv-02048-MO

**BRIEF OF LIBERTARIAN LAW COUNCIL
AND INSTITUTE FOR FREE SPEECH
AS *AMICI CURIAE* IN SUPPORT OF
DEFENDANT-APPELLEE**

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Interest of *Amici Curiae*¹

The Libertarian Law Council is a Los Angeles-based organization of lawyers and others interested in the principles underlying a free society, including the right to liberty and property. Founded in 1974, the Council sponsors meetings and debates concerning constitutional and legal issues and developments; participates in legislative hearings and public commentary regarding government curtailment of choice and competition, economic liberty, and free speech; and files briefs *amicus curiae* in cases involving serious threats to liberty.

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, press, assembly, and petition. Along with scholarly and educational work, the Institute represents individuals and civil-society organizations in litigation securing their First Amendment liberties.

¹ All parties have consented to the filing of this brief. No party or party's counsel has authored this brief in whole or in part, or contributed money intended to fund preparing or submitting the brief. No person has contributed money intended to fund preparing or submitting the brief, except that UCLA School of Law paid the costs of filing this brief. As is customary for clinics at educational institutions, this brief is the professional work product of the lawyer signing the brief, representing clients, and does not express the view of UCLA or any UCLA department.

Summary of Argument

Beauty pageants, true to their name, are “theatrical production[s]”² that aim to convey a particular viewpoint about beauty, femininity, or identity. In this, they are like many other theatrical productions: *Hamilton* uses race-based casting to convey a particular artistic message about American Revolutionary ideals; a traditionalist *Othello* might cast a white Desdemona and a black Othello to express its view of historical authenticity; the Miss America pageant limits itself to unmarried 17-to-25-year-old female U.S. citizens as a means of conveying its message; cross-dressing pageants may send a message of their own by limiting participants to men dressed as women rather than women dressed as women; likewise, Miss USA is trying to send a message—controversial as it may be—about what it understands to be true femininity. 2-ER-225 (“the [Miss USA] pageant organizers wished to convey some message about the meaning of gender and femininity and . . . the specific implica-

² “Pageant,” *Encyclopedia Britannica*, 2021, <https://www.britannica.com/art/pageant>.

tion that the pageant organizers did not believe transgender women qualified as female”). The First Amendment protects all these artistic decisions and the viewpoints they embody.

Oregon’s Public Accommodation Act, if read to cover pageants, thus violates Miss USO A’s First Amendment rights—both “speech and expressive-association rights,” which “are closely linked.” *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 680 (2010). The forced inclusion of Anita Green, who is transgender, would keep Miss USO A from being able to effectively convey its beliefs that “natural born” women are the only true women. And this severe intrusion into Miss USO A’s First Amendment rights cannot be justified by Oregon’s interest in stopping gender identity discrimination in places of public accommodations. *See e.g., Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 578 (1995).

Argument

I. Forcing Miss USOA to accept Green as a contestant would substantially burden Miss USOA’s First Amendment rights

A. Groups have a First Amendment right to express themselves through choosing performers who participate in their speech

Speakers often rely on their ability to select certain performers to shape a specific message or vision they wish to convey. For example, *Hamilton* intentionally casts nonwhites for traditionally white roles, because that is a critical aspect of the show’s creative vision and message about American Revolutionary ideals.³ Though it may well be that “[a] music teacher has no . . . speech right to discriminate when soliciting the general public to purchase group lessons,” LAMBDA Amicus Br. at 22, musical producers are entitled to select who will have singing roles in their productions.

Conversely, producers of a traditional production of *Othello* would choose a white lead actress and a black lead actor to achieve their artistic goal of faithfully representing Shakespeare’s original work. Producers of

³ Annette Gordon-Reed, *The intense debates surrounding Hamilton don’t diminish the musical—they enrich it*, Vox (Sept. 13, 2016), <https://www.vox.com/the-big-idea/2016/9/13/12894934/hamilton-debates-history-race-politics-literature>.

other productions might want to depart more from the Shakespearean mold, by changing the races of the characters or the way they dress, or hew more closely to it, by insisting on Elizabethan-era pronunciation.⁴ (Even “authenticity” is not self-defining.) There is little doubt that such producers would have the First Amendment right to make all these choices.

Beauty pageants are likewise a protected form of theatrical expression. Thus, for instance, *Norma Kristie, Inc. v. City of Oklahoma City*, 572 F. Supp. 88, 91 (W.D. Okla. 1983), held that the “Miss Gay America Pageant”—a slightly misleading title for a cross-dressing pageant, in which men (whether or not gay) competed in female impersonation, *id.* at 89—was protected by the First Amendment. Any supposed “inequality in aesthetic value between [a] pageant and a musical or play,” the court held, “is a distinction without a difference,” *id.* at 91: The ostensible “degree of ‘art’” does not change the level of protection afforded by the First Amendment. *Id.*

⁴ See, e.g., Jeremy D. Goodwin, *At Chelsea Theatre Works, A Fresh Take On Shakespeare That Looks New And Sounds (Very) Old*, WBUR News (Feb. 23, 2018), <https://www.wbur.org/news/2018/02/23/shakespeare-original-pronunciation-underlings>.

Thus, a beauty pageant's eligibility criteria are just as constitutionally protected as the casting decisions in *Hamilton* or *Othello*. These criteria convey pageant organizers' viewpoints about beauty, femininity, and identity (whether or not they are fully shared by all the contestants or by all the organizers' employees). And indeed, many such pageants use criteria that limit participants to a particular group, even when the criteria may violate many jurisdictions' antidiscrimination statutes:

- Likely the most famous pageant, Miss America, limits itself to (1) unmarried (2) women (3) age 17 to 25 (4) who are U.S. citizens,⁵ even though many states ban discrimination based on marital status, sex, age, and citizenship.⁶ The choice, for instance, to exclude married women conveys a certain message about the value of a particular kind of feminine desirability. The choice to focus on 17-to-25-year-olds conveys a related message. The choice to limit candi-

⁵ *Become a Candidate*, Miss America, 2021, <https://www.missamerica.org/sign-up/> (last visited Oct. 19, 2021).

⁶ *See, e.g.*, Ore. Rev. Stat. § 659A.403(1) (marital status, sex, age); Cal. Civ. Code § 51(b) (marital status, sex, age, citizenship).

dates to U.S. citizens conveys a message about the propriety of seeking the most beautiful American, and not the most beautiful Canadian or Mexican.

- Miss Asian American limits contestants to those who share at least one-fourth Asian ancestry (as it happens, including not just East Asia but also South Asia, Central Asia, the Asian Middle East—including Israel—and Georgia and Azerbaijan in the Caucasus but not Armenia).⁷ This is how the pageant organizers choose to “celebrat[e] Asian culture, beauty, and intelligence”⁸ and not the culture, beauty, and intelligence of other ethnic groups.⁹
- Miss Black America does not appear to formally limit contestants by race, but presumably the judging process will, true to the pageant’s name, select someone who the judges view as representative

⁷ *Step 1: Overview*, Miss Asian Global & Miss Asian American Pageant, <https://www.missasianglobal.com/apply/step1/> (last visited Oct. 4, 2021).

⁸ *About Our Pageant*, Miss Asian Global & Miss Asian American Pageant, <https://www.missasianglobal.com/about/> (last visited Oct. 19, 2021).

⁹ Perhaps the most prominent Miss Asian American winner is Mona Lee Locke, the former First Lady of Washington. *Attention on US ambassador’s wife in Beijing [sic]*, AsiaOne (Sept. 2, 2012), <https://www.asiaone.com/News/Latest+News/Diva/Story/A1Story20120902-369088.html>.

of Black America. The pageant does limit itself to people “born . . . Female with Female Anatomy.”¹⁰

- Miss Gay America, a pageant for “female impersonators,” explicitly excludes those who have undergone any feminizing hormone treatment or plastic surgery,¹¹ thus defining what qualifies as female impersonation.
- Any beauty pageant, by definition, discriminates based on beauty, offering the more beautiful real prizes and giving the less (at most) consolation prizes. If done in D.C., that would violate the District’s prohibition on discrimination based on “personal appearance.”¹²

And these are just a few examples of how pageants define participant eligibility as a means of crafting the pageant’s message about who counts as a beautiful, talented representative of particular identity groups. The *Hurley* Court noted that “[p]arades are public dramas of social relations,

¹⁰ *Pageant Registration*, Miss Black America, <https://www.missblackamerica.com/pageant-registry> (last visited Oct. 19, 2021). This pageant’s alumnae include Oprah Winfrey, Miss Black Tennessee 1971.

¹¹ *What is Miss Gay America?*, Miss Gay America, <http://www.missgayamerica.com/what-is-mga.html> (last visited Oct. 4, 2021).

¹² D.C. Code § 1402.31(a).

and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration.” 515 U.S. at 568. Beauty pageants are even more public dramas of social relations—connected, as are parades, to deeper political debates about identity and authenticity—and in them the organizers define who counts as beautifully feminine¹³ and worthy of representing their sex and a particular social group.

B. Producers of performing arts works, including pageants, have a right to choose whom to include

The law has long recognized that the First Amendment right to speak through performing arts includes the First Amendment right to choose the performers. For instance, the Civil Rights Act of 1964 allows employees to be selected based on sex when sex “is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise,” 42 U.S.C. § 2000e-2(e), and the EEOC regulations recognize that,

¹³ Or, for some competitions, such as Mr. World, masculine. *Top Talent*, Miss World, 2021, <https://www.missworld.com/#/news/1765> (last visited Oct. 19, 2021) (stating that Mr. World contestants “battle it out to discover who should be declared ‘The world’s most desirable man’”).

Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

29 C.F.R. § 1604.2(a)(2).

The statutory definition of bona fide occupational qualification expressly excludes race,¹⁴ but producers and directors are nonetheless protected by the First Amendment in their race-based casting, as is made clear by *Claybrooks v. ABC, Inc.*, 898 F. Supp. 2d 986 (M.D. Tenn. 2012), the one case on the subject. The *Claybrooks* plaintiffs were two black men who unsuccessfully applied to be on ABC's television show *The Bachelor*. *Id.* at 989. Plaintiffs alleged that they were rejected because of their race. *Id.* at 990. The court concluded that, even if ABC did discriminate based on race (which ABC had denied, *id.* at 996), it had a right to do so:

[C]asting decisions are a necessary component of any entertainment show's creative content. The producers of a television program, a movie, or a play could not effectuate their creative vision, as embodied in the end product marketed to the public, without signing cast members [R]egulating the casting process necessarily regulates the end product. In this respect, casting and the resulting work of entertainment are inseparable and must *both* be protected to ensure that the producers' freedom of speech is not abridged.

Id. at 999–1000. If it were otherwise, then

the content of any television show that does not have a sufficiently diverse cast would be or would have been subject to court scrutiny,

¹⁴ *Swint v. Pullman-Standard*, 624 F.2d 525, 535 (5th Cir. 1980).

such as *The Jersey Shore* (all white cast members), *The Shags of Beverly Hills* (a show about Persian-Americans living in Los Angeles), *The Cosby Show* (a show with an African-American cast), and *The Steve Harvey Show* (a show with an African-American lead actor and supporting cast).

Id. at 998.

Likewise, in *Apilado v. North Am. Gay Amateur Athletic Alliance*, the court held that the North Am. Gay Amateur Athletic Alliance, which had rules limiting the number of heterosexual participants, was protected by the First Amendment against a claim brought under Washington’s Law Against Discrimination. 792 F. Supp. 2d 1151, 1163 (W.D. Wash. 2011). The court noted that, through these limitations, the Alliance was not just organizing sporting events, but was seeking to convey a message “promot[ing] an athletic, competitive, sportsmanlike gay identity, with a unique set of values.” *Id.* And because “the forced inclusion of straight athletes would distract from and diminish those efforts” to promote that message, the rules designed to limit the number of such unwanted players were protected by the First Amendment. *Id.*

Nor did it matter that some might view that the Alliance’s mission statement of “promot[ing] amateur competition ‘for *all persons* regardless

of age, sexual orientation or preference, with special emphasis on the participation of members of the gay, lesbian, bisexual and transgender (GLBT) community,” *id.* at 1159, as inconsistent with such sexual orientation discrimination. “[A]s the Supreme Court has stated, ‘it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent.’” *Id.* at 1162 (quoting *Dale*, 530 U.S. at 650).

Both *Claybrooks* and *Apilado* also illustrate that an organization may promote its message through competitive performance and not just through scripted works. Indeed, many popular shows such as *American Idol*, *The Voice*, and *America’s Next Top Model*—which restrict contestants by age, gender, or both¹⁵—involve competitions; yet all are protected by the First Amendment.

¹⁵ Helen Armitage, *American Idol’s Current Age Limit For Contestants*, ScreenRant (May 13, 2021), <https://screenrant.com/american-idol-show-age-limit/>; *Eligibility Requirements*, NBC The Voice Official Casting Site, 2021, <https://www.nbcthevoice.com/auditions/eligibility> (last visited Oct. 19, 2021); Jorie Mark, *Here’s What It Takes To Apply For America’s Next Top Model*, The List (July 13, 2020), <https://www.thelist.com/225953/heres-what-it-takes-to-apply-for-americas-next-top-model/>.

Claybrooks and *Apilado* naturally flow from *Hurley* and *Dale*, which recognized that antidiscrimination laws must yield to the First Amendment when substantial free speech interests are present. *Hurley*, 515 U.S. at 578; *Dale*, 530 U.S. at 659. Parade organizers have a First Amendment right to control the content of their own parades by choosing “expressive units of the parade from potential participants” based on which “contingent’s expression in the [organizer’s] eyes comports with what merits celebration on that day.” *Hurley*, 515 U.S. at 574. Likewise, Miss USA, Miss Asian America, Miss Black America, and Miss Gay America all have the right to select participants based on their judgment about what features of a person’s identity “merit[] celebration.”

Even when the unwanted members do not necessarily seek to overtly express an unwanted or contrary message, as was the case in *Hurley*, the mere “presence of [a] person affects in a significant way the group’s ability to advocate public or private viewpoints.” *Dale*, 530 U.S. at 648. The Boy Scouts in *Dale* refused to let Dale continue to participate as Assistant Scoutmaster when the organization discovered that he was gay. It did not matter that Dale had no intentions to send a conflicting message; his homosexuality and his presence as an Assistant Scoutmaster—where he

was expected to speak to Scouts—were enough to affect the Boy Scouts’ message. “The forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association.” *Id.* Likewise, the forced inclusion of an unwanted participant in a pageant, play, or television production infringes the group’s rights to expressive association and free speech.

Dale further illustrates that all organizations, whether they represent minority or majority groups, or are traditionalists or egalitarians, are entitled to express their views regardless of what that view represents. The First Amendment “protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.” *NAACP v. Button*, 371 U.S. 415, 444–45 (1963). Whether a speaker “happens to be engaged in activities of expression and association on behalf of the rights of” minority group members (as in *NAACP v. Button*) or on behalf of the rights of traditionalist organizations such as the Boy Scouts—or Miss USOA—does not affect the speaker’s First Amendment rights.

C. Freedom of association and free speech rights are inextricably intertwined for expressive associations

The rights described above can be framed equally as free speech rights and expressive association rights, because “speech and expressive-association rights are closely linked.” *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 680 (2010). (Both speech and expressive association rights are also closely linked to the right of assembly, *Thomas v. Collins*, 323 U.S. 516, 530 (1945), including the right to assemble both for “religious or political” purposes and for other purposes, *id.* at 531; *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass’n*, 389 U.S. 217, 223 (1967); see also *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2390 (2021) (Thomas, J., concurring in part) (stressing the connection between the “right to assemble” and the “right to associate”).) “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). And this is especially clear when the group’s speech necessarily involves choreographing the speech of others.

Though the district court correctly upheld Miss USOA’s expressive association claim, it erred in rejecting Miss USOA’s free speech claim—“when these intertwined rights [the freedoms of speech and expressive association] arise in exactly the same context,” as is the case here, “it would be anomalous for a restriction on speech to survive constitutional review . . . only to be invalidated as an impermissible infringement of expressive association.” *Christian Legal Soc’y*, 561 U.S. at 681. The Miss USOA contestants become parts of the organization’s speech by participating in the pageant, and they (especially the winner) become spokeswomen for the organization by promoting the pageant and being identified with the pageant. 2-ER-118–19, 126. “*Who* speaks on [an expressive association’s] behalf . . . colors *what* concept is conveyed.” *Christian Legal Soc’y*, 561 U.S. at 680. Being forced to include certain members inevitably changes the pageant’s expression. “It therefore makes little sense to treat [Miss USOA’s] speech and association claims as discrete.” *Id.*

II. Miss USOA is entitled to prevail under the *Dale* test

Dale makes clear this interconnection between free speech and freedom of association. To be protected under the First Amendment right of expressive association, a group must establish three things:

1. that the group “engage[s] in some form of expression, whether it be public or private.” *Dale*, 530 U.S. at 648;
2. that “[f]orcing [the] group to accept certain members [would] impair the ability of the group to express those views” (illustrating that the right of association is derivative of the right of free speech), *id.*; and
3. that the group’s interest in expressive association is not overcome by the state’s interest in eliminating discrimination, *id.* at 653.

Miss USOA satisfies this test, and the District Court was correct to so conclude on a motion for summary judgment, rather than burdening Miss USOA with the costs of going to trial. “In the First Amendment area, summary procedures are even more essential” than in other fields, in order to prevent speakers from engaging in “self-censorship.” *McBride v. Merrell Dow & Pharms. Inc.*, 717 F.2d 1460 (D.C. Cir. 1983) (quoting as “especially apposite” *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) (panel opinion by J. Skelly Wright, J.)).

A. Miss USOA engages in expression

Like the Boy Scouts in *Dale*, which wanted to express a message of heterosexuality as being the norm to aspire to, *Dale*, 530 U.S. at 650, Miss USOA wants to express a message that “natural born” women are

the proper exemplar of true femininity. To be sure, Miss USOA expresses its views about femininity through a competition rather than through a purely scripted program, but that is a protected expressive choice. To borrow the Court’s analysis regarding parades, “Rather like a composer, the [pageant organizers] select[] the expressive units of the [pageant] from potential participants, and though the score may not produce a particularized message, each contingent’s expression in the [organizers’] eyes comports with what merits celebration on that day.” *Hurley*, 515 U.S. at 574. That is especially so because the contestants presumably generally want to win, and as a result are likely to tailor their speech and performance to what the organizers signal that they want to see.

As in *Dale*, Miss USOA’s view is controversial, and ties to broader political debates about who should count as truly male or female in various programs where sex is a permissible criterion. Though *amici* are unaware of any polls on transgender participation in beauty pageants, Americans are split, for instance, on the similar question whether “transgender athletes . . . should be able to play on sports teams that match their current

gender identity (or) should only be allowed to play on sports teams that match their birth gender.”¹⁶

But whether American public opinion would support Miss USOA, be split, or oppose it, Miss USOA’s view is constitutionally protected. All that matters is that, like many organizations who are currently sharing their views about transgender inclusion, Miss USOA is trying to assert its own beliefs. And “an association that seeks to transmit such a system of values engages in expressive activity.” *Dale*, 530 U.S. at 650.

The *Dale* Court also recognized that the Boy Scouts’ expressed values were sincere even though they appeared to the district court to be antithetical to the Scouts’ goals and philosophy of diverse membership and reaching “all eligible youth.” *Id.* at 651–52. Similarly, here, “it is not the role of the courts to reject [Miss USOA]’s expressed values” because they may seem “internally inconsistent” with Miss USOA’s stated purposes of female empowerment and uplifting the community. *Id.* at 651. Miss USOA seeks to “EMPOWER Women” and “inspire each delegate to be the

¹⁶ Justin McCarthy, *Mixed Views Among Americans on Transgender Issues*, Gallup (May 26, 2021), <https://news.gallup.com/poll/350174/mixed-views-among-americans-transgender-issues.aspx> (62% say “Play on teams that match birth gender,” 34% say “Play on teams that match gender identity”).

best version of herself!” 2-ER-129; but it is entitled to define for itself who it views as “Women”—or as proper inspirations for women—or as counting as “herself.”

Miss USOA’s views are also protected even though Miss USOA does not spend much time discussing them. *Dale* illustrates that an organization is not required to “trumpet its views from the housetops” to earn First Amendment protection: “If the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach only by example, this fact does not negate the sincerity of its belief discussed above.” 530 U.S. at 655–56. We do not demand explicit descriptions of artists’ or musicians’ viewpoints to accompany each work they create; the existence of an implicit message is enough. Likewise, the existence of a formally and expressly stated policy on Miss USOA’s part, 2-ER-225, is surely enough as well. As the District Court put it,

Someone viewing the decision to exclude transgender women (and cisgender males) from a beauty pageant would likely understand that the pageant organizers wished to convey some message about the meaning of gender and femininity, and would probably also grasp the specific implication that the pageant organizers did not believe transgender women qualified as female. Although, given *Hurley*’s dismissal of the “particularized message” requirement, it is probably enough just that the observer understands that a more general message about gender norms or sexual identity is being expressed.

1-ER-17.

Indeed, for better or worse, traditionalist organizations often express their traditionalist views minimalistically, simply by avoiding expression that might run counter to those views and expecting traditional norms to fill the gap. The Scouts, for instance, implemented their policy against the backdrop of a culture where heterosexuality was presumed, and homosexuality was largely ignored. It made sense for the Scouts to express themselves subtly on the subject, by relying on what they thought would be the common view of their audience, which is that “morally straight” and “clean,” 530 U.S. at 650, implicitly embodies traditional morality with no need for further elaboration. (In the same respect, for instance, a Jewish beauty pageant might exclude Messianic Jews by simply relying on many Jews’ implicit assumption, however controversial it might be to some, that a person cannot be both Christian and religiously Jewish.¹⁷)

Likewise, Miss USOA is likely relying on its audience’s presupposing

¹⁷ This is a hypothetical; though there has been a Miss Jewish South Florida, see Victor Gonzalez, *Miss Jewish South Florida 2011: Babes and Matzo Balls at Miami’s “Main Hanukkah Party”*, Miami New Times (Dec. 15, 2011), <https://www.miaminewtimes.com/music/miss-jewish-south-florida-2011-babes-and-matzo-balls-at-miamis-main-hanukkah-party-6444209>], amici are unaware of any specific criteria for entry.

that “Misses” are indeed what Miss USOA calls “natural born women,” without the need for loud public announcements on the subject. Perhaps that is an archaic attitude; many no longer make that presupposition; and perhaps in time Miss USOA will either change its views (as the Boy Scouts eventually did¹⁸), or feel the need to defend them more prominently (as the Boy Scouts at first did as well, *Dale*, 530 U.S. at 652–53). But the First Amendment secures Miss USOA’s right to express its views subtly, and in reliance on what it sees as its particular audience’s existing attitudes, rather than by “trumpet[ing] its views from the housetops,” just as it secured the Boy Scouts’ right to do so, *id.* at 656.

And USOA has the right to seek to promote the view that only “natural born women” are true exemplars of femininity even if that view is not “central” (AAJ Amicus Br. 8) to their message; the word “central” appears nowhere in the *Dale* majority opinion (though it appears twice in the dissent, *id.* at 666, 675 (Stevens, J., dissenting)). Instead, as the *Dale* majority held, *id.* at 655,

[A]ssociations do not have to associate for the “purpose” of disseminating a certain message in order to be entitled to the protections

¹⁸ Kurtis Lee, *Here is how the Boy Scouts has evolved on social issues over the years*, L.A. Times (Feb. 5, 2017), <https://www.latimes.com/nation/la-na-boy-scouts-evolution-2017-story.html>.

of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection. For example, the purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless.

B. Miss USOA's speech is not stripped of protection because Miss USOA makes money with it

Miss USOA would also be entitled to this protection under the definition of an expressive association set out in Justice O'Connor's concurrence in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 635–36 (1984), and cited favorably by this Court in *IDK, Inc. v. Clark County*, which held that escort services were not expressive associations. 836 F.2d 1185, 1195 (9th Cir. 1988). Miss USOA conspicuously differs from an escort service, which clearly engages in only non-expressive, commercial activity. Miss USOA primarily engages in expressive activity, since its main purpose is to host the pageants, which are expressive events. And Miss USOA's events are conducted publicly on a stage so that it conveys its expressive message to an audience.

To the extent that Miss USOA engages in commercial activity, such as selling tickets and advertisements for its pageants, it is no different from newspapers, bookstores, and theaters, which all charge fees. Even the

parade in *Hurley* apparently charged a fee to some participants, *see Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston v. City of Boston*, 418 Mass. 238, 247 n.13 (1994) (“The findings of the judge suggest that virtually any member or group drawn from the public may apply or pay to enter the parade.”), *rev’d by Hurley*, and the Boy Scouts charge membership fees.¹⁹

And, like Miss USOA, most newspapers, bookstores, and theaters aim to make a profit. Indeed, the Copyright Act and the Constitution’s Copyright and Patent Clause recognize that a profit motive and creative expression go hand in hand. *See, e.g., Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985). Not only do economic incentives encourage speech creation, but they also help the creators “spread its message further.” 1-ER-28. “If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.” *Harte-Hanks Comms., Inc. v. Connaughton*, 491 U.S. 657, 667 (1989).

¹⁹ *Cost of Cub Scouting*, Boy Scouts of America, 2021, <https://www.scouting.org/programs/cub-scouts/cost-of-cub-scouting/> (last visited Oct. 20, 2021).

C. Requiring Miss USOA to include transgender contestants would impair its ability to convey its message

As the concept of a “Miss United States of America” beauty pageant suggests, the pageant aims to promote a particular vision of American (“United States of America”) femininity (“Miss”). The other criteria reinforce this. Contestants in the Miss division must be United States citizens between the ages of eighteen and twenty-eight, who are not married and have never given birth,²⁰ which suggests a particular vision—however archaic or even offensive it might seem to some—of maidenly American beauty. Likewise, when the contestants speak and present themselves individually during the personal interview round of the pageant, they would presumably strive to show the judges that they share Miss USOA’s vision.

Including Green in Miss USOA’s pageant would significantly burden Miss USOA’s ability to advocate its views that transgender women are not genuine exemplars of American femininity. “The forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way

²⁰ *The Pageant*, United States of America Pageants, <https://www.unit-edstatesofamericapageants.com/about> (last visited Oct. 4, 2021).

the group’s ability to advocate public or private viewpoints.” *Dale*, 530 U.S. at 648. Just as including Dale, a gay rights activist, as an Assistant Scout Master would “force the [Boy Scouts] to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior,” *Dale*, 530 U.S. at 653, so requiring Miss USOA to include Green would force Miss USOA to send a message that it sees transgender women as true women.

Indeed, if the pageant could indeed be required not to discriminate based on transgender status, then it would presumably be forbidden from discriminating in judging and not just in the eligibility criteria—just as a restaurant not only has to allow patrons regardless of protected status, but must serve them equally, and an employer not only has to accept applicants regardless of protected status, but must evaluate them equally. If that is so, then it is possible that Green might actually win the pageant, under these government-imposed equal treatment rules. And that would be even more clearly inconsistent with the message that Miss USOA is trying to send about “natural born women” being the ones who are truly feminine.

Miss USOA thus has certain eligibility criteria for contestants so that its staged production expresses its artistic vision and viewpoints; its eligibility decisions are “part and parcel of the [pageant’s] creative content.” *Claybrooks*, 898 F. Supp. 2d at 999. Miss USOA is “entitled to select the elements (here, cast members) that support whatever expressive message the [pageants] convey or are intended to convey.” *Id.* at 1000.

As courts must “give deference to an association’s assertions regarding the nature of its expression, [courts] must also give deference to an association’s view of what would impair its expression.” *Dale*, 530 U.S. at 653. But here such deference to the association’s view of what would impair its expression is not even needed. Miss USOA has been “unequivocal” that it “views the concept of womanhood to be limited to ‘natural born’ or ‘biological’ women, which does not include transgender women like Green,” 1-ER-29. That is part of its own self-definition of who counts as a “Miss.” Allowing contestants within the pageant who do not fit that definition would impair Miss USOA’s ability to convey the particular message that it chooses to convey.

Indeed, because including Green would force Miss USOA to send a message it does not agree with, Miss USOA may feel pressure to respond

to disavow that compelled message, which itself would be an unconstitutional speech compulsion. *See, e.g., Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 11–12 (1986) (plurality opin.). The inclusion of transgender contestants would likely attract the public’s attention, especially because transgender participation in beauty pageants is still novel. For example, another beauty pageant recently crowned a transgender Miss Nevada, and this was extensively covered by media outlets.²¹ A resulting opinion piece was titled, “A Man is the Winner: Trans Contestant Wins Women’s Beauty Pageant.”²² If Green participated in the Miss

²¹ *See, e.g.,* Josie Fischels & Sarah McCammon, *2021 Miss Nevada Will Be The First Openly Transgender Miss USA Contestant*, NPR (July 3, 2021), <https://www.npr.org/2021/07/03/1012666827/2021-miss-nevada-will-be-the-first-openly-transgender-miss-usa-contestant>; Sarah Betancourt, *Miss Nevada to be first openly transgender Miss USA contestant*, Guardian (June 30, 2021 11:38 AM), <https://www.theguardian.com/us-news/2021/jun/30/miss-nevada-first-openly-transgender-miss-usa-contestant>; Dan Avery, *Nevada pageant winner to become 1st transgender Miss USA contestant*, NBC News (June 29, 2021 11:30 AM), <https://www.nbcnews.com/nbc-out/out-news/nevada-pageant-winner-become-1st-transgender-miss-usa-contestant-rcna1298>; Kiara Brantley-Jones, *Kataluna Enriquez, 1st transgender woman to win Miss Nevada USA, speaks out on overcoming challenges to claim title*, Good Morning America (July 19, 2021), <https://www.goodmorningamerica.com/culture/story/kataluna-enriquez-1st-transgender-woman-win-miss-nevada-78554882>. “Miss USA” in these articles is a different organization from Miss United States Of America, LLC.

²² Kenny Webster, *A Man is the Winner: Trans Contestant Wins Women’s Beauty Pageant*, Walton and Johnson, KPRC Radio (Mar. 22,

USOA pageant, and the public began to discuss that, Miss USOA would have to publicly discuss its beliefs in more detail, and give more emphasis to them than it would otherwise have preferred.

And to hold that Miss USOA has not sufficiently nor sincerely expressed its views would likewise force Miss USOA to engage in undesired speech. If Miss USOA's views on transgender women are only protected if Miss USOA explicitly and regularly discusses them, then Miss USOA will have to increase its discussion of those beliefs to stave off any other lawsuits. This would risk drowning out—or at least diluting—Miss USOA's other messages, such as female empowerment, confidence, and success. Instead of the positive ideals Miss USOA primarily seeks to promote, Miss USOA might have to shift to more negative messaging. Miss USOA has the right to determine what to say, how much to say it, and in what way to say it. *See Dale*, 530 U.S. at 655–56 (concluding that the Boy Scouts' message was sincere because they chose to lead its members by example and provided “a positive moral code for living”). Miss USOA has sufficiently presented its viewpoints, and they warrant deference.

2021), <https://kprcradio.iheart.com/featured/walton-and-johnson/content/2021-03-22-a-man-is-the-winner-trans-contestant-wins-womens-beauty-pageant/>.

D. Miss USOA’s interests in expressive association and free speech outweigh Oregon’s interests under the Act

The *Dale* Court concluded that the Scouts’ right to expressive association trumped New Jersey’s interests in eliminating sexuality discrimination in places of public accommodation. 530 U.S. at 648. Similarly, here, Miss USOA’s First Amendment rights trump Oregon’s interests in eliminating gender-identity discrimination.

“[T]he associational interest in freedom of expression [must be] set on one side of the scale, and the State’s interest on the other.” *Id.* at 658–59. In such a balancing test, the Court has repeatedly found that the states’ interests cannot justify an intrusion on First Amendment rights when the intrusion is severe. *Id.* at 659; *see e.g., Hurley*, 515 U.S. at 578–79. Indeed, when the Court rejected the First Amendment defense in *Roberts*, it did so only after holding that “the Jaycees . . . failed to demonstrate . . . any *serious* burdens on the male members’ freedom of expressive association.” 468 U.S. at 626 (emphasis added). If the Jaycees had also organized a Mr. Jaycees handsomeness contest, and limited it to men, *amici* doubt that the Court would have required the contest to equally admit and evaluate both men and women.

The district court rightly found that the facts in this case were materially similar to those in *Dale* and demand the same result. 1-ER-32. The state’s interest in combatting transgender discrimination here is no more compelling than the interest in combatting sexual orientation discrimination in *Dale*. *Id.* New Jersey’s accommodations law there and the Act here “both enforce a blanket prohibition against discrimination based on a protected status” and are equally restrictive “in achieving the state[s]’ interest[s] in preventing discrimination.” *Id.*

And the burden on Miss USOA here is at least as great as that on the Scouts in *Dale*. Indeed, as noted at p. 26, Green’s theory might require Miss USOA to actually crown her the winner, which would undermine Miss USOA’s message about what constitutes true femininity even more than having a gay Assistant Scoutmaster undermined the Scouts’ message about what constitutes being “morally straight.”

Conclusion

Denying Miss USOA the right to define who can qualify as a “Miss” would contradict and undermine the protection long afforded to artistic expression. The creators of films, television shows, plays, and other works would not be able to express their desired messages through their

selective casting. Other pageants would likewise have to forswear their selection criteria, whether they turn on national origin, race, age, citizenship, marital status, or for that matter sex; Miss America would have to become Anyone Anywhere. Both the freedom of speech and the closely related freedom of expressive association preclude such a result.

Respectfully Submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 9th Cir. R. 32-1(a) because this brief contains 6,266 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: Oct. 29, 2021

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Certificate of Service

I hereby certify that I electronically filed the foregoing Brief *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on Oct. 29, 2021.

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