No. 21-35228

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANITA NOELLE GREEN,

Plaintiff-Appellant,

v.

MISS UNITED STATES OF AMERICA, LLC, a Nevada limited liability corporation, DBA United States of America Pageants,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Oregon
Civil Case No. 3:19-cv-02048-MO
Hon. Michael W. Mosman

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Miss United States of America, LLC, states that it does not have any parent corporation, nor does any publicly held corporation own 10% or more of its stock.

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STATEMENT OF JURISDICTION

Miss United States of America agrees that the district court properly exercised diversity jurisdiction under 28 U.S.C. § 1332, that Anita Green timely appealed, and that this Court thus has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court correctly concluded that a beauty pageant celebrating biological women through a livestreamed event before a live audience is an expressive association entitled to First Amendment protection.

2. Alternatively, whether the forced inclusion of a biological male, transgender activist into a beauty pageant that celebrates biological women would alter the pageant's message in a content- and viewpoint-based way and compel that pageant to speak a message with which it fundamentally disagrees.

3. Whether a pageant's interests in expressive association and freedom from compelled speech outweigh generalized state interests in enforcing public-accommodation laws.

PERTINENT STATUTES AND REGULATIONS

Per Circuit Rule 28-2.7, an addendum is attached to this brief, identifying the pertinent statutes at issue in this appeal and cited throughout the brief.

INTRODUCTION

The instant Broadway classic *Hamilton* was a runaway hit because it invited "African Americans, Latinos, and immigrants to see themselves as part of the genuinely glorious American story." Kevin D. Williamson, *The Heights of Stupidity*, NAT'L REV. (June 23, 2021), https://perma.cc/Q35S-HGUX. If the government used public-accommodation laws to force *Hamilton*'s producers to cast more white actors, it would fundamentally change the show and its message. Brian Soucek, *The Constitutional Irrelevance of Art*, 99 N.C. L. REV. 685, 719 (2021). And no one would disagree that such compulsion violates the production's First Amendment free-association and free-speech rights.

In a nutshell, that's this case. Miss United States of America (the Pageant) is a live-streamed entertainment show that conveys the Pageant's chosen messages uplifting and empowering women. Green asks this Court to use Oregon's public-accommodation law to force the Pageant's producers to also showcase biological males who identify as women and who desire to advocate that female-identifying males *are* women.

But just like forcing *Hamilton* to change its actors and actresses, compelling the Pageant to change its participants to include biological males would unequivocally alter the Pageant's live show—and its message. To require the Pageant to accept a natural born male as a contestant would necessarily "impair the ability of the [Pageant] to express those views, and only those views, that it intends to express." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

Green concedes that forcing other beauty pageants to showcase participants contrary to *those* pageants' messages would violate the First Amendment. 1-SER-177 ("[T]he inclusion of [non]-gay or non-Native American groups [would] interfere with . . . expressive association."). Yet Green—who disagrees with the Pageant's message and viewpoint and desires to change them—inexplicably does not see that same problem here. What Green fails to appreciate is that no matter the specific message at issue, government compulsion violates First Amendment free-association and free-speech rights.

Accordingly, this Court should affirm the district court's grant of summary judgment for the Pageant.

STATEMENT OF THE CASE

A. Factual Background

1. Miss United States of America

The Pageant annually orchestrates a national beauty pageant, which is performed "before a live in-person audience and live-streamed online." 2-ER-212. Its live show follows a familiar format: participants compete in multiple rounds where judges evaluate them based on criteria that reflect the Pageant's vision and message.

In the pageant's opening preliminary round, contestants answer questions in an off-stage interview, and judges evaluate their answers for "voice," "confidence," "knowledge," and "sense of values." 2-ER-299; 3-ER-403. Then contestants perform onstage in patriotic dress, showcasing American pride with everything from bald eagle costumes to living Statues of Liberty. Finally, contestants compete onstage in fitness wear, swimsuits, and formal gowns.

After the preliminary round, contestants again appear onstage and perform a choreographed dance. During this dance, each contestant wears a cocktail dress with a specialized sash that prominently displays the Pageant's logo. An emcee then announces, using feminine titles like "Miss," which contestants will move on to the semi-final rounds.

The semi-final round resembles the preliminary. Contestants again appear onstage in fitness wear and formal gowns, and judges again evaluate them based on "poise," "posture," "charisma," and "grace." 2-ER-301.

Three semi-finalists advance to a final round featuring onstage questioning. The Pageant decides which questions the emcee will pose to the contestants. Previous examples include, "What will you do to . . . promote your platform on a national level?" and "Why is the image you portray on your personal social media accounts important as a titleholder?"[1] The judges then tally the semi-finalists' scores, and they are invited back onstage in formal wear for the final awards. The winning contestant is crowned Miss United States of America.

Tanice Smith, the Pageant's National Director, is intimately involved with the pageantry at every step. She writes the emcee's scripts, the judges' criteria, and the questions posed to each contestant.

[1] These questions (and others like them) can be found in the video copies of the Pageant's 2020 national pageant, submitted in the record below as Exhibits 24, 25, and 26 to the Declaration of Tanice Smith in Support of Defendant's Motion for Summary Judgment. Simultaneous with the filing of this brief, the Pageant, under C.R. 27-14, requests this Court's leave to transmit a copy of these exhibits.

2-ER-203. She selects the pageant's music and backgrounds, designs the contestants' sashes, coordinates the choreography, and even sets the stage lighting. *Id.* Moreover, Smith helps assemble the Pageant's national program book, where each contestant gets a one-page spread identifying her as a state titleholder and including an inspirational message (one that Smith must approve in advance). 2-ER-213. Pageant sponsors also place advertisements in this book, which Smith "review[s] and [then] approve[s]" if they are "consistent with [the Pageant's] message." *Id.*

In essence, that message is "empowering biological women." *Id.* The Pageant wants to "encourage women to strive to ACHIEVE their hopes, dreams, goals, and aspirations, while making them feel CONFIDENT and BEAUTIFUL inside and out!" 2-ER-224. Through the Pageant, contestants form an "elite sisterhood" that collectively represent the Pageant's mission "to EMPOWER [w]omen, INSPIRE others, and UPLIFT everyone!" 2-ER-273. The Pageant believes that this "elite sisterhood" will "inspire each [woman] to be the best version of herself"—especially the titleholder, who, as the Pageant's most visible representative, embodies its message. *Id.*

Like all beauty pageants, the Pageant uses certain eligibility requirements to restrict who can compete. Some of these requirements—such as age, residency, marital status, and maternity status—slot contestants into certain divisions. For example, the Pageant uses age to differentiate who it crowns as "Teen" and "Miss." 2-ER-224–25.

But the Pageant uses additional eligibility requirements to safeguard its message. Not every person can become a member of the Pageant's "elite sisterhood," for some do not align with the Pageant's message. 2-ER-224. Prospective candidates cannot, for instance, have ever "posed nude," for that would contradict the moral and ethical message that the Pageant communicates. *Id.* Moreover, to promote the Pageant's idea of femininity, prospective contestants must be "natural born female[s]." 2-ER-225.

The Pageant vigorously enforces these eligibility requirements. A selection committee reviews each prospective contestant's application. If applicants do not meet the eligibility requirements, the committee rejects their application. 2-ER-207. Because one Oregon applicant had "posed nude in the past," the committee rejected her application. *Id.* Similarly, the committee rejected another applicant who used

"photographs and language" in her application that were "inconsistent" with the "vision and message [that the Pageant] wishes to associate" with. *Id.*; *see also* 2-ER-322.

Safeguarding the message does not stop with contestant screening; the Pageant also ensures that each selected contestant will not compromise its message. For even if they are not crowned, these contestants will visibly promote the Pageant's message. They will compete before a live audience wearing a sash emblazoned with the Pageant's logo. And the Pageant will promote them on social media, particularly highlighting their community service efforts as emblematic of the female role model that the Pageant wants to celebrate.

So, if selected to compete, contestants agree to abide by all Pageant guidelines. 2-ER-312–14. Those guidelines include, for instance, prohibitions from posting on personal social media accounts any material that is "sexually explicit," "offensive," or otherwise "inconsistent with the positive images and/or good will with which [the Pageant] wishes to associate." 2-ER-335. To ensure compliance, each contestant must give the Pageant "authority to monitor and regulate the content of [her] personal social media accounts." *Id.* Contestants

also agree to refrain from activity "that is, or could be, perceived by [the Pageant] as contrary to the mission of the organization." 2-ER-321.

If a contestant wins the crown, the Pageant takes steps to ensure that the titleholder does not compromise its message. Among other things, titleholders agree to uphold the Pageant's "dress code regulation standards." 2-ER-337. When a national titleholder posted images on her social media account in revealing clothing, the Pageant "discharged [her] from [her] role as United States of America's Miss" for "tarnish[ing] and impugn[ing] [the Pageant's] integrity." 3-ER-374. Similarly, the Pageant revoked a state titleholder's crown for posting a picture of herself "in a thong" on social media. 3-ER-379. The Pageant explained that this behavior was not only "inconsistent with" its "vision and message" but also actively harmed the Pageant's "efforts to promote body positivity and positive self-images and produce community role models and leaders who can encourage others and inspire women to be confident." 3-ER-379–80.

The Pageant guards its message so closely that it even regulates its volunteers and contributors. Emcees, for instance, cannot "promote . . . messages inconsistent with [the Pageant's] values, message, or

ideals"—including "political, social, or economic issues, groups, or ideas." 3-ER-355. When a state pageant wanted to use as a judge a male dressed in female drag, the national Pageant prohibited the state pageant from doing so "to avoid confusion on what [the Pageant's] stance is on what it means to be a woman."[2] 2-ER-72. Similarly, the Pageant rejected a proposed advertisement for its national program book because the advertisement "featured an image of a man dressed as a woman which contradicted [the Pageant's] message of empowering biological women." 2-ER-213; *see also* 3-ER-629.

Everything the Pageant does, then, either communicates or protects what the Pageants envisions as the ideal woman.

[2] Green faults the Pageant for the fact that, in 2018, a state-pageant affiliate used as a judge a man dressed in female drag. At that point, however, the Pageant had only operated for one year and had not prepared for every contingency. As soon as the national Pageant learned of the state pageant's actions, the Pageant changed its rules to prevent such an incident from happening again. 2-ER-63. Indeed, in 2020, the Pageant used this rule to prevent another state affiliate from using as a judge a man dressed in female drag. So rather than a "sudden change in position . . . convenient to [the Pageant's] litigation position," as Green alleges, the Pageant's rule change was part of Smith's annual contract review and a natural outgrowth of the Pageant exercising editorial control over its affiliates. Green Br. at 44.

2. Appellant Green

Appellant Green participates in beauty pageants as an "openly transgender contestant." 4-ER-862. Among other reasons, Green competes to obtain "a public platform in which to discuss important social issues," including gender ideology. 4-ER-862. As a self-described "leftist," 4-ER-696, and "activist," 4-ER-697, Green wants "to fight for the LGBTIQ community"—specifically "the transgender community"—"by bringing attention to the issues [they] face." 4-ER-725. Green sees the connection between politics and pageants as "not . . . much of a stretch." 4-ER-725. On Instagram, for instance, Green posted an image in pageant attire with a caption noting that Green is a "fighter" whose "number one issue . . . is queer rights." 4-ER-708.

On this "hotly contested matter of public concern," the Pageant does not share Green's philosophical views. *See Meriwether v. Hartop*, 992 F.3d 492, 506 (6th Cir. 2021). Whereas Green defines womanhood to include biological males who identify as women, the Pageant defines women as only biological women. To do so, the Pageant limits its contestants to "natural born female[s]." *E.g.*, 2-ER-224.

Despite this rule, in 2018, Green started a conversation with Smith—without initially disclosing that Green was transgender—to "learn[ ] more" about how to compete in the Pageant. 4-ER-690. Smith sent Green the Pageant's rules, including its eligibility requirements. Smith also informed Green that the Oregon state pageant had already occurred but proceeded to invite Green to apply to the national pageant as an at-large contestant. "You know I'm transgender, right?" Green asked Smith, to which Smith responded that she did not. 4-ER-691. Though Smith offered to help Green find a different pageant to compete in, Green refused and threatened to speak to an attorney. *Id.*

Green then applied to the national Pageant anyway. Green *only* applied to the national Pageant and "never actually applied to the Oregon pageant," a fact the district court acknowledged as "undisputed." 1-ER-36; *see also* 1-SER-36–39. The Pageant's selection committee rejected the application—not because Green was a natural born male but because the "entry deadline for [the] 2019 pageant [had] passed" and the Pageant was "not currently taking applications for [the] 2020 pageant." 4-ER-695.

B. Procedural History

Undeterred, Green made good on the earlier threat to Smith and sued the Pageant, alleging that the Pageant had discriminated based on gender identity in contravention of Oregon's Public Accommodations Act. Or. Rev. Stat. § 659A.403. Green sued only the national Pageant, alleges an injury caused only by the national Pageant, and seeks relief only from the national Pageant.

The Pageant moved to dismiss, arguing, among other things, that Green's attempt to weaponize the Act would violate the Pageant's free-association and free-speech rights under the First Amendment. Rather than rule on the motion to dismiss, the district court opened "limited discovery to gather the facts necessary to resolve whether [the Pageant] should be considered an expressive association." 4-ER-868. The court vowed to resolve the "First Amendment constitutional questions of free speech and free association" afterward "in a summary judgment posture." *Id.*

After discovery, the district court resolved the Pageant's motion for summary judgment and agreed with the Pageant's free-association

argument.[3] The court explained that the Supreme Court drew "a wide boundary around what it means to 'engage in some form of expression,'" and the Pageant "clear[ed] that relatively low bar." 1-ER-22 (quoting *Dale*, 530 U.S. at 648). After weighing the Pageant's expressive and commercial activities, the court held that the Pageant "is predominantly engaged in expressive activity." 1-ER-25. Moreover, the court held that the Pageant "seeks to promote a particular conception of female identity which does not include transgender women," so "including contestants at odds with that concept of womanhood [like Green] . . . would burden [the Pageant's] chosen expression." 1-ER-30.

Finally, the court held that the Pageant's "interest in expressive association outweigh[ed] Oregon's interest in preventing gender-identity discrimination in places of public accommodation." 1-ER-32.

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[3] Contrary to the State's assertion, nowhere did the Pageant concede that it was a public accommodation. The district court opened discovery on and sought to resolve only the First Amendment issues. 1-ER-3 (the district court "ordered the parties to engage in limited discovery and to submit supplemental briefing on the question of whether [the Pageant] is an 'expressive association' under First Amendment doctrine"). The Pageant therefore limited the arguments in its summary judgment motion to those issues. Should this Court reverse and remand, the Pageant reserves its right to pursue the defense that it is not a public accommodation subject to the Act as well as its other defenses.

The First Amendment therefore protected the Pageant's right to free association, and the district court granted the Pageant's summary-judgment motion.

Curiously, the court rejected the Pageant's compelled-speech argument. It said that the Act "regulates conduct, not speech" because the Act would not "directly require [the Pageant] to host a particular message because of that message's content" but would only redress a situation where "individuals had been denied privileges because of their protected status," 1-ER-12–14 (cleaned up), ignoring that the inclusion of a biological male activist fundamentally alters a pageant's message about biological women.

Since the court thought that the Act would only "incidentally" regulate the Pageant's speech, it applied the framework in *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam), to determine whether the Pageant's contestant-selection process was nonetheless "expressive conduct" entitled to some First Amendment protection. The court said there was expressive conduct because the Pageant "intends to send a message about its views on womanhood" that those "viewing [that] decision . . . would understand." 1-ER-17. But the Court nonetheless

said that the State's important interest—ensuring that biological male activists can participate in pageants celebrating biological women—meant that the State could alter and compel the Pageant's "expressive conduct." 1-ER-20 (applying *United States v. O'Brien*, 391 U.S. 367 (1968)).

SUMMARY OF THE ARGUMENT

"The right to speak is often exercised most effectively by combining one's voice with the voices of others." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006). But for that right to be effective, the government cannot force groups like the Pageant "to accept members" that change the Pageant's message. *Dale*, 530 U.S. at 648. Otherwise, the government could compel association that would "significantly affect [the group's] expression" and prevent it from communicating the message that it wants to convey. *Id.* at 656.

Here, to force the Pageant to allow Green, a natural born male, to compete in a live event promoting women and crowning the ideal woman would necessarily alter the Pageant's desired message: the celebration of biological women. The district court correctly held that

the First Amendment prevents Green from using the Act in this way, and this Court should affirm.

The First Amendment also gives speakers like the Pageant the "autonomy" to craft their own message. *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995). With that autonomy, the Pageant decided that it wanted to celebrate only biological females. To force the Pageant to include a natural-born male as a contestant would unconstitutionally force the Pageant "to express a message contrary to [its] deepest convictions." *Nat'l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (*NIFLA*) (Kennedy, J., concurring). This is an alternative basis to affirm.

Finally, because Green's weaponization of the Act would infringe either the Pageant's free-association or its free-speech rights, this Court should apply strict scrutiny. Green has not alleged an "actual problem" that would give the State a compelling interest in specifically forcing the Pageant to accept Green as a contestant. Nor has Green shown that such an application is the least restrictive means by which the State can promote public accommodation. Because the Act cannot survive constitutional scrutiny, this Court should affirm.

ARGUMENT

I. The district court correctly granted summary judgment to the Pageant because the Pageant is an expressive association entitled to First Amendment protection.

A. Standard of Review

This court reviews a grant of summary judgment de novo. *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 796 (9th Cir. 2011).

B. The Pageant is an expressive association entitled to full First Amendment protection.

The First Amendment protects the right "to associate" with others to promote diverse "political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984). That protection precludes the government from forcing "inclusion of an unwanted person in a group" if doing so would compromise "the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648. To qualify for First Amendment protection, a group simply "must engage in some form of expression, whether it be public or private." *Id.*; *Roberts*, 468 U.S. at 617.

Courts must also "give deference to [associations'] assertions regarding the nature of [their] expression." *Dale*, 530 U.S. at 653. Though Green argues the district court erred by doing so, the Supreme

Court was clear that courts must not "reject a group's expressed values because they disagree with those values." *Id.* at 651. And the record here—even more than the record in *Dale*—confirms that everything about the Pageant, from its candidate-selection process to the control it exercises over volunteers and contributors, is consistent with its desire to promote biological women. It has done more than merely "assert[ ] that" Green's forced inclusion "would impair its message." *Id.* at 653.

Even without this deference, "[t]he Supreme Court has cast a fairly wide net in its definition of what comprises expressive activity." *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 443 (3d Cir. 2000). So, too, has this Court, recognizing everything from a "sexy cops" "street performance" to the "distribution of sanctified vegan and vegetarian food" as expressive association. *Santopietro v. Howell*, 857 F.3d 980, 990–91 (9th Cir. 2017); *Krishna Lunch of S. Cal., Inc. v. Gordon*, 797 F. App'x 311, 313 (9th Cir. 2020).

Pageants also qualify as purely expressive activities. Pageants are "elaborate ceremon[ies]" and can encompass everything from "political events like the . . . president's annual State of the Union speech" to university "commencement ceremonies." Hilary Levey Friedman, HERE

SHE IS: THE COMPLICATED REIGN OF THE BEAUTY PAGEANT IN AMERICA 3 (2020). Indeed, "[s]ome of the biggest events in popular culture, like the Academy Awards, Super Bowl, and opening and closing ceremonies of the Olympics, have many elements of pageantry." *Id.* These events all "entertain[ ] and visual[ly] express[ ]." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010).

No less than "plays[ ] and movies" like *Hamilton*, pageants "communicate ideas" and "social messages." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011). They do so with "words," "symbols," costumes, and acted-out drama, "all of which are forms of pure expression that are entitled to full First Amendment protection." *Anderson*, 621 F.3d at 1061. A university commencement ceremony, for instance, celebrates academic achievement with a valedictory address ("words") and a recognizable outfit (the cap-and-gown). Likewise, the 2012 Summer Olympics opening ceremony celebrated British heritage through vibrant performances and music—culminating with a cameo from the Queen and one of Britain's most celebrated literary characters, James Bond.

Beauty pageants also convey messages about social and political topics. These messages often revolve around the "ideal vision of American womanhood." Margot Mifflin, LOOKING FOR MISS AMERICA: A PAGEANT'S 100-YEAR QUEST TO DEFINE WOMANHOOD 9 (2020). To find that ideal woman, most pageants use "a familiar, recognizable format: female contestants enter a competitive event, where they are judged based on beauty, personality, talent, and the ever so elusive 'poise.' A panel of judges evaluates each contestant, and the woman who garners the most points in the various events of the pageant—often including swimsuit, evening gown, talent, and interview competitions—wins and is crowned 'queen.'" Sarah Banet-Weiser, THE MOST BEAUTIFUL GIRL IN THE WORLD: BEAUTY PAGEANTS AND NATIONAL IDENTITY 31 (1999). That queen is "often viewed as representative of the best of what a [community] has to offer." Magda Hinojosa & Jill Carle, *From Miss World to World Leader: Beauty Queens, Paths to Power, and Political Representations*, 37 J. OF WOMEN, POLITICS & POLICY 24, 28 (2016).

Here, the Pageant specifically uses its pageantry "to encourage women," to "mak[e] them feel confident and beautiful inside and out," to

"promot[e] positive self-image," and to "advocat[e] a platform of community service"—all qualities that, like being a "natural born female," the Pageant sees encapsulated in "ideal American womanhood." 2-ER-224 (cleaned up); Mifflin, LOOKING FOR MISS AMERICA at 9.

The Pageant's message is first "social"—so much so that it is inherent in everything the Pageant does. *Roberts*, 468 U.S. at 622–23. In fact, the Pageant "exist[s] for little reason *other* than to express," Soucek, *The Constitutional Irrelevance of Art*, 99 N.C. L. REV. at 745, and "would cease to exist" otherwise, 2-ER-203. In *Hurley*, it was the inherent, social expressiveness of parades that made Boston's St. Patrick's Day Parade an expressive association rather than a mere "march from here to there . . . to reach a destination." 515 U.S. at 568. The Parade was a "public drama[ ] of social relations," *id.*, a collective action whose inherent "expressiveness [was] the very thing that [made it] different than ordinary walks." Soucek, *The Constitutional Irrelevance of Art*, 99 N.C. L. REV. at 745.

Here, watchers understand that the contestants in a pageant, like floats in a parade, come together to make "some sort of collective point." *Hurley*, 515 U.S. at 568; *Norma Kristie, Inc. v. City of Okla. City*, 572 F.

Supp. 88, 91 (W.D. Okla. 1983) (holding Miss Gay America Pageant is an artistic, expressive activity); *see also Revels v. Miss Am. Org.*, No. 7:02CV140-F(1), 2002 WL 31190934, at *8 (E.D.N.C. Oct. 2, 2002) (holding that a beauty pageant "has the right to express its values by associating with those contestants, and *only* those contestants, who, in the opinion of [the pageant], share [its] values"). That's why the Pageant opens its events to viewers, both through a live audience and a livestream. This inherent, social message marks the Pageant as an expressive association.

Moreover, the Pageant's message is "political." *Roberts*, 468 U.S. at 622–23. Gender identity is a "sensitive political topic[ ]"—and a "hotly contested" one at that. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018); *Meriwether*, 992 F.3d at 506. As the district court noted, "beauty pageants are commonly understood to be bound up with notions of gender and sexual identity." 1-ER-17. So when the Pageant talks about what it means to be a woman and produces a pageant that displays its ideal vision of femininity, it expresses a political message. That expression "occupies the highest rung of the hierarchy of First Amendment values and

merits special protection." *Janus*, 138 S. Ct. at 2476 (cleaned up). Indeed, such "political speech is entitled to the *fullest* possible measure of constitutional protection." *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (emphasis added).

Even Green recognizes the political nature of the Pageant's expression. Green admitted that the line between politics and pageants is "not as much of a stretch as many people think." 4-ER-725. Green sees pageants as "much more than just competing on a stage with other women"; instead they are a "public platform in which to discuss important social issues." 4-ER-862. Green competes, for instance, to bring a "message of solidarity for the transgender community to a grand stage." 4-ER-725. Green's own admissions thus highlight the political nature of the Pageant's expression about gender identity.

Finally, the Pageant's message is also "educational." *Roberts*, 468 U.S. at 622–23. It is "indisputable that an association that seeks to transmit . . . a system of values engages in expressive activity." *Dale*, 530 U.S. at 650; *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring) (noting that an association might be expressive if its activities are "intended to develop good morals, reverence, patriotism, and a desire for

self-improvement"). In *Dale*, the Supreme Court held that the Boy Scouts qualified as an expressive association because the Scouts sought to "transmit such a system of values." 530 U.S. at 650. And like the Boy Scouts, the Pageant here has a "clear" "general mission": "to instill values in" contestants, values like female empowerment, female achievement, and positive self-image. *Id.* at 649 (cleaned up).

As the Boy Scouts instilled its values through "activities like camping, archery, and fishing," the Pageant instills its values through its pageantry. *Id.* The Pageant aspires to "produce community role models and leaders who can encourage others and inspire women to be confident." 3-ER-379–80. Thus, because the Pageant "seeks to transmit . . . a system of values," it "engages in expressive activity" and is an expressive association entitled to First Amendment protection. *Dale*, 530 U.S. at 650.

Not only does the Pageant express a message, but, like other expressive associations, it exercises "editorial judgment" to vigorously protect that message. *IDK, Inc. v. Clark Cnty.*, 836 F.2d 1185, 1196 (9th Cir. 1988). Before a pageant even begins, the Pageant has already shaped its message through its contestant-selection process. *Hurley*,

515 U.S. at 570 (noting that Boston's St. Patrick's Day Parade expressed a message before the parade started through its "selection of contingents"). The Pageant excludes, for example, applicants who have "posed nude in film or print media" as contrary to the Pageant's message of "positive self-image." 4-ER-654; 3-ER-379; *see also* 2-ER-207 (noting that a prospective contestant was rejected for posing nude). It also rejects prospective candidates "whose application[s] include[ ] photographs and language . . . inconsistent with [the Pageant's] message." 2-ER-207.

And the Pageant guards its message after the live event ends, prohibiting contestants from posting on personal social media accounts any material that is "sexually explicit," "offensive," or otherwise "inconsistent with the positive images and/or good will with which [the Pageant] wishes to associate." 4-ER-668–69; *see also* 2-ER-215 (the Pageant "regularly review[s] [a] prospective contestant['s] social media pages to evaluate whether the prospective contestant communicates messages consistent with [the Pageant's] rules, goals, mission, and message"). Through these actions, the Pageant, like "publishers,

concert promoters, and cable television franchisers," exercises "editorial judgment" to safeguard its message. *IDK*, 836 F.2d at 1195–96.

Green's contrary arguments fail. Green first argues that the Pageant does not merit First Amendment protection because it is not an "association," likening the Pageant to mere contestants that are "first and foremost competitors." Green Br. at 23. This argument contradicts Green's admission that "pageants are much more than just competing on stage with other women." 4-ER-862. And it erroneously redirects the focus from the national Pageant—the sole defendant here—to its contestants. Every expressive association, after all, is made up of "*individuals*[who] join together and speak." *Rumsfeld*, 547 U.S. at 68 (emphasis added). Even if these individuals compete against each other, they can collectively form an association that expresses a message.

For instance, in *Apilado*, several gay softball players competed within the North American Gay Amateur Athletic Alliance. Even so, the Alliance itself still "promote[d] amateur sports competition . . . with special emphasis on the participation of members of the gay, lesbian, bisexual and transgender (GLBT) community." *Apilado v. N. Am. Gay Amateur Athletic All.*, 792 F. Supp. 2d 1151, 1161 (W.D. Wash. 2011).

Individual competition did not diminish the Alliance's expressive association; nor does it diminish the Pageant's. *See also Hardie v. NCAA*, 876 F.3d 312, 328 (9th Cir. 2017) (Faber, J., concurring in part and in the judgment) (noting that the NCAA "has the right, one with robust constitutional dimensions, to decide with whom it will associate").

In fact, that the contestants compete against each other makes it *more* an association, not less. Unlike in *Rumsfeld*, where military recruiters merely came onto campus, "interact[ed]" with students in isolated encounters, and then left, here pageant contestants vie against each other to visibly represent the Pageant. 547 U.S. at 69. They do so in a livestreamed event; in *Rumsfeld*, no one livestreamed the job interviews. And whereas an observer could have failed to notice the recruiters' presence on campus, *no one* will miss the contestants' association with the Pageant: contestants wear the Pageant's custom sashes—emblazoned with the Pageant's logo—and participate on a stage bedecked with banners bearing the Pageant's name. The Pageant also uses its social media to promote each contestant.

Nor will anyone misunderstand what that association means. By being on stage, each contestant could become Miss United States of America, the Pageant's most visible representative. In fact, during the pageant, each contestant is evaluated based on how well she aligns with the Pageant's message, for whoever wins the crown will then embody that message. *Rumsfeld* is inapposite.

The contestants' individual expressions also do not defeat the Pageant's expressive association. Green argues that the Pageant is not an association because the contestants "speak their *own* various and individualized messages." Green Br. at 23. But "First Amendment protection [does not] require a speaker to generate, as an original matter, each item featured in the communication." *Hurley*, 515 U.S. at 570. Nor does "a private speaker [like the Pageant] . . . forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569–70. Instead, the speaker must merely coalesce these messages around a "common theme." *Id.* at 576.

That the Pageant does. The Pageant is not a passive platform open to any contestant to express whatever message she wants.

Instead, the Pageant cultivates a contestant pool, selecting candidates that best embody the Pageant's vision, then "pieces together an *ideal* from [these] separate parts and . . . call[s] that ideal a whole, seamless identity." Banet-Weiser, THE MOST BEAUTIFUL GIRL IN THE WORLD at 22 (emphasis added). "[L]ike a composer," the Pageant "selects the expressive units . . . from potential participants," with "each contingent's expression . . . comport[ing] with what merits celebration" in the Pageant's eyes. *Hurley*, 515 U.S. at 574.

In this way, the Pageant is just as much an expressive association as a parade. In *Hurley*, the parade floats individually were "equally [as] expressive" as the Parade corporately. *Id.* at 570. But though the individual floats expressed messages, that did not compromise the Parade's expression of *its own* message. The Parade carefully selected what floats it wanted and, in doing so, expressed its own message. Here, the pageant contestants can, like the floats in *Hurley*, speak an "equally expressive" individual message without compromising the Pageant's own expression.

In fact, the Pageant takes greater steps than did the Parade in *Hurley* to ensure cohesiveness with its overall identity. "Although each

[contestant] generally identifies [herself], each is understood to contribute something to a common theme." *Id.* at 576. That theme is what the Pageant sees as the ideal woman. Green contends that contestants have total control over "their choice of gown and swimsuit, answers to on-stage questions, and individualized platforms." Green Br. at 23. But Green overstates the creative freedom given to contestants. To make sure that contestants do not compromise the Pageant's expressive message, the Pageant *does not* give contestants' free rein over "their choice of gown and swimsuit" but establishes guidelines that promote the Pageant's view of womanhood. For instance, the Pageant prohibits swimsuits, such as "thongs," that do not "provide adequate coverage." 2-ER-277. Evening gowns likewise should "flatter[ ] [the contestant's] figure [and] complexion." 2-ER-277.

The Pageant similarly constrains the contestants' "individualized platforms." Green Br. at 23. Smith must approve each contestants' platform. 2-ER-209. Moreover, the Pageant prohibits contestants from sharing "messages or images inconsistent with the positive images and/or good will with which [the Pageant] wishes to associate." 2-ER-335. If contestants violate this prohibition, the Pageant disassociates

itself. When a national titleholder posted images on her social media account in revealing clothing, for instance, the Pageant revoked her title. So whatever freedoms the Pageant affords contestants, they still must "contribute something to [the] common theme": the Pageant's expressive views. *Hurley*, 515 U.S. at 576.

Finally, the contestants need not associate "regularly" or "frequently" to qualify for First Amendment protections. Green contends that, because the Pageant's contestants "do not *regularly* associate with each other," the Pageant is not an expressive association. Green Br. at 23. But for First Amendment protection, the Pageant merely needs to "engage in some form of expression." *Dale*, 530 U.S. at 648. The First Amendment does not set a frequency threshold before protection kicks in.

Indeed, in *Hurley*, the Supreme Court protected Boston's St. Patrick's Day Parade as expressive even though it happened only once a year. Yet under Green's theory, the Parade would be out of luck because the individual floats do not "regularly associate with each other." Green's theory would also exclude everything from Oktoberfest to Martin Luther King Jr.'s March on Washington as too infrequent to

receive First Amendment protection. The Supreme Court has never adopted such an approach; neither should this court.

Green argues alternatively that even if the Pageant is an association, it is a commercial one and thus entitled only to "minimal constitutional protection." Green Br. at 26 (quoting *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring)). That view finds no support in the First Amendment's history. The freedom to expressively associate is "implicit in the freedom[ ] of speech." *Healy v. James*, 408 U.S. 169, 181 (1972).

Time and again, the Supreme Court has affirmed that the First Amendment's protections—especially the freedom of speech—"extend[ ] to" commercial associations. *Citizens United v. FEC*, 558 U.S. 310, 342 (2010); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (collecting cases); *see also Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring) ("[T]his Court has repeatedly rejected the notion that a speaker's profit motive gives the government a freer hand in compelling speech."). "Although the State may at times prescribe what shall be orthodox in commercial *advertising* by requiring the dissemination of purely factual and uncontroversial information, outside that [limited]

context it may not compel affirmance of a belief with which the speaker disagrees." *Hurley*, 515 U.S. at 573 (emphasis added) (cleaned up). Given commercial associations' robust free-speech protections, it thus makes little sense to limit their derivative expressive-associational rights.

Moreover, that commercial associations garner less protection than expressive associations is a view "the Supreme Court has never adopted," only Justice O'Connor. *IDK*, 836 F.2d at 1199 (Reinhardt, J., dissenting). Though this Court has applied Justice O'Connor's approach, it has never formally adopted it and should not do so here. *See id.* at 1195 (holding that escort services did not garner First Amendment protection "[u]nder *any* test" (emphasis added)). After all, commercial associations, just as much as expressive ones, "contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster." *Pac. Gas & Elec.*, 475 U.S. at 8 (cleaned up). They should receive just as much First Amendment protection.

Regardless, the Pageant is mainly an expressive, rather than a commercial, association. Justice O'Connor thought that an association

was expressive when its "activities are . . . predominantly of the type protected by the First Amendment." *Roberts*, 468 U.S. at 635 (O'Connor, J., concurring). Here, the Pageant's "primary purpose" is to "produce pageants" (not, as Green contends, recruiting and promotion). 2-ER-203. These pageants share roots with the medieval festivals that "invoke[d] civic pride and affirm[ed] community values"—the exact "inculcation of traditional values" the First Amendment protects. *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring); Banet-Weiser, THE MOST BEAUTIFUL GIRL IN THE WORLD at 34; *see also id.* ("[W]hat better way was there to symbolize enduring community values and future utopian expectations than by choosing women as festival queens?").

Pageants also "blend . . . components borrowed from other traditional public events" protected by the First Amendment, like "carnivals," "parades," and "sporting events." *Id.* at 56–57. In doing so, beauty pageants promote "visions of ideal American womanhood." Mifflin, LOOKING FOR MISS AMERICA at 9. And these visions make pageants "important sites for the construction of national feminine identity"—no less than feminist magazines or newspaper editorials. Banet-Weiser, THE MOST BEAUTIFUL GIRL IN THE WORLD at 23. Thus, in

producing pageants, the Pageant mainly engages in expressive activity that the First Amendment protects, even under Justice O'Connor's test.

That the Pageant has commercial aspects does not make it any less expressive. Green contends that the Pageant mainly engages in "[r]ecruiting, sales, and promotion," thus making it commercial. Green Br. at 28. But expression "does not lose its First Amendment protection [simply] because money is spent to project it." *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976). Here, the Pageant's commercial activities are derivative and entirely in service of projecting its "primary purpose": pageantry. 2-ER-203.

For instance, contestants' entry fees cover their participation in the pageant, their pageant attire, their feature in the pageant's "National Program Book," pageant meals, pageant lodging, and other pageant memorabilia. 2-ER-279. And the Pageant recruits contestants not to increase revenue but to *have contestants*, for a pageant could not happen without them. In fact, the Pageant *loses* money when it turns away contestants inconsistent with its message. *E.g.*, 2-ER-207 (turning away a prospective contestant who "posed nude" years before); 2-ER-213, 3-ER-629 (rejecting an advertisement that featured a man dressed

as a woman as inconsistent with the Pageant's message of "empowering biological women"). Unlike the Jaycees in *Roberts*, the Pageant does not "sell memberships" as its end goal. Instead, everything the Pageant does contributes to its "primary purpose": to "produce pageants." 2-ER-203. Put simply, the Pageant would continue to operate even absent its commercial activities, but without pageantry, the Pageant would "cease to exist." *Id.*

Nor is the Pageant any less expressive because it operates for profit. Green and supporting *amici* argue that the Pageant's for-profit status automatically renders it a commercial association. But it is "beyond serious dispute" that expression "is protected even though it is carried in a form that is 'sold' for profit." *Va. State Bd. of Pharm.*, 425 U.S. at 761; *accord IDK*, 836 F.2d at 1194 (certain "organizations' claim on the [F]irst [A]mendment [are] not diminished by their sale of expression").

This Court focuses not on an association's corporate status but rather on whether "expression is a significant or necessary component of" what the association does. *IDK*, 836 F.2d at 1195. For example, many theaters operate for profit. But that does not change the fact that

the production crew and acting cast come together to express a message. "Even when . . . expression is for sale—*Hamilton* tickets do not come cheap—people are paying for the expression; the expression is not meant . . . primarily to get them to buy [something]." Soucek, *The Constitutional Irrelevance of Art*, 99 N.C. L. REV. at 746. Indeed, this Court has recognized that for-profit entities like publishers, newspaper companies, concert promoters, and television studios all qualify as expressive associations. *IDK*, 836 F.2d at 1195. Like these companies, the Pageant's for-profit status does not diminish its expressive nature.

Similarly, the Pageant should not be forced to choose between the "marketplace of commerce" and the "marketplace of ideas." Green Br. at 26–27. Green and *amici* urge this Court to strip an organization's First Amendment protection whenever it "enters into the marketplace of commerce *in any substantial degree*." *Id.* at 27 (quoting *Roberts*, 468 U.S. at 635 (O'Connor, J., concurring)). This false dichotomy would imperil many expressive associations. For instance, under Green's theory, the Girl Scouts might have to stop selling cookies lest this "substantial" activity mark them as more commercial than expressive. And because the *Los Angeles Times* sells newspapers, Green's test

would allow the government to control who the newspaper hires as editors, regardless of the impact that government interference would have on "the expressive content of [the] newspaper." *Contra McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 962 (9th Cir. 2010). The First Amendment does not force associations to choose strictly between "commerce" and "ideas." Neither should this Court.

C. Forcing the Pageant to include contestants antithetical to its expressive purpose will eviscerate the Pageant's ability to advocate its viewpoint.

The First Amendment presumes that an expressive association like the Pageant best knows "both what [it] want[s] to say and how to say it." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 790–91 (1988). Thus, when weighing whether Green's forced inclusion would impair the Pageant's expression, this Court must "give deference to [the Pageant's] view of what would impair its expression." *Dale*, 530 U.S. at 653.

Expressive associations often speak with "a voice" cultivated by their "selection of members." *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring); *accord Hurley*, 515 U.S. at 570. Newspapers hire writers that compliment "the expressive content of [the] newspaper."

McDermott, 593 F.3d at 962. Parades select floats consistent with the overall message that the parade organizers want to communicate. *Hurley*, 515 U.S. at 572–73. And political parties nominate candidates that best embody the parties' platforms. *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 121–22 (1981).

No less than these protected associations, beauty pageants use the contestant-selection process to ensure that each contestant will contribute to the pageant's overarching "common theme." *Hurley*, 515 U.S. at 576; *see also* Friedman, HERE SHE IS at 6 ("[B]eauty pageants are *exclusionary* in a number of dimensions."). Miss Christian America, for instance, uses its pageants to emphasize "growing as a Christian at all stages of life" and so requires prospective contestants to affirm its Statement of Faith. CHRISTIAN MISS, https://perma.cc/5GKD-FZ4E. Miss International Queen hosts pageants that create a positive image of LGBTQ and thus excludes contestants that are not a naturally born genetic male. *See generally* MISS INTERNATIONAL QUEEN, https://perma.cc/9PD9-U22Z. And Miss Indian World "produce[s] an event where Native people can come together each year to celebrate and share culture," so it limits pageant contestants to "natural born female

indigenous women" with "verifiable tribal status." *About*, GATHERING OF NATIONS POW WOW, https://perma.cc/AM73-5GBD; *see also Official 2022 Miss Indian World Entry Application*, GATHERING OF NATIONS POW WOW, https://perma.cc/ZSS7-RNFU.

The Pageant is of a piece. It associates to promote "women empowerment, . . . positive self-image . . . [and] community service." 2-ER-224. But the Pageant limits its message of "ideal American womanhood" to biological females. The Pageant thus accepts as contestants only "natural born female[s]." 2-ER-224–25.

To require the Pageant to accept a natural born male as a contestant would necessarily "impair the ability of the [Pageant] to express those views, and only those views, that it intends to express." *Dale*, 530 U.S. at 648. Even Green concedes this. 4-ER-769 ("permitting men into the pageant would interfere with" the Pageant's associational interests). It would be the same as forcing Miss Indian World to accept a non-indigenous contestant, disrupting its celebration of Native culture. The First Amendment does not allow the government to force expressive associations to speak in a manner that is inconsistent with their messages.

Moreover, that Green is a self-described activist exacerbates the harm on the Pageant's association and message. In *Dale*, the Boy Scouts revoked a scoutmaster's membership after it learned that he was a "gay rights activist." 530 U.S. at 644. The Scouts, by contrast, saw "homosexual conduct [as] contrary to being 'morally straight' and 'clean.'" *Id.* at 650. When the scoutmaster sued under the state's public-accommodation law, the Supreme Court affirmed that the First Amendment shielded the Scouts' decision. To accept the scoutmaster as a leader would "send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior," contrary to the Scout's preferred message. *Id.* at 653. Similarly, to accept an "openly transgender" activist as a contestant in a pageant that seeks to empower biological women would necessarily "send a message" that the Pageant views males who identify as females as women. That contradicts the Pageant's message. Green's inclusion would thus eviscerate the Pageant's expression.

Green's inclusion would also impede the Pageant's artistic license. The First Amendment robustly protects arts and entertainment, from theatrical productions like *Hamilton* to entertainment shows like *The*

Bachelor. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981); *accord White v. City of Sparks*, 500 F.3d 953, 955 (9th Cir. 2007). That protection includes "casting decisions [for these shows]," which "are part and parcel of the creative process behind [the] television program [and] thereby merit[ ] First Amendment protection." *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986, 993 (M.D. Tenn. 2012). Theatrical productions and entertainment shows communicate an "overall message" in part through the "distill[ation] from the individual" actors cast in their performances. *Cf. Hurley*, 515 U.S. at 577. After all, *Hamilton* would look very different if theaters were "forced to cast a White George Washington." Soucek, *The Constitutional Irrelevance of Art*, 99 N.C. L. REV. at 719.

So too, a Pageant that celebrates natural born females would look very different if forced to accept a natural born male as a contestant. The Pageant cannot communicate the message that it wants unless it has creative control over which contestants can compete. Green's forced inclusion eviscerates the Pageant's exercise of this artistic license.

That the Pageant has associated to express a "sensitive political" message also gives it "special [First Amendment] protection." *Janus*,

138 S. Ct. at 2476. "[T]he freedom to associate for the common advancement of political beliefs necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party*, 450 U.S. at 121–22 (cleaned up). In *Democratic Party*, the government tried to force the National Democratic Party to seat at its national convention delegates voted on by anyone, not just registered Democrats. The Party "expressed the concern that" this forced association would dilute its political message. *Id.* at 116–17. The Supreme Court upheld the Party's right to protect itself from "intrusion by those with adverse political principles." *Id.* at 122. Here, the Pageant associates to express a message on a "sensitive political topic[ ]"—namely, gender identity. *Janus*, 138 S. Ct. at 2476. The Pageant equates "ideal American womanhood" with, among other qualities, biological femininity. Mifflin, LOOKING FOR MISS AMERICA at 9. As an "openly transgender" activist, Green disagrees. The Constitution prevents the government from forcing the Pageant to associate with someone who advocates an "adverse political principle[ ]." *Democratic Party*, 450 U.S. at 122.

Green's arguments otherwise do not address the "serious burden" that Green's forced inclusion would have on the Pageant's message. *Dale*, 530 U.S. at 658. First, Green argues that forced participation would not burden the Pageant's expression because the Pageant has already engaged in "public acceptance and promotion of non-cisgender women" by allowing a male judge who dressed in drag. Green Br. at 44 (emphasis omitted). But "a private speaker does not forfeit constitutional protection [to have autonomy over its message] simply by combining multifarious voices." *Hurley*, 515 U.S. at 569–70. Like the St. Patrick's Day Parade, the Pageant here "exclude[s] some applicants" even though it might be more "lenient in admitting" other staff, such as judges. The attempt to control an expressive message, rather than the strictness exercised in communicating that message, is all the First Amendment requires.

Moreover, Green misunderstands the situation. Green faults the *national* Pageant—the only defendant here—for actions taken by *state* affiliates. Once the *national* Pageant discovered what the state affiliate had done, the national Pageant promptly updated its rule to prevent this from happening again and "to avoid confusion on what [the

Pageant's] stance is on what it means to be a woman." 2-ER-72. Indeed, when a different state affiliate desired to hire as a judge a man dressed in female drag, the Pageant refused.

Second, Green argues that forced participation would not burden the Pageant's message because the Pageant has "never conveyed any public or private 'message' related to transgender women." Green Br. at 11. But everything the Pageant does communicates what, in the Pageant's view, it means to be a woman. That the Pageant omits words like "cisgender" and "transgender" does not mean the Pageant isn't expressing a message about "gender identity." In fact, that the Pageant does not adjectivize the word woman is *part* of the message: the word "woman" so naturally means "born female" that the Pageant does not need or use qualifiers.

Green disagrees with how the Pageant expresses its message, 4-ER-702 (Green arguing that it is "IMPERATIVE" that speakers distinguish between "cis" women and "trans" women). But the "speaker has the right to tailor [its] speech" to its own liking. *Hurley*, 515 U.S. at 573. That means the Pageant need not articulate a "narrow" or "succinctly articulable" message that satisfies Green's views. *Id.* at 569.

The First Amendment guarantees the opposite: the one "who chooses to speak" gets to "decide 'what not to say.'" *Id.* at 573 (quoting *Pac. Gas & Elec.*, 475 U.S. at 16). The Pageant has decided that using the word "woman" without modifiers is enough to communicate its desired message. The choice "not to propound a particular point of view . . . lie[s] beyond the government's power to control." *Id.* at 575.

In fact, even if the Pageant had decided to stay silent on what it means to be a woman—it has not—Green's forced inclusion would still violate the First Amendment because it would force the Pageant to take a side in the public debate. Just as the government cannot force a speaker to advocate a view contrary to his beliefs, so it cannot force a neutral speaker to "propound a particular point of view." *Dale*, 530 U.S. at 654.

The Pageant also communicates its message through more than its eligibility requirements. Every detail in the livestreamed pageant, from the questions posed to contestants to the lighting choices, showcase the Pageant's message. Moreover, the Pageant highlights its message with its program book, which displays each contestant and her selected platform, all approved for conformity with the Pageant's

message. Likewise, the Pageant communicates its message every time it promotes a contestant, her platform, and her community service on social media. The Pageant further conveys its message every time it requires a contestant or volunteer to sign a contract that binds them to abide by the Pageant's moral and ethical guidelines. And it communicates its message every time it enforces violations of those contracts. The Pageant thus uses more than its eligibility requirements to advance its view of what it means to be a woman.

II. The district court correctly granted summary judgment to the Pageant because forcing Green's inclusion would compel the Pageant to speak a message with which it disagrees.

A. Standard of Review

This Court can affirm based on any reason supported by the record. *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004). Indeed, "in cases raising First Amendment issues . . . appellate court[s] [have] an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)

(cleaned up). And appellate courts do this "without deference to the trial court." *Hurley*, 515 U.S. at 567.

That means this Court can rely on reasoning that the district court rejected to nonetheless affirm. This Court should do so here because forcing Green's inclusion in the Pageant would compel the Pageant to communicate a message with which it fundamentally disagrees, a content- and viewpoint-based regulation that the First Amendment forbids.

B. The First Amendment gives the Pageant autonomy to craft its own message free from government intrusion.

The First Amendment's robust protections include "both the right to speak freely and the right to refrain from speaking." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). When an association speaks, the default "general rule" is that "the speaker has the right to tailor [its] speech" to express its desired message. *Galvin v. Hay*, 374 F.3d 739, 750 (9th Cir. 2004) (quoting *Hurley*, 515 U.S. at 573). Thus, if the association wants to exclude something from its message, the First Amendment protects its "autonomy to [so] choose." *Hurley*, 515 U.S. at 573. As a "cardinal . . . command," the Constitution especially precludes

the government from "[c]ompelling [an association] to mouth support for views [it] find[s] objectionable." *Janus*, 138 S. Ct. at 2463.

Forcing the Pageant to accept Green as a contestant would do exactly that. The Pageant wants to celebrate and empower biological women. To have a natural born male competing in the Pageant's events—and vying for the chance to visibly represent the Pageant as its Miss—would compromise that message. This court should affirm the district court's grant of summary judgment on the alternative ground that to force the Pageant to include Green in its pageants would compel it to speak a message with which it fundamentally disagrees.

C. Pageants—and the process to select who competes in them—are pure speech.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. And "the Constitution looks beyond written or spoken words as mediums of expression." *Hurley*, 515 U.S. at 569. It protects "various forms of entertainment and visual expression as purely expressive activities," encapsulating within its ambit everything from "dance" to "movies" to "parades." *Anderson*, 621 F.3d at 1060 (citing cases).

As noted above, pageants qualify as purely expressive activities. That the Pageant uses "a talent competition with singing and dance" to express its message—and even these activities the Supreme Court has protected as pure speech, *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975)—makes no constitutional difference. *Norma Kristie*, 572 F. Supp. at 91.

Selecting contestants for a beauty pageant is so "inextricably intertwined" in the pageant that it too "is itself entitled to full First Amendment protection." *Anderson*, 621 F.3d at 1062. Neither the Supreme Court nor this Court "has ever drawn a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded." *Id.* at 1061. In *Anderson*, for instance, this Court considered both tattoos and the inking process used to create them pure speech. After all, "the entire purpose of tattooing" was "to produce the tattoo." *Id.* at 1062. The process was "not intended to 'symbolize' anything." *Id.*

So too here. When the Pageant selects contestants, its "primary purpose" is "to produce" pageants. 2-ER-203. The process is just as

"inextricably intertwined" in stage pageantry as inking is in the final tattoo. It is thus pure speech entitled to First Amendment protection.

Disconnecting the contestant-selection process from the final product endangers many other creative outlets protected as pure speech. Television shows and theater productions, for instance, qualify as pure speech. And their "casting decisions are part and parcel of the creative process behind" the shows. *Claybrooks*, 898 F. Supp. 2d at 993. So the First Amendment "protects the right of the producers of these [s]hows to craft and control [their] messages" through casting, "based on *whatever* considerations the producers wish to take into account." *Id.* at 1000 (emphasis added). Otherwise, *Hamilton* could not cast the Founders as diverse to "make the story of America something that can . . . be owned by people of color." Maya Phillips, *'Hamilton,' 'The Simpsons,' and the Problem with Colorblind Casting*, N.Y. TIMES (July 10, 2020), https://perma.cc/329F-CGFP. There is no meaningful difference between selecting a cast for a television show or theater production and selecting a contestant for a livestreamed beauty pageant. Both processes cannot be "disconnect[ed from] the end

product." *Anderson*, 621 F.3d at 1061. Both, then, garner protection as pure speech.

Green's argument would also imperil newspapers' First Amendment rights. Courts jealously protect the "liberty of the press" and disown anything that "interfer[es] with the exercise of [its] editorial control and judgment." *Pac. Gas & Elec.*, 475 U.S. at 33 (Rehnquist, J., dissenting); *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring) ("[T]he First Amendment erects a *virtually insurmountable* barrier between government and the print media so far as government tampering . . . with news and editorial content is concerned." (emphasis added)). This Court, for example, recognized that "[t]elling [a] newspaper that it must hire specified persons . . . as editors and reporters . . . is bound to affect what gets published," infringing on "the publisher's choice of . . . the expressive content of its newspaper." *McDermott*, 593 F.3d at 962. Who the newspaper hired would affect what the newspaper said. Likewise, telling a Pageant who it must accept as a contestant will inevitably change the Pageant's expressive content, no less than if the government mandated what the contestants must say and wear. Just as the First

Amendment cannot abide government coercion of the press, it cannot tolerate coercion of the Pageant.

D. Forcing the Pageant to include a natural born male as a contestant would compel the Pageant to speak a message with which it fundamentally disagrees.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The government violates this "cardinal constitutional command" whenever it "[c]ompel[s] individuals to mouth support for views they find objectionable." *Janus*, 138 S. Ct. at 2463. For whenever the government "compel[s] individuals to speak a particular message," it inevitably "alters the content of [their] speech." *NIFLA*, 138 S. Ct. at 2371 (cleaned up). And the First Amendment, as a default rule, gives speakers the "autonomy" to choose what to say—and what not to say. *Hurley*, 515 U.S. at 573.

Public-accommodation laws that do not facially compel speech can still do so when applied to "expressive activity." In *Hurley*, though Massachusetts's public-accommodations law said nothing about speech, the State "applied [it] to [the Parade's] expressive activity" in a way

that "require[d] [the Parade] to modify the content of [its] expression to whatever extent beneficiaries of the law [chose] to alter it with messages of their own." *Id.* at 578. This "peculiar" application "violate[d] the fundamental rule . . . that a speaker has the autonomy to choose the content of his own message." *Id.* at 572–73.

Similarly, in *Telescope Media Group*, the Eighth Circuit held that Minnesota could not use its public accommodations law to force a film studio to celebrate same-sex weddings. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 756–57 (8th Cir. 2019). To do so would force the film studio "to propound a particular point of view"—something "presumed to lie beyond the government's power to control." *Id.* at 752 (quoting *Dale*, 530 U.S. at 654).

The Arizona Supreme Court reached the same conclusion about calligraphy and art for wedding invitations. *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019). Applying a public-accommodations law to force artists to create an invitation for a same-sex wedding would "coerce[ ]" those artists to "abandon[ ] their convictions" and "compel[ ] them to [communicate] celebratory

messages" with which they fundamentally disagreed. *Id.* at 914. The First Amendment did not countenance such an application.

Here, no less than in *Hurley*, *Telescope Media Group*, and *Brush & Nib*, if the Act forces the Pageant to include Green as a contestant, it would unconstitutionally "alter[ ] the content of [the Pageant's] speech." *NIFLA*, 138 S. Ct. at 2371. The Pageant seeks to empower, promote, and celebrate "women." And when the Pageant uses the word "woman," it means only those naturally "born female." Forcing the Pageant to include a natural born male as a contestant inevitably "alter[s] the expressive content of [the Pageant's message]." *Hurley*, 515 U.S. at 572–73.

Again, Green argues that forced inclusion would not compel a message because, according to Green, the Pageant has not communicated "any 'message' related to cisgender women." Green Br. at 42. Not so. Every time the Pageant uses the word "woman," it communicates precisely its message. The First Amendment gives the Pageant the right to say no more, for pure speech need not be "narrow" or "succinctly articulable" or even, like the "Jabberwocky verse of Lewis Carroll," widely understood by others. *Hurley*, 515 U.S. at 569. The Pageant

especially does not need to tailor its message to match Green's views. If the Pageant considers only natural born females as women, it does not need to add adjectives every time it uses the word woman. The First Amendment protects the Pageant's "self-expression" of a "clear social position" on its own terms. *White*, 500 F.3d at 955–56.

Indeed, what words speakers use in this context reflect "a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes." *Meriwether*, 992 F.3d at 508. Green understands these political implications. After all, part of Green's platform is that "it is IMPERATIVE" to distinguish between "trans women and cis women." 4-ER-702. Just as the First Amendment protects Green's right to advocate for this distinction, so does it protect the Pageant's right to insist that it does not exist.

This societal debate over what it means to be a woman further demonstrates that the Act would burden the Pageant's speech. The Pageant wants to produce a livestreamed pageant celebrating biological women. Having a biological male onstage as a contestant would contradict this message. Yet the district court thought that Green's forced inclusion would burden the Pageant's speech only incidentally

because it would first affect the Pageant's conduct. Accordingly, the district court applied the Supreme Court's "expressive conduct" framework and determined that the Pageant's free-speech protections must yield to the government's interests. 1-ER-12 (applying *Spence* and *O'Brien* to the Pageant).

But when the district court labeled the Pageant's contestant-selection process as conduct, it erroneously disconnected that process from the pageant. The two must be considered together, for the process is "inextricably intertwined with the purely expressive product ([the pageant])." *Anderson*, 621 F.3d at 1062. Like a television show's or theater production's casting choices—or a parade organizer's selection of floats—the "entire purpose" behind the Pageant's process is to select contestants that will convey the Pageant's message. *Id.; see also Claybrooks*, 898 F. Supp. 2d at 993; *Hurley*, 515 U.S. at 577. And "every participating [contestant] affects the message conveyed by" the Pageant. *Hurley*, 515 U.S. at 572. So excluding biological men who express and identify as women is essential to the Pageant's ability to express its own messages about women. It is pure speech, not merely expressive conduct.

That also explains why the district court erred when it downplayed the impact *Hurley* has on the Pageant's compelled-speech argument. The district court distinguished *Hurley* because there the parade organizers "disclaim[ed] any intent to exclude homosexuals as such." 515 U.S. at 572–73. But in *Hurley* a person could have marched in the Parade without revealing their sexual orientation—and thus without impacting the Parade's overall expression. Not so here. Sometimes message and status overlap, as in *Hamilton*, where the cast's race is so "inextricably intertwined" with its message that to force the play to cast a white George Washington is to alter the message. *Anderson*, 621 F.3d at 1062. Likewise, to force the Pageant to accept a biologically male contestant in a pageant celebrating biological women would force the Pageant to alter its message. That's what the Supreme Court found dispositive in *Hurley*, not the incidental fact that the Parade could distinguish between status and message.

To apply the Act in this "peculiar" way would transform the Pageant's "speech itself [into] the public accommodation." *Hurley*, 515 U.S. at 573. But if pageantry were a public accommodation, then beauty pageants as we know them would cease to exist—for almost all beauty

pageants make distinctions based on some protected status, whether age or sex or gender identity. "Compelled access" would "both penalize[ ] the expression of particular points of view and force[ ] speakers to alter their speech to conform with an agenda they do not set." *Pac. Gas & Elec.*, 475 U.S. at 9. Here, the Pageant would suffer both. To force Green into its pageant would punish the Pageant's view on femininity and force it to alter its message to conform to Green's agenda. The First Amendment does not abide this content- and viewpoint-based regulation.

III. As applied to the Pageant, Oregon's public-accommodation law does not survive strict scrutiny.

A. This Court should subject the Act to strict scrutiny because it infringes on both the Pageant's expressive-associational rights and its free-speech rights.

Government action that infringes on expressive association must satisfy strict scrutiny—"the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); *Dale*, 530 U.S. at 648. Under strict-scrutiny review, the action stands only if it was "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means

significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648.

Similarly, laws that regulate speech based on content or viewpoint also trigger strict-scrutiny review. *NIFLA*, 138 S. Ct. at 2371–72. And when the government compels speech, it necessarily regulates speech based on content. *Id.* at 2371; *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 759 (9th Cir. 2019) (en banc) (Ikuta, J., concurring in the judgment). Such laws are "presumptively unconstitutional" and "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *NIFLA*, 138 S. Ct. at 2371.

Green would have the Act apply against the Pageant in a way that trips both constitutional protections. By forcing Green's inclusion in the Pageant, the Act infringes on the Pageant's expressive association. And it compels the Pageant to speak a message with which it fundamentally disagrees. Thus, Green must prove that applying the Act in this way narrowly serves a compelling interest. Green cannot do so.

B. The State does not have a compelling interest in regulating expression with which it doesn't agree.

"[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414 (1989). Indeed, "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided." *Hurley,* 515 U.S. at 574. So "[w]hile the law is free to promote all sorts of conduct . . ., it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* at 579.

Yet here Green advances no better reason to infringe on the Pageant's First Amendment protections than Green's disagreement with the Pageant's views on women. The State asserts an interest in "eliminating discrimination against LGBTQ individuals," Oregon Br. at 25, but only at "a high level of generality." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021). "[T]he First Amendment demands a more precise analysis." *Id.* "Rather than rely on broadly formulated interests, courts must scrutinize" whether the State has "specifically identif[ied] an actual problem in need of solving." *Id.*;

Brown, 564 U.S. at 799 (cleaned up). "The question, then, is not whether the [State] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest" in specifically forcing the Pageant to include Green as a contestant. *Fulton*, 141 S. Ct. at 1881. Green's evidence generally does not answer this question.

But Green's own admissions do, and they show there is no "actual problem" the State needs to solve. Green admits that the Pageant's expressive principles have not stopped Green from "participat[ing] in pageants similar to [the Pageant]." Green Br. at 14. In fact, Green—a self-described "experienced pageant contestant," *id.*—has been able to compete in several pageants, including the Miss Montana USA pageant and the Miss Earth USA Elite Oregon pageant. Green even won the latter, advancing to and then competing in the Miss Earth Elite National competition. Each pageant "welcomed [Green] with arms wide open," 4-ER-738, because they expressed a different message than the Pageant. Where there are multiple associational organizations, including some who enthusiastically express the government's message,

it is unnecessary to force the Pageant to associate with someone that it does not want and communicate a message with which it disagrees.

There's more. "Although antidiscrimination laws are generally constitutional . . . a 'peculiar' application that require[s] speakers 'to alter their expressive content' [are] not." *Telescope Media Grp.*, 936 F.3d at 755 (quoting *Hurley*, 515 U.S. at 572–73). Green attempts to mask this peculiarity by contending that the State "does not seek to regulate any expressive aspects of [the Pageant's] pageant." Green Br. at 30. But what else would the State regulate if it forced a pageant celebrating biological women to accept a natural born male as a competitor?

Without a demonstrated problem that needs solving, such naked suppression smacks of a state-sponsored attempt to promote the government's own message. "But the Supreme Court has made it clear that antidiscrimination regulations may not be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 863 (7th Cir. 2006). Indeed, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."

Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam). Green's attempt to use the Act to override the Pageant's First Amendment expression is "a decidedly fatal objective" that cannot survive strict scrutiny. *Hurley*, 515 U.S. at 579.

Moreover, Green's admissions undermine any argument that the Pageant has a "monopoly" that might justify government intervention. Green has experienced no difficulties competing "in pageants similar to [the Pageant]." Green Br. at 14. These pageants have, in fact, "welcomed [Green] with arms wide open." 4-ER-738. One such pageant even crowned Green as its winner. Though the Pageant may be an "enviable vehicle" for Green to compete in and espouse a contrary social agenda, that, "without more . . . fall[s] far short of supporting a claim that [the Pageant] enjoy[s] an abiding monopoly of access to" pageantry, such that the State has a compelling interest in disrupting the Pageant's First Amendment protections. *Hurley*, 515 U.S. at 577–78.

Finally, the Act is so underinclusive as to undermine the State's asserted public-accommodation interests. The Act exempts from its ambit, for instance, any "state hospital." Or. Rev. Stat. § 659A.400(2)(b). It also exempts any "institution[or] bona fide club . . . that is in its

nature distinctly private." *Id.* § 659A.400(2)(e). Yet state hospitals and private institutions, just as much as public ones, can perpetuate the harms that the State seeks to eradicate. That the State still allows some hospitals and clubs to discriminate "undermines [its] contention that its non-discrimination policies can brook no departures." *Fulton*, 141 S. Ct. at 1882.

C. To achieve its purported goal, the State has avenues other than infringing on the Pageant's First Amendment freedoms.

"First Amendment freedoms need breathing space to survive." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021) (cleaned up). Thus, the "government may regulate in the First Amendment area only with narrow specificity." *Id.* (cleaned up). Unless Green can show that the Act is "the least restrictive means among available, effective alternatives," then the Act does not survive review. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

Green cannot make this showing. Rather than violate the Pageant's First Amendment interests, the State could define public accommodations narrowly to exclude expressive associations like theaters and pageants. Federal law, for instance, provides an exception

to Title VII's general antidiscrimination provisions if there is a "bona fide occupational qualification." 29 C.F.R. § 1604.2. The regulations even explicitly permit theaters and production studios to differentiate on the basis of sex when selecting "actor[s]" and "actress[es]," a process similar to the Pageant's own for selecting contestants. *Id.*

Similarly, federal law provides an exception to Title IX's general antidiscrimination provisions for "any pageant . . . in which participation is limited to individuals of one sex only." 20 U.S.C. § 1681(a)(9). Neither Green nor the State has mustered a reason why Oregon cannot provide these same exemptions for the Pageant. *See McCullen v. Coakley*, 573 U.S. 464, 494 (2014) (holding that the State's abridgement of free speech was not narrowly tailored when the State did not show "that it considered different methods that other jurisdictions have found effective").

Finally, Green wants to selectively target the Pageant—demonstrating that Green's requested relief is not the least restrictive means available. When a speech regulation is underinclusive, it is not narrowly tailored. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 & n.* (1991). Under Green's

theory, nearly every beauty pageant violates the Act, for almost every pageant draws contestant lines based on some protected status. Yet Green wants to apply the Act only against the Pageant. Consider, for instance, Green's hedging that other beauty pageants—pageants with whose message Green may agree—should *not* fall within the Act's ambit. 1-SER-177 ("[T]he inclusion of [non]-gay or non-Native American groups [would] interfere with . . . expressive association."). Green cannot square that concession with the broader theory advanced, highlighting how Green wants to target only certain viewpoints. This underinclusiveness is fatal to Green's requested relief.

D. The Act fails to pass constitutional muster even under lower standards of scrutiny.

At a minimum, the Pageant's contestant-selection process qualifies as expressive conduct. Expressive conduct receives First Amendment protection so long as "it is sufficiently imbued with elements of communication." *Anderson*, 621 F.3d at 1059 (quoting *Spence*, 418 U.S. at 409). Pageants clear this low bar. They are "richly symbolic competitions" that convey "visions of ideal American womanhood." Friedman, HERE SHE IS at 3; Mifflin, LOOKING FOR MISS AMERICA at 9. The contestant-selection process contributes just as much

to the "end product" as the evening gowns, sashes, and tiaras. *Anderson*, 621 F.3d at 1061–62. It cannot be "disconnect[ed]" from the pageant itself and thus qualifies as expressive conduct protected by the First Amendment. *Id.*

Courts analyze government action that directly targets expressive conduct under strict scrutiny. Though some State regulation "is not related to expression" and thus merits "less stringent standard," a "more demanding standard" applies when the State's "aim *is* to regulate the message conveyed by expressive conduct." *United States v. Swisher*, 811 F.3d 299, 312 (9th Cir. 2016) (en banc) (quoting *Johnson*, 491 U.S. at 403). That's true here. Rather than incidentally target the Pageant's expression, Green would have the Act regulate the expression itself to convey Green's desired message rather than the Pageant's own. That application "must . . . be justified by the substantial showing of need that the First Amendment requires." *Johnson*, 491 U.S. at 406. As noted above, Green cannot show such a need.

But even under a lower standard, the Act's application to the Pageant fails review. Under that standard, government action must be "narrowly drawn to further a substantial governmental interest."

Swisher, 811 F.3d at 312 (cleaned up). Green cannot show that the Act's application to the Pageant is "no greater than is essential to the furtherance of" the State's interest. *O'Brien*, 391 U.S. at 377. Like the federal government, the State could take several alternative steps before infringing on the Pageant's core First Amendment rights. That the State has not done so demonstrates that the Act is not narrowly drawn here.

CONCLUSION

The Pageant wants to use pageantry to "encourage women to strive to ACHIEVE their hopes, dreams, goals, and aspirations, while making them feel CONFIDENT and BEAUTIFUL inside and out!" 2-ER-224. The Pageant confines what it means to be a "woman" to those naturally "born female." Other beauty pageants may define womanhood differently. Green certainly does. The beauty in the First Amendment is that it allows both the Pageant and Green to express their views on this important social issue.

But the First Amendment does not allow Green to use the Act, with otherwise commendable applications, to coerce the Pageant to

accept a new orthodoxy. This most fixed star in our constitutional constellation prevents any official from exercising such coercion.

As the district court recognized, both Green's and the Pageant's messages can coexist, but only if both are given equal space to express them. This Court should therefore affirm the district court's grant of summary judgment to the Pageant.

Date: October 22, 2021

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STATEMENT OF RELATED CASES

Miss United States of America is aware of no other related cases.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate CM/ECF system on October 22, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

ADDENDUM

Constitutional Provisions

Statutes and Regulations

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Oregon Rev. Stat. § 659A.400(2)(b)

(2) A place of public accommodation does not include:

(b) A state hospital as defined in ORS 162.135.

Oregon Rev. Stat. § 659A.400(2)(e)

(2) A place of public accommodation does not include:

(e) An institution, bona fide club or place of accommodation that is in its nature distinctly private.

Oregon Rev. Stat. § 659A.403

(1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, gender identity, national origin, marital status or age if the individual is of age, as described in this section, or older.

(2) Subsection (1) of this section does not prohibit:

(a) The enforcement of laws governing the consumption of alcoholic beverages by minors and the frequenting by minors of places of public accommodation where alcoholic beverages are served;

(b) The enforcement of laws governing the use of marijuana items, as defined in ORS 475B.015, by persons under 21 years of age and

the frequenting by persons under 21 years of age of places of public accommodation where marijuana items are sold; or

(c) The offering of special rates or services to persons 50 years of age or older.

(3) It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section.

20 U.S.C. § 1681(a)(9)

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

29 C.F.R. § 1604.2

(a) The commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Label—"Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment: that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in paragraph (a)(2) of this section.

(2) 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.

(b) Effect of sex-oriented State employment legislation.

(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, for more than a specified number of hours per day or per week, and for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(2) The Commission has concluded that State laws and regulations which discriminate on the basis of sex with regard to the employment of minors are in conflict with and are superseded by title VII to the extent that such laws are more restrictive for one sex. Accordingly, restrictions on the employment of minors of one sex

over and above those imposed on minors of the other sex will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(3) A number of States require that minimum wage and premium pay for overtime be provided for female employees. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the payment of minimum wages or overtime pay required by State law; or

(ii) It does not provide the same benefits for male employees.

(4) As to other kinds of sex-oriented State employment laws, such as those requiring special rest and meal periods or physical facilities for women, provision of these benefits to one sex only will be a violation of title VII. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the provision of such benefits; or

(ii) It does not provide the same benefits for male employees. If the employer can prove that business necessity precludes providing these benefits to both men and women, then the State law is in conflict with and superseded by title VII as to this employer. In this situation, the employer shall not provide such benefits to members of either sex.

(5) Some States require that separate restrooms be provided for employees of each sex. An employer will be deemed to have engaged in an unlawful employment practice if it refuses to hire or otherwise adversely affects the employment opportunities of applicants or employees in order to avoid the provision of such restrooms for persons of that sex.