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
Case No. 3:19-cv-02048-MO
The Honorable Michael W. Mosman, District Judge

BRIEF OF *AMICUS CURIAE* PINNACLE PEAK PICTURES IN SUPPORT OF APPELLEE AND AFFIRMANCE FILED WITH CONSENT OF ALL PARTIES

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Rule 26.1 Corporate Disclosure Statement

Pinnacle Peak Pictures is a limited liability corporation incorporated under the laws of Delaware. Pinnacle Peak Pictures neither issues stock nor is owned by any parent corporation.

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Interest of Amicus Curiae

Pinnacle Peak Pictures ("Pinnacle Peak") is a production and theatrical distribution company that deals in family, inspirational, and faith-based content. Founded in 2005 to create films with a Christian message for families to enjoy together with spiritual, uplifting messages, Pinnacle Peak's films include the "God's Not Dead" series, "The Case for Christ," and similar life-affirming content with a moral and religious foundation. Pinnacle Peak, a for-profit enterprise, relies upon its ability to select actors, directors, and writers to produce content compatible with its faith-based mission and who do not contravene the message it seeks to relay to audiences. Pinnacle Peak specifically selects actors and writers who believe in the specific messages conveyed by the company's films, including critically-acclaimed performers such as Kevin Sorbo.

Federal Rule of Appellate Procedure 29 Statement

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Pinnacle Peak affirms that no counsel for a party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amicus, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Summary of Argument

The district court correctly held that Miss United States of America ("Miss USA" or the "Pageant") is an expressive association and therefore is protected from

compelled expression under the First Amendment. *See* Section I. Appellant Green's effort to compel the Pageant to change its viewpoint and expression—rooted in its values and mission—by allowing participants other than only "natural born female[s]" therefore must fail. Reversing this ruling would have detrimental implications for others' expressive associations, including *Amicus* Pinnacle Peak Pictures ("Pinnacle Peak") and other filmmakers, production companies, and artists whose viewpoints and creative license frequently requires selecting participants and subjects for their works based on identity or beliefs. Casting decisions—akin to the selection of participants for the Pageant—have long enjoyed robust First Amendment protection. That is true for commercial and non-commercial productions and artwork. *See* Section II. This Court should again reaffirm that protection for the Pageant.

Casting decisions and the Pageant's criteria-based selection of participants goes beyond expressive association; it also constitutes protected speech. On this point, the district court erred by misapplying *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995), and overlooking the strong free speech protections of *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). *Dale* held that an organization could not be compelled to accept members and participants when such acceptance itself sent a message with which the group disagrees or which is contrary to its values and mission. *Dale*'s free speech holding is on all fours with the Pageant's decision to select only "natural born female[s]" for its pageants, giving expression to its views on female empowerment and femininity. *See* Section III.

Argument

I. The claims advanced by Appellant Green challenge the Pageant's expressive activity.

The right to speak guaranteed by the First Amendment to the U.S. Constitution extends to virtually all forms of communication. "First Amendment protection extends not only to traditional street corner, soap-box speeches, but to virtually all modes of communication that may be utilized to disseminate ideas and protected expression on the public streets." *Kash Enters., Inc. v. City of Los Angeles*, 19 Cal.3d 294, 301 (1977) (citation omitted); *see also Perry v. Los Angeles Police Dep't*, 121 F.3d 1365, 1368 (9th Cir. 1997) (commercial sales of expressive items protected under First Amendment). As relevant to Pinnacle Peak, film is a "significant medium for the communication of ideas" ranging from "direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (rejecting also the notion that for-profit films are not protected). *See also Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019). Miss USA's Pageant, as performative entertainment that also conveys inherently ontological ideas about womanhood, femininity, and female empowerment, is no less an expressive medium protected under the First Amendment.

This is true regardless of whether the Pageant seeks to express a specific viewpoint about female empowerment and womanhood (as it does) or a more generalized one. The First Amendment's protection of expressive activity would be far less meaningful if it were limited to only particularized messages or targeted ideas and excluded generalized or inchoate but still thought-provoking ideas. Accordingly, courts

have broadly interpreted the First Amendment to encompass both generalized and particularized expression embodied in the selection of speakers and participants.

Supreme Court precedent demonstrates these principles. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* 515 U.S. 557 (1995), affirmed that an organizer's selection of participants for a public St. Patrick's Day parade falls within the ambit of expressive activity protected under the First Amendment. A state public accommodations law protecting people from sexual-orientation discrimination could not override that constitutional right. In accord with well-established jurisprudence, the Court recognized that the First Amendment "looks beyond written or spoken words as mediums of expression" and extends to expressive conduct as well. *Hurley*, 515 U.S. at 569. *Hurley* followed a long line of cases protecting not just the spoken word but also expressive acts, ranging from one's refusal to salute a flag to wearing an armband to protest a war. *Id.* (citing, *e.g.*, *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)). The district court, too, recognized that *Hurley*, at a minimum, "softens" an earlier requirement that an expression contain a particularized message, and correctly held that Miss USA is engaged in expressive activity.

The applicability of First Amendment protection to entertainers and artists was underscored by the Court's analogy to the parade organizer's selection of participants:

> [L]ike a composer, the Council selects the expressive units of the parade from potential participants, and though the scope may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. Even if this view gives

> the Council credit for a more considered judgment than it actively made, the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.

Id. at 574.

Post-*Hurley*, "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expression conveying a 'particularized message' ... would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Id.* at 569; *see also White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007); *Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004). Rather, conduct is protected so long as the actor intends for his or her conduct to convey a message and some viewers understood that there was some message being conveyed. *White*, 500 F.3d at 956; *see also Egolf v. Witmer*, 421 F.Supp.2d 858, 868 (E.D. Pa. 2006).

Consistent with this analysis, courts have broadly held that *Hurley's* "precepts hold equally for station assemblies" as they do for parades, artwork, television productions, and film. *See, e.g.*, *Symmonds v. Mahoney*, 31 Cal.App.5th 1096, 1106 (2019) (selection of musician in furtherance of free speech because it advanced or assisted the creation and performance of artistic works); *Hunter v. CBS Broad., Inc.*, 221 Cal.App.4th 1510, 1515-16, 1521 (2013) (broadcasting company's selection of on-air news personnel was protected free speech); *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F.Supp.2d 986 (M.D. Tenn. 2012); *Tamkin v. CBS Broad., Inc.*, 193 Cal.App.4th 133, 143, (2011); *Startzell v. City of Philadelphia*, 533 F.3d 183 (3d Cir. 2008) (concluding that *Hurley* would apply to gay

pride street festival, including commercial booths and a flea market, if protestors sought to participate in the event rather than merely attend the event); *Schwitzgebel v. City of Strongsville*, 898 F. Supp. 1208, 1219 (N.D. Ohio 1995).

Miss USA's selection of its pageant participants, as set out in its eligibility criteria and supported by its mission and value statements, and performance of the pageant itself, including its structure, rules, and broadcast, fall squarely within this precedent.

II. Forcing the Pageant to accept contestants who directly contravene the mission of its organization would infringe upon the Pageant's rights, along with the rights of filmmakers, musicians, artists and related entities to freely produce content consistent with their beliefs.

It is axiomatic that the First Amendment protects persons and entities against compelled speech with which they do not agree, as well protecting their right to speak freely on matters of personal belief, opinion, and concern. This includes forms of art, such as film, television, music, plays, books, dances, and other entertainment. The protection from compelled speech has been reaffirmed time and time again, including when that right has been tested by local and state governments through the application of antidiscrimination laws. In almost all instances, courts have held that such laws do not override the First Amendment.

The rights to free speech, and to be free from compelled speech, are critical to production companies such as Pinnacle Peak, which creates specialized film and television programming geared towards a particular audience. Once the door of the law is cracked open to require other forms of entertainment and performance to express a message with which the creators or producers disagree, artists and other content

producers will find themselves next in line for government oversight and censorship of their expressions. First Amendment rights are critical to incubating an array of entertainment and artistic creations that speak across individual experiences, and those rights protect the producers and creators regardless of whether their underlying expression is for profit or motivated by other concerns.

A. The First Amendment protects the Pageant's selection of participants, just as it protects the casting decisions and creative license of companies like Pinnacle Peak.

There is no dispute that the First Amendment protects casting decisions and the creative license of entertainers and artists. The underlying reasoning and legal precedent reveal why such protection also extends to Miss USA and why overturning the district court's ruling to hold otherwise has far-reaching implications for the art and entertainment industries.

"[C]asting decisions are part and parcel of the creative process behind a television program … thereby meriting First Amendment protection against the application of anti-discrimination statutes to that process." *Claybrooks*, 898 F. Supp. 2d at 993. *Telescope Media Group* comprehensively addressed why antidiscrimination laws do not override the First Amendment rights of filmmakers and content creators. There, a media production company wished to begin producing wedding videos of opposite-sex couples that would capture "the sacredness of their sacrificial vows at the alter" and even the following chapters of the couples' lives. 936 F.3d at 748. The State of Minnesota, relying on the Minnesota Human Rights Act ("MHRA"), claimed the decision to produce *any* wedding videos required the Larsens, who owned the

production company, to make such videos for everyone, including same-sex couples, regardless of their deeply-held personal and religious beliefs and the specific message they wished to convey with their wedding videos. *Id.* Minnesota also asserted that the MHRA conferred on the Larsens a duty to depict same-sex weddings in an "equally positive light" as opposite-sex ones. *Id.* at 748-49.

The Eighth Circuit held that Minnesota's application of the MHRA interfered with the Larsen's speech (their filmmaking), because, by compelling the company to "speak favorably" about same-sex marriage if they chose to do so about opposite-sex marriage, it operated as a content-based regulation of speech. The application of the MHRA to the Larsens contravened the "cardinal constitutional command" against compelled speech. *Id.* Even if their view is "'provocative'" and "'stirs people to anger,'" a state may not "'coerce [them] into betraying their convictions'" and promoting "'ideas they find objectionable.'" *Id.* at 752-53 (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949); *Janus v. AFSCME Council*, 138 S.Ct. 2448, 2464 (2018)).

While the government has a compelling interest in ensuring that all people are "entitled to full and equal enjoyment of public accommodations and service," "[e]ven antidiscrimination laws, as critically important as they are, must yield to the Constitution." *Id.* at 754; *see also Hurley*, 515 U.S. at 579. Therefore, while the government may prohibit "'the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services,' it may not 'declare another's speech itself to be a public accommodation or grant protected individuals … the right to participate in another's speech." *Telescope Media Group*, 936 F.3d at 755 (quoting *Hurley*, 515 U.S. at 572-53) (cleaned up).

The Arizona Supreme Court reached a similar result in *Brush & Nib Studios, LC v. City of Phoenix*, where the designers of custom wedding invitations alleged that a Phoenix antidiscrimination ordinance forcing them to create invitations celebrating same-sex weddings violated their rights to free speech and free exercise of religion. 247 Ariz. 269 (2019). While the court noted the owners' "beliefs about same-sex marriage may seem old-fashioned, or even offensive to some," it emphasized "the guarantees of free speech and freedom of religion are not only for those who are deemed sufficiently enlightened, advanced, or progressive. They are for everyone." *Id.* at 275. "Indeed, '[w]e can have intellectual individualism' and 'rich cultural diversities … only at the price' of allowing others to express beliefs that we may find offensive or irrational." *Id.* (quoting *Barnette*, 319 U.S. at 641-42); *see also Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2379 (2018) (Kennedy, J., concurring) (government "must not be allowed to force persons to express a message contrary to their deepest convictions").

These cases are not outliers but applications of binding First Amendment principles. *See, e.g.*, *Hurley*, 515 U.S. at 579. And, in the present context, they may properly be analogized to Appellant's Green effort to apply the Oregon public accommodations law to require that Miss USA to declare Green to be a "natural born female" by allowing Green to participate in the Pageant, even though such a declaration is contrary to Miss USA's policies, values, mission, training and participation requirements. Although no one is contesting that Miss USA and similar pageants can exclude men, the notion that Oregon can force the organization to—implicitly or explicitly—express the message that a transgender woman qualifies as a "natural born

female" despite Miss USA's beliefs to the contrary, violates well-established precedent and would nullify the fundamental constitutional principles discussed above.

Courts have upheld the First Amendment right against compelled speech not only against public accommodations statutes but also racial discrimination statutes. In *Claybrooks*, the court rejected claims of racial discrimination relating to the casting calls for the popular television shows "The Bachelor" and "The Bachelorette," noting that application of 42 U.S.C. § 1981 "would force the defendants to employ race-neutral criteria in the casting process, thereby regulating the creative content of the Shows" and applying strict scrutiny to the content-based speech restriction that § 1981 operated as in that context. 898 F. Supp. 2d at 993 (citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000)). The court found "no legal authority" for any "purported distinction between 'identity-themed programming' and other forms of television programming" that would warrant separate treatment under the First Amendment by mandating particular casting decisions. *Id.* at 998. And, in any event, any test by which a court attempted to discern whether a television program, movie, or play was sufficiently "identity-themed," "specifically geared" to, or "about" a particular racial, religious, or gender group "to construe the demographics of its cast as to constitute the show's 'content'" would be unreasonably unwieldy and raise "intractable issues" beyond the judicial function. *Id.*

Other courts have reached similar conclusions. *See, e.g.*, *Symmonds*, 31 Cal.App.5th at 1099-1100, 1106 (singer's decision to fire his drummer was a protected act of free speech because a "singer's selection of the musicians that play with him both advances and assists the performance of the music, and therefore is an act in furtherance of …

the right of free speech."); *Hunter*, 221 Cal.App.4th at 1513 (CBS's "selection of a weather anchor" qualified as an exercise of free speech in gender discrimination suit); *see also Tamkin*, 193 Cal.App.4th at 143 (writing, casting, and broadcasting popular television show are acts of free speech).

Here, too, Oregon's public accommodations statute must yield to Miss USA's casting decisions regarding who it features in its pageant. As might a play or a show, the Pageant consists of multiple components, including interview rounds, onstage performances, and choreographed dance routines, complete with costumes and performed before a live audience and streamed to online viewers. Precedent leaves no doubt that the Pageant qualifies as "pure speech," along with paintings, music, film, and other forms of art "that predominantly serve to express thoughts, emotions, or ideas." *Brush & Nib*, 247 Ariz. at 284 (citing *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (books, plays, films, and video games are protected pure speech); *Hurley*, 515 U.S. at 569 (music, painting, and poetry are examples of speech "unquestionably shielded" under the First Amendment); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("pictures, films, paintings, drawings, and engravings" covered by First Amendment)).

Much like a film studio's selection of actors and scenes—"pure speech" that is "unquestionably shielded" by the First Amendment, the Pageant's selection of contestants and elements of the actual performance are inextricably part of the overall art. In the Broadway smash-hit "Hamilton," produced and starring acclaimed actor and director Lin-Manuel Miranda, America's founders are portrayed virtually exclusively by persons of color, in response to well-publicized "casting calls" soliciting "non-White

actors."[1] But if local and state governments are permitted to interfere in the selection of contestants for a pageant, at what point will they also preclude the creators of Hamilton from choosing actors that are consistent with the message they are trying to convey? If Lin-Manuel Miranda wanted a Latino or African-American actor to portray the lead role of Alexander Hamilton, should a government be able to force him to permit a Caucasian man to portray the role instead? How about forcing Hamilton to star a female in the lead role? Once governments are allowed to determine what elements should go into a performance—from the actors, to the scenery to the music and lighting—it will quickly become impossible to delineate where the creator's "unquestionably shielded" First Amendment protections end and where the permissible level of the government's intrusion into the minutia of the "what, when, where and how" such performances begins.

As with the St. Patrick's Day Parade, the Pageant's selection criteria for contestants are designed as part of the overall expressive activity—and performance—the Pageant seeks to put on. Just as in other cases involving public accommodations statutes, Miss USA is not actively seeking to exclude *anyone* from attending or purchasing tickets to its pageants. *See Startzell*, 533 F.3d at 194-95. But Green—a professed transgender activist—is not seeking to attend a show as a customer, but to actively participate in a designed program and thus relay the message that transgender women are the same as "natural born female[s]"—a message that the Pageant specifically does not wish to convey. If the Pageant is forced to contravene its stated

[1] *See, e.g.*, https://www.cnn.com/2016/03/30/entertainment/hamilton-broadway-casting-call/index.html.

mission and beliefs by having Green participate, then such an outcome is hardly distinguishable from requiring filmmakers or playwrights to cast actors based on identities that do not convey the intended message, requiring scholarship providers to permit persons of classes outside of the intended recipients (*e.g.*, women, persons of color, and LGBT individuals) to receive such grants, or to allow men onto women's college athletic teams. Courts have recognized such far-reaching implications from such a holding, including "requir[ing] a Muslim tattoo artist to inscribe 'My religion is the only true religion' on the body of a Christian if he or she would do the same for a fellow Muslim, or it could demand that an atheist musician perform at an evangelical church service." *Telescope Media Group*, 936 F.3d at 756. For states that declare political affiliation or ideology to be a protected characteristic, such antidiscrimination laws could force Democratic or Republican speechwriters to perform similar services for the opposing party, or require professional entertainers and musicians to perform at rallies for political candidates they do not support. *Id.* The number of such examples is limited only by one's imagination, with another court observing further effects:

> the legality of any network targeting particular demographic groups would be called into question, including, *inter alia*, the Lifetime Network (targeted to female audiences), the Black Entertainment Channel (targeted to African–Americans), Telemundo (targeted to Latinos), the Jewish Channel, the Christian Broadcast Channel, the Inspiration Network (targeted to Protestants), and LOGO (targeted to gays and lesbians).

Claybrooks, 898 F.Supp.2d at 998.

For Pinnacle Peak, such a holding may force it to cast actors in roles that are contrary to the entire mission of the company and the reason it was created. It is not solely the on-screen performances that relay the message Pinnacle Peak seeks to convey, but also the specific individuals recognizable to the company's viewing audience that make its productions unique—the same way the Pageant might choose to distinguish itself from other pageants, such as Miss America, or Miss Nevada USA, which recently celebrated an openly transgender woman as its winner (which exemplifies that pageant's corresponding right to engage in free speech and expressive activity).

For these reasons, courts have given content creators wide latitude in making casting decisions and selecting participants in their programming. Requiring Miss USA to accept transgender women as participants is fundamentally no different than requiring them to accept men as participants—one would allegedly be discrimination based on sexual identity while the other would allegedly be discrimination based on gender. Nor is it any different than requiring the Miss Black America pageant to accept Caucasian participants or requiring an LGBT pageant to accept heterosexual, cisgender contestants. In any of these scenarios, the cherished First Amendment rights of the producers and creators—which have repeatedly been affirmed by the Supreme Court in the similar contexts of films, books, music, and parades—would be negated and there would be little keeping such anti-discrimination mandates from overriding the First Amendment in other contexts. As *Claybrooks* observed, many popular television shows, books, plays and other performances would cease to exist in the form we know. There would be no "Cosby Show," "Jersey Shore," "The Shahs of Beverly Hills," "BET" and other entertainment that millions of Americans love—whether in good taste or poor.

898 F.Supp.2d at 998. The First Amendment cannot be relegated to the whims and political machinations of local and state elected officials regardless of how much they may disagree with the message of a particular show, song or beauty pageant. Allowing the erosion of the First Amendment in this sense would render filmmakers such as Pinnacle Peak—as well as television broadcasters, musicians and playwrights—subjected to the mercy of whichever politicians were in office at a given time.

B. A speaker's status as a for-profit enterprise does not diminish its First Amendment rights.

The for-profit status of the Pageant—or Pinnacle Peak or any other speaker—does not diminish the degree of First Amendment protection afforded to them. *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756, n.5 (1988) (the "degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away"); *Riley v. Nat'l Fed'n of Blind, Inc.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received…."); *Brush and Nib*, 247 Ariz. at 286 ("[a] business does not forfeit the protections of the First Amendment because it sells its speech for profit."). Likewise, in *City of Cincinnati v. Discovery Network, Inc.,* the Supreme Court addressed a municipality's refusal to allow a company engaged in the business of providing adult educational, recreational, and social programs to distribute magazines advertising its services through freestanding news racks on public property and held that "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. 507 U.S. 410, 412, 420-21 (1993) (cleaned up). "Speech likewise is protected even though it is carried in a form that is 'sold' for

profit." *Id.*; *see Brown*, 564 U.S. at 789 (commercial video games); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (books).

Similarly, the Court has elsewhere reiterated numerous times that the right to autonomy of speech and freedom from compelled speech is "enjoyed by business corporations generally," *Hurley*, 515 U.S. at 573-74, and that for-profit motion picture companies—such as Pinnacle Peak—engage in "a form of expression whose liberty is safeguarded by the First Amendment," *Burstyn*, 343 U.S. at 501. In the seminal *Burstyn* decision, the Supreme Court explicitly rejected the argument that films do not "fall within the First Amendment's aegis [simply] because" they are often produced by "large-scale business[es] conducted for private profit." *Id.*; *see also Masterpiece Cakeshop Ltd. v. Colo. Civil 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."). It is well-established that other types of commercial enterprises and corporations, such as utilities and newspapers, also maintain First Amendment protection. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *see also Citizens United v. FEC*, 558 U.S. 310, 342 (2009) (collecting cases). Regardless of whether an entity operates for-profit, such speakers "contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster" no differently than individual persons motivated to speak for other reasons. *Pac. Gas*, 475 U.S. at 8.

In this case, the Pageant's operation as a for-profit enterprise is no less deserving of the same First Amendment protection that other entities and corporations have routinely received with the Supreme Court's explicit approval.

III. The district court erred in finding that the compelled inclusion of transgender women did not violate the Pageant's free speech rights.

The district court erred when it held that Miss USA's free speech rights had not been infringed upon. In *Hurley*, the Court reasoned that the general rule, "that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." 515 U.S. at 573. Accordingly, in *Hurley*, regardless of the parade organizer's reason for rejecting a participant's application, "it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id.* at 575. In *Boy Scouts of America v. Dale*, the Supreme Court went on to hold that forcing "inclusion of an unwanted person in a group" affects "the group's ability to advocate public or private viewpoints." 530 U.S. 640, 648 (2000). The Court recognized that "the presence of Dale as an assistant scoutmaster" would "surely interfere with the Boy Scout's choice not to propound a point of view contrary to its beliefs." *Id.* at 654. *Dale* thus reinforces that a group has a First Amendment right to express a message or "point of view" through its decisions about who participates in its activities or serves as a member. *Dale* is not simply an application of the expressive association holding of *Hurley*, but instead directly addresses an organization's free speech rights as they relate to allowing the participation by members who will significantly affect the group's ability to propound certain

viewpoints. *See Dale*, 530 U.S. at 689 (Stevens, J., dissenting) (describing the Boy Scouts's free speech claim). The district court, however, failed to properly apply *Dale* with respect to free speech rights, distinguished *Hurley* in an interpretation that is inconsistent with *Dale*, and erred in denying Miss USA's free speech interest.

The district court appears to have overlooked the numerous references to the Boy Scout Association's free speech rights in *Dale* when it relied primarily on *Hurley* to reject Miss USA's free speech arguments. Justice Stevens' dissent underscores the free speech rights driving the holding in *Dale*: "The majority holds that New Jersey's law violates BSA's right to associate **and** its right to free speech." 530 U.S. at 664 (emphasis added). The majority opinion, of course, discusses at length the Boy Scouts's First Amendment right to choose to send a message through who participates in its leadership, even if it "does not trumpet its views from the housetops" and tolerates disagreement with those views within its ranks. *Id.* at 656.

Other courts also recognize that "*Dale* makes clear that once conduct crosses over to speech or other expression, the government's ability to regulate it is limited." *See also Telescope Media Group*, 936 F.3d at 755. In other words, a speaker has a right to convey a message through the selection of participants to represent or participate on behalf of an expressive activity organized by the speaker. The associational freedom argument "is really a disguised free-speech claim." *Id.* at 760.

But in its free speech analysis, the district court here did exactly what the New Jersey Supreme Court did and which was reversed in *Dale*. It latched on to the same language from *Hurley* that "Petitioners disclaim any intent to exclude homosexuals as such" to distinguish between "status-based and speech-based exclusion[s]" and reject

the free speech claim. *See Dale v. BSA*, 734 A.2d 1196, 1237 (N.J. 1999). The Supreme Court's reversal in the later-issued *Dale* repudiated this line of thinking. The Pageant similarly transmitted its values and views on the femininity and womanhood through its programming and the participants therein; yet the district court virtually ignored *Dale*'s free speech holding to reject the Pageant's free speech claim.

Public accommodations statutes cannot compel speech or otherwise interfere with protected First Amendment activity. Compelled participation in an expressive activity under such a statute "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. As other courts have interpreted this holding, "[t]he Supreme Court has expressly found that the First Amendment can trump the application of antidiscrimination laws to protected speech." *Claybrooks*, 898 F. Supp. 2d at 993.

As other courts have recognized, a speaker's "free speech and free association claims merge into one because '[w]ho speaks on [one's] behalf … colors what concept is conveyed." *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855 (8th Cir. 2021) (quoting *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 680 (2010)). This rule extends not only to traditional speakers, but all individuals engaging in expressive conduct, even if some viewers find the content of the expression "misguided, or even hurtful." *Hurley*, 515 U.S. at 574. Had the district court properly applied the free speech holding of *Dale*, it likely would have reached a different conclusion. In fact, it acknowledged that "it is not necessarily the case that the proper application of a public accommodations law will never implicate the First Amendment expression of a

regulated entity," and that it is "possible, in certain contexts, that the conduct of including or excluding an individual of a particular status can express a message or an idea." Dkt. 57 at 13. Indeed, "[t]here is no real dispute" that Miss USA's decision to allow only "natural born female[s]" to participate in its pageant that "Miss USA intends to send a message about its views on womanhood," or that others would understand that "the pageant organizers wished to convey some message about the meaning of gender and femininity." Dkt. 57 at 15.

The district court erred by applying Oregon's public accommodations statute to override the Miss USA Pageant's speech rights, through inclusion of participants in contravention of a primary message of the organization to "empower women," defined as "natural born female[s]." The extension of such an accommodations statute to artistic endeavors (*e.g.*, films, plays, concerts) and membership groups such as "Young Democrats," "College Republicans," "Black Student Union," "Asian-Pacific Islander Association," "Hillel International," and the "Christian Legal Society" would essentially preclude such entities from existing or promoting values and messages consistent with the beliefs of those organizations. *See* Section II.

Because the Pageant is engaged in expressive conduct just as any other performative work, the *Spence* test is met, and the Pageant qualifies for protection under the First Amendment. *See Spence v. Washington*, 418 U.S. 405 (1974); Sections I-II. Requiring Miss USA to include Green as a contestant in its Pageant "would embroil courts in questioning the creative process behind any television program or other dramatic work." *Claybrooks*, 898 F. Supp. 2d at 993. As such, the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968), traditionally applied where a government

regulation has only an incidental effect on protected speech, is not applicable. *See Dale*, 530 U.S. at 659 (rejecting application of the *O'Brien* balancing test when the state public accommodations law "would significantly burden" the organization's right to express a point of view).

Just as in *Dale*, the Court "must not be[] guided by [its] views of whether" Miss USA's views are right or wrong; the law ""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."' 530 at 661 (quoting *Hurley*, 515 U.S. at 579). The Pageant's free speech rights are infringed when they are compelled to advance a point of view with which they disagree. It was error for the district court to hold to the contrary.

Conclusion

Pinnacle Peak respectfully asks the Court to affirm the district court's order and hold that Miss United States's interest in expressive association outweighs the state's interest in preventing gender-identity discrimination.

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Respectfully submitted,

/s/ Anna St. John

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Pursuant to 9th Circuit Rule 32-1 for Case No. 21-35228

I certify that: This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 5,726 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Executed on October 29, 2021.

/s/ Anna St. John
Anna St. John

Proof of Service

I hereby certify that on October 29, 2021, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/ Anna St. John
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