No. 21-35228

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANITA NOELLE GREEN,

Plaintiff-Appellant,

v.

MISS UNITED STATES OF AMERICA, LLC,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Oregon
No. 3:19-cv-02048-MO

BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, TRANSGENDER LEGAL DEFENSE AND EDUCATION FUND, AND NATIONAL CENTER FOR LESBIAN RIGHTS IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* Lambda Legal Defense and Education Fund, Inc., Transgender Legal Defense and Education Fund, and National Center for Lesbian Rights certify that they are nonprofit organizations, that they have no parent corporation, and that no corporation owns 10% or more of their stock.

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INTEREST OF *AMICI CURIAE*[1]

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender (LGBT) people through impact litigation and other advocacy. As both party counsel and *amicus curiae*, Lambda Legal has litigated the constitutionality of civil rights protections barring discrimination against LGBT people, including expressive association defenses. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

Transgender Legal Defense and Education Fund (TLDEF) is a non-profit organization that advocates on behalf of transgender and non-binary people across the United States. TLDEF is committed to ensuring that law and policy permit full, lived equality for the transgender and non-binary community. TLDEF seeks to coordinate with other civil rights organizations to address key issues affecting transgender people in the areas of employment, healthcare, education and public accommodations and provides public education on transgender rights.

National Center for Transgender Rights (NCLR) is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian,

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[1] All parties consented to the filing of this brief. No party's counsel authored this brief in whole or in part. No party, party's counsel, or any person or entity other than *amici*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity for LGBT people in employment, education, housing, and public accommodations through legislation, policy, and litigation. NCLR represents LGBT people in civil rights cases throughout the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

Civil rights protections embody the collective promise of equal participation in public life, one of the most compelling interests that a government can achieve for its people. These protections cover a wide array of settings where discrimination can inflict its damage—but regulation of activity by commercial businesses falls within the dead-center core of the government's constitutional authority. When prohibiting discrimination by commercial enterprises that profit from solicitation of the general public, the government interest at stake is at its zenith, and the purported burden on the business is at its nadir.

The district court turned this principle on its head when concluding, for perhaps the first time in this nation's history, that a for-profit business open to the general public had a constitutional right of expressive association that trumped the

state's interest in prohibiting discrimination in the commercial sphere.

It erred in two key respects when balancing these considerations. First, it failed to apprehend the full weight of the government interest at stake. Barring discrimination based on sex in public accommodations is a quintessential compelling state interest, and the rampant discrimination, harassment, and even violence faced by transgender people powerfully illustrates why. Such discrimination not only deprives transgender people of equal access to goods and services in the commercial marketplace but also inflicts the unforgettable humiliation of being rejected as unworthy in places otherwise open for business to the general public—followed by the often unshakeable fear of more to come. Today, it may be a pageant; tomorrow, it may be a grocery store, school, or shelter.

Second, any burden on a claimed right of expressive association is especially weak on the facts presented here. As a threshold matter, the evidence does not show that contestants sought to send any shared message regarding transgender women, and Defendant cannot coopt them to support its unilateral retelling of their collective expression. Moreover, the commercial nature of Defendant's company, which profits from unselective solicitation of the general public for business, already relinquishes significant autonomy to pick and choose the individuals from whom it accepts fees. Merely affording Plaintiff Anita Green the same treatment as other fee-paying contestants does not impose any greater burdens on Defendant

than those faced by groups that unsuccessfully challenged protections against sex discrimination on associational grounds in the past.

The government's compelling interest in eliminating discrimination against transgender people in the commercial marketplace outweighs any marginal burden faced by the business on the record here. In concluding otherwise, the district court hobbled the government's ability to protect its most vulnerable from harm.

ARGUMENT

In striking down the application of Oregon's nondiscrimination law as unconstitutional, the district court erred in conducting what it described as a balancing test, with "the associational interest in freedom of expression . . . on one side of the scale, and the State's interest on the other." *Dale*, 530 U.S. at 658-59. It both underestimated the weight of the government's compelling interest here in protecting transgender people from discrimination and overestimated the burden on Defendant's interest in light of the facts presented.

I. There Is a Compelling State Interest in Barring Discrimination Against Transgender People.

The compelling nature of the state interest at issue in protecting transgender people from the harms of discrimination is reinforced by multiple considerations. First, courts have long recognized that there is a compelling interest in prohibiting discrimination based on sex, which necessarily includes discrimination against transgender people. Second, the state interest in ensuring nondiscrimination within

the commercial marketplace is particularly consequential given the role of businesses in everyday life. Third, the civil rights law at stake here—Oregon's prohibition of discrimination based on gender identity in public accommodations—illustrates precisely why the state has an interest of the highest order.

A. Eliminating Sex-Based Discrimination—Including Against Transgender People—Is a Compelling State Interest.

Across an unbroken line of cases beginning with *Roberts*, the U.S. Supreme Court has repeatedly affirmed that states act pursuant to a compelling interest when they prohibit discrimination based on sex in public accommodations. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (recognizing that a state's "commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order"); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *see also N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988). While recognizing that the freedom of association can encompass a freedom not to associate, it nonetheless held that various clubs seeking to exclude women could not maintain their discriminatory practices, even where there was "some slight infringement" on associational rights. *Rotary Club*, 481 U.S. at 549.

The *Roberts* trio of cases confirmed the breadth of the government's interest in prohibiting discrimination based on sex in public accommodations. That includes ensuring equal access to "purely tangible goods and services"—as well as

more intangible benefits such as "leadership skills" and "business contacts"—and the removal of "barriers to economic advancement and political and social integration." *Roberts*, 468 U.S. at 625-26 (1984) (quotes omitted); *Rotary Club*, 481 U.S. at 549. But the government's interest extends further. It also encompasses a compelling interest in preventing the "deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Roberts*, 468 U.S. at 625 (quotes omitted). "Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring; quotes omitted).

The Supreme Court has now confirmed in *Bostock* that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020). Because the government has a compelling interest in striking at the entire spectrum of sex-based discrimination, it has no less of a compelling interest where that discrimination manifests in the targeting of transgender people. Like the challenges that women faced in overcoming "stereotypical notions," transgender people have also encountered barriers to inclusion "that have historically plagued certain disadvantaged groups." *Roberts*,

478 U.S. at 625-26. Indeed, even before *Bostock*, this Court's precedent recognized that discrimination against transgender people is inescapably based on sex. *See, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000). And in light of the pervasive discrimination and persecution that transgender people have historically suffered—and continue to face—this Court held that classifications based on transgender status demand heightened scrutiny. *Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019).

Courts to have addressed the issue agree that the government interest in prohibiting sex discrimination is no less compelling when transgender people are on the receiving end of such discrimination. *See, e.g.*, *EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 591 (6th Cir. 2018) (recognizing the government's "compelling interest in combating discrimination in the workforce" in addressing termination of transgender woman), *aff'd sub nom. Bostock*, 140 S. Ct. 1731; *Taking Offense v. State*, 66 Cal. App. 5th 696 (2021) (applying *Bostock* to confirm the government's compelling interest in barring discrimination against transgender people); *see also Parents for Priv. v. Barr*, 949 F.3d 1210, 1238 n.21 (9th Cir. 2020) (recognizing that nothing in *Hurley* precludes a compelling interest in protecting transgender people from "the stigmatizing injury of discrimination" when denied access to facilities matching their gender identity or publicly available goods and services), *cert. denied*, 141 S. Ct. 894 (2020). Just as protections from

sex discrimination do not carve out transgender people from their scope, neither does the government's compelling interest in eliminating sex discrimination in all its forms. *See EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) (holding that the government has a compelling interest in eliminating "all forms of discrimination").

Indeed, this Court has upheld the constitutionality of government action protecting transgender people from the harms of discrimination. *Parents for Priv.*, 949 F.3d at 1238 (affirming protections that ensure transgender students have equal access to facilities matching their gender identity and recognizing authority that the government has a compelling interest in similar contexts). Given long-standing precedent upholding prohibitions against sex-based discrimination, prohibiting discrimination against transgender people serves an interest that is at least as compelling.

B. The Government Has a Particularly Strong Interest in Prohibiting Discrimination in the Commercial Marketplace.

The government's interest in prohibiting discrimination by commercial businesses is particularly compelling given the enormous role that they play in everyday life. As *Roberts* noted long ago, "the changing nature of the American economy" strengthened the government's interest in regulating even "various forms of public, quasi-commercial conduct." 468 U.S. at 625-26. There is thus no question that ensuring full and equal access to the commercial marketplace—the

backdrop for "an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society"—falls within the heartland of the government's constitutional authority. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

The district court assumed that Oregon's interest could not have been any greater than the state's interest in *Dale*. 1-Excerpts of Record (ER)-32. But *Dale* involved a "private, not-for-profit organization." 530 U.S. at 644. Indeed, the Supreme Court specifically contrasted public accommodation laws' regulation of "clearly commercial entities" on the one hand with organizations like the Boy Scouts on the other. *Id.* at 657. Courts have thus recognized *Dale*'s limited relevance beyond the specific context in which it arose. *See, e.g.*, *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 496 F. Supp. 3d 1195, 1209 (S.D. Ind. 2020) (distinguishing *Dale* from discrimination in employment because *Dale* involved "membership in a private organization"); *Klein v. Or. Bureau of Labor & Indus.*, 289 Or. App. 507, 530 (2017) (explaining that *Dale* only applies to "circumstances outside of the usual commercial context"), *vacated on other grounds*, 139 S. Ct. 2713 (2019).

In fact, courts have had no difficulty in confirming, in the related context of sexual orientation, that prohibiting discrimination by a range of commercial businesses serves a compelling state interest. *See, e.g.*, *State v. Arlene's Flowers, Inc.*, 193 Wash. 2d 469, 531 (2019) (flower shop), *cert. denied*, -- S. Ct. --, 2021

WL 2742795 (Jul. 2, 2021); *Cervelli v. Aloha Bed & Breakfast*, 415 P.3d 919, 935 (Haw. Ct. App. 2018) (bed-and-breakfast), *cert. denied*, 139 S. Ct. 1319 (2019); *Gifford v. McCarthy*, 23 N.Y.S.3d 422 (2016) (facility rental); *N. Coast Women's Care Med. Grp., Inc. v. Superior Court*, 44 Cal. 4th 1145, 1158 (2008) (medical group). The government "has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace." *303 Creative LLC v. Elenis*, -- F.4th --, 2021 WL 3157635, at *9 (10th Cir. 2021) (website services); *see also Latta v. Otter*, 771 F.3d 456, 475 (9th Cir. 2014) ("enforcement of anti-discrimination laws . . . 'serv[e] compelling state interests of the highest order'").

These authorities stand on a bedrock of precedent rejecting constitutional challenges to civil rights protections similar to the one mounted by Defendant here. *See, e.g.*, *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (rejecting law firm's expressive association defense to sex discrimination); *Heart of Atlanta Motel*, 379 U.S. at 250 (upholding federal public accommodations law against constitutional challenge); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 384 (1973) (rejecting expression defenses in holding newspaper could be restrained from carrying job advertisements that displayed illegal sex preferences); *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941 (D.S.C. 1966) (rejecting restaurant's asserted constitutional right to discriminate based on race); *see also*

Stevens v. Optimum Health Inst.—San Diego, 810 F. Supp. 2d 1074, 1094 (S.D. Cal. 2011) (rejecting expressive association defense to disability discrimination). And the government also has a compelling interest in prohibiting discrimination outside the commercial context as well. *See, e.g.*, *Norwood v. Harrison*, 413 U.S. 455, 463 (1973) (private school); *Ry. Mail Ass'n v. Corsi*, 326 U.S. 88, 94 (1945) (labor union); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1368 (9th Cir. 1986) (compelling interest in eliminating religious school's discriminatory employment policy).

The *Roberts* trio of cases recognized that public accommodation laws validly root out a particular form of discrimination: the attempt by homogenous groups, which serve commercial or quasi-commercial interests, to limit professional development and networking benefits to those that most resemble themselves. *See, e.g.*, *Rotary Club*, 481 U.S. at 549; *N.Y. State Club Ass'n*, 487 U.S. at 12 (upholding city's interest in regulating small club based on its commercial nature, which city defined as being "where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed"); *Lahmann v. Grand Aerie of Fraternal Ord. of Eagles*, 202 Or. App. 123, 127 (2005). The state has a compelling interest in ensuring equal access to the kind of networking that commercial public accommodations in particular can facilitate.

C. Oregon's Prohibition of Discrimination Against Transgender People Serves a Compelling Interest of the Highest Order.

As relevant here, the Oregon Equality Act enacted in 2007 amended state law to advance the State of Oregon's compelling interest in prohibiting discrimination based on gender identity in public accommodations. 2007 Or. Laws ch. 100, Senate Bill (SB) 2; Or. Rev. Stat. § 659A.403 (guaranteeing that "all persons . . . 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" any protected characteristic); Or. Rev. Stat. § 174.100 (protecting gender identity).

Oregon's law responds to a well-documented harm. Social science has confirmed pervasive and widespread discrimination against transgender people in public accommodations. In recent studies of transgender people, nearly one-third of respondents "reported being denied equal treatment or service, verbally harassed, or physically assaulted in a place of public accommodation in the past year," and twenty percent of respondents avoided public accommodations altogether to avoid mistreatment. Jody L. Herman, Taylor N.T. Brown & Ann P. Haas, *Suicide Thoughts and Attempts Among Transgender Adults Findings from the 2015 U.S. Transgender Survey*, The Williams Institute, 25 (Sep. 2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Suicidality-Transgender-Sep-2019.pdf. The consequences of that discrimination can be devastating.

Among transgender respondents, "having negative experiences in places of public accommodation in the past year, or avoiding these places all together, [was] associated with a higher prevalence of suicide thoughts and attempts." *Id.*

Discrimination has harmful snowball effects. A 2014 survey of transgender people in Massachusetts found that a staggering sixty-five percent of respondents reported at least one experience of discrimination in a public accommodation within the last year, and that such experiences were associated with postponing needed medical care when sick or injured. Sara Reisner, et al., *Discrimination and Health in Massachusetts: A Statewide Survey of Transgender and Gender Nonconforming Adults*, Fenway Health, 15-19 (2014), https://fenwayhealth.org/wp-content/uploads/The-Fenway-Institute-MTPC-Project-VOICE-Report-July-2014.pdf. Similarly, another study found widespread avoidance of public accommodations by transgender people due to discrimination, with 34 percent who had experienced discrimination in the past year avoiding public spaces like stores and restaurants. Movement Advancement Project, *LGBT Policy Spotlight: Public Accommodations Nondiscrimination Laws*, 2-4 (2018), https://www.lgbtmap.org/file/Spotlight-Public-Accommodations-FINAL.pdf.

Oregon's own history is replete with a record of discrimination against transgender people. Incidents of such discrimination were recounted during legislative hearings on the Oregon Equality Act. For example, a transgender

woman testified about experiencing harassment when she was simply dining at a restaurant. Hearing on SB 2 Before the Oregon Senate Judiciary Committee, Part II (March 12, 2007), http://oregon.granicus.com/MediaPlayer.php?clip_id=15672, at 2:3:12-2:35:35. A transgender man spoke about fearing physical assault and verbal harassment when traveling throughout the state of Oregon and being vulnerable to refusals of service at hotels and restaurants. *Id*. at 2:32:33-2:34:45. A transgender woman with an illustrious military and law enforcement career testified about losing her job as a deputy sheriff after her gender identity was revealed, with the sheriff declaring that she was a "freak" who could no longer perform her duties. Hearing on SB 2 and House Bill (HB) 2007 Before the Oregon House of Representatives, Committee on Elections, Ethics and Rules Testimony (April 9, 2007), http://oregon.granicus.com/MediaPlayer.php?clip_id=17530, at 5:10:45-5:13:38. It was against this painful record of discrimination that Oregon chose to act and expressly protect transgender people from harm.

Subsequent enforcement of Oregon's protections based on gender identity and sexual orientation have only confirmed that discrimination persists in the state. In *Klein*, for instance, a woman went with her mother to a bakery to shop for a wedding cake, only to have her same-sex relationship referred to as an "abomination" by the owner. 289 Or. App. at 512. In another case, a group that included transgender women gathered at a bar, and the bar asked them not to meet

there again, believing that their presence was bad for business. *Blachana, LLC v. Or. Bureau of Lab. & Indus.*, 273 Or. App. 806, 810 (2015).

Moreover, as the district court acknowledged, Oregon's own courts have held that the state's interest in barring discrimination in public accommodations is compelling. 1-ER-8 (citing *Klein*, 289 Or. App. at 542); *see also King v. Greyhound Lines, Inc.*, 61 Or. App. 197, 203 (1982) (recognizing that a "chief harm resulting from the practice of discrimination by establishments serving the general public is not the monetary loss of a commercial transaction or the inconvenience of limited access but, rather, the greater evil of unequal treatment, which is the injury to an individual's sense of self-worth and personal integrity"). There is no reason to believe that "Oregon courts would treat discrimination based on gender-identity as less than compelling." 1-ER-8.

Finally, Oregon's public accommodation law is narrowly tailored to achieve its compelling interest in eliminating discrimination in the commercial marketplace. The law represents "the least restrictive means of achieving its ends" and it "responds precisely to the substantive problem which legitimately concerns the State." *Roberts*, 468 U.S. at 629 (quotes omitted); *see also PGA Tour, Inc. v. Martin*, 532 U.S. 661, 681 (2001) (recognizing that public accommodation laws properly include any place of exhibition or entertainment where patrons compete). It is also no answer to tell Ms. Green to "go elsewhere" to find another pageant,

which would neither remedy dignitary injuries nor provide her with full and "equal access to publicly available goods and services." *Roberts*, 468 U.S at 624.

Defendant alternatively argued below that the law is under-inclusive merely because it contains a limited number of exceptions for particular places, such as correctional facilities. Or. Rev. Stat. § 659A.400(2); *cf. N.Y. State Club Ass'n*, 487 U.S. at 4 & 14 n.5 (upholding public accommodation law as constitutional, notwithstanding exemptions for public educational facilities). None of these exceptions, however, involve a commercial enterprise open to the public, and they do not diminish the state's compelling interest in maintaining a nondiscriminatory commercial marketplace.

II. The Facts Fail to Substantiate Any Serious Burden on Defendant's Claimed Right of Expressive Association.

The strength of the government's interest in nondiscrimination stands in stark contrast to any marginal burden on Defendant from complying with state law. Any burden on a right of expressive association is significantly attenuated by three considerations: (1) the factual record fails to substantiate that contestants shared a commonly held view regarding the exclusion of transgender women from pageant participation; (2) Defendant's unselective commercial solicitation of the general public already relinquishes significant autonomy over selecting pageant participants; and (3) Defendant need only treat Ms. Green like all other paying contestants, which does not preclude achieving its goals on the record presented.

A. The Record Does Not Show that Contestants Sought to Engage in Defendant's Claimed Expression.

The right of expressive association does not protect the right of individuals to come together for any reason; rather, it protects the "right to associate for the purpose of speaking." *Rumsfeld v. F. for Acad. and Institutional Rts., Inc.*, 547 U.S. 47, 68 (2006). The factual record here, however, belies the notion that contestants sought to engage in any expression relating to transgender women, including even a desire not to associate with them, as Defendant suggests. Instead, the record reveals that contestants—and even pageant leadership—were surprised that transgender women were excluded from participation. That all-too-revealing fact significantly undermines any purported burden on an expressive association right.

Most recently, the Supreme Court has characterized the right of expressive association as protecting "the ability of like-minded individuals to associate for the purpose of expressing commonly held views." *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 309 (2012). Association is not a free-standing right but, rather, instrumental in nature, serving only as a means of protecting other enumerated rights. The Supreme Court "has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S. at 618. For example, this Court rejected the expressive association defense of

the website Glassdoor.com that allowed users to post information about employers—whether positive or negative—because users did not "associate[] to advance shared views." *In re Grand Jury Subpoena*, 875 F.3d 1179, 1184 (9th Cir. 2017). Here, Defendant must show not merely that contestants associated with one another in order to engage in speech but, more precisely, that one component of that speech was that they did not wish to associate with transgender women.

The factual record here does not show that contestants were "like-minded" and shared the "commonly held" view that Defendant must prove. *Knox*, 567 U.S. at 309. To the contrary, the evidence shows that contestants were "surprised and shocked" to learn of Defendant's ban against transgender women. 2-ER-126; 2-ER-119. That includes a contestant who was heavily involved in Defendant's pageants, having received first runner-up in Oregon. 2-ER-122. Indeed, even pageant leadership occupying key roles such as "Promotions Director" revealed that, before the litigation, they were also unaware of Defendant's ban against transgender women, which was never promoted. 2-ER-119 ("several of the delegates also expressed their surprise to me"). There cannot be collective expression where the collective does not share a common, baseline understanding of the supposed expression.

Unsurprisingly, Defendant's contestants come together to compete—not to engage in group expression about transgender women. *Cf. Semaphore Ent. Grp.*

Sports Corp. v. Gonzales, 919 F. Supp. 543, 550 n.4 (D.P.R. 1996) (holding that participation in a mixed martial artist competition was not an expressive association); *Burrows v. Ohio High Sch. Athletic Ass'n*, 712 F. Supp. 620, 626 (S.D. Ohio 1988) (holding that participation on soccer team was not for expressive purposes but simply to play a game). Moreover, as explained below, pageant participants are enticed primarily, if not solely, by commercial and professional benefits, such as winning prize packages, selling advertisements, and being offered modeling, acting, or similar opportunities. *See infra* § II.B; *cf.* 2-ER-192 (pageants present professional opportunities for "models, actors, singers, [and] dancers").

The record here distinguishes this case from Defendant's comparison to the "Miss Black America" pageant and others, where there could be a more factually credible contention that its contestants actually sought to engage in collective expression reflected in the record. And the same could be true if the Ku Klux Klan also sought to produce a pageant for members that excluded black women, which no contestant would be shocked to learn. Here, if anything, Defendant touts the *differences* between contestants, as its mission explains: "We believe the true definition of beauty is, 'The unique set of combinations that make you, You!'" 2-ER-142.

As proof for its defense, Defendant points to its "natural born" eligibility requirement, which appears alongside its "uplift everyone" motto. 2-ER-224-25.

But that cannot overcome the inescapable fact that, on this record, contestants and staff did not even understand that Defendant excluded transgender women, much less seek to express a view that transgender women ought to be excluded. And that is true regardless of the reason for that lack of common understanding, whether contestants only reviewed the requirements to verify their own eligibility, or if they interpreted them differently.

To be sure, that is not to suggest "every member" of an association needs to agree on every issue to engage in expression, *Dale*, 530 U.S. at 655; but there must nonetheless be a sufficient factual basis for finding that individuals are associating "for the purpose of expressing commonly held views," *Knox*, 567 U.S. at 309. This case is also unlike *Dale*, where the association sought to *create* shared views by inculcating its "official position" on homosexuality within youth members. 530 U.S. at 652. Here, Defendant never claims to instill any view regarding transgender women on contestants. To the contrary, Defendant at most provides a platform for individuals "to express their own opinions," which this Court held *precludes* an expressive association. *In re Grand Jury Subpoena*, 875 F.3d at 1184 n.3. There is a world of difference between joining a membership organization in order to express shared views versus participating in a pageant where contestants are motivated to showcase their own individual perspectives.

B. Defendant's Commercial and Unselective Solicitation of the General Public Weakens Any Purported Expressive Burden.

Defendant's commercial and generally unselective solicitation of the general public for business also weakens any purported burden on expressive association and strengthens the government interest at stake. 1-ER-4, 25 (acknowledging that, like most businesses, "Miss USA is generally unselective" and "mainly focused on growth"). Defendant's position would create a boundless right of commercial disassociation, which has no support in precedent, and which would risk eviscerating civil rights protections at every corner.

It is notable that "the Supreme Court has never held that a commercial enterprise, open to the general public, is an 'expressive association' for purposes of First Amendment protections." *Arlene's Flowers*, 193 Wash. 2d at 533. That makes sense from a historical perspective: even before the enactment of modern public accommodation laws, the common law long constrained the ability of a business to pick and choose its customers. The duty to guarantee access to public accommodations "was firmly rooted in ancient Anglo-American tradition." *Bell v. Maryland*, 378 U.S. 226, 296-97 (1964) (Goldberg, J., concurring). Innkeepers, for instance, had a duty to serve all travelers. *Id.* at 297. The law has consistently recognized the *quid pro quo* relationship between a business and the general public: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the . . .

rights of those who use it." *Id.* at 314-15 (quotes omitted).

That same principle still holds when a business invokes the particular defense of expressive association, because "activity that is otherwise regulable when undertaken by a single individual or entity" does not become constitutionally protected simply because a group is involved. *Wine & Spirits Retailers Inc. v. Rhode Island*, 418 F.3d 36, 50 (1st Cir. 2005). And it is clear that a commercial business has no general speech right to discriminate against customers in violation of civil rights protections—notwithstanding whatever message that refusal may communicate. *See Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1729 (2018) (refusing to credit any constitutional defense that would excuse the "serious stigma" inflicted upon customers by unlawful discrimination).

A few examples illustrate the point. A music teacher has no greater speech right to discriminate when soliciting the general public to purchase group lessons, rather than one-on-one tutoring, even though the former necessarily involves multiple individuals. Nor would merely adding an audience during lessons confer such a right. Likewise, if a store named "Betsy's Dresses – No Transgender Women!" claimed a constitutional right to discriminate, it would simply lose—even if every customer agreed that they were banding together to send a message of exclusion. It is a logical contradiction to conclude, as the district court did here, that a business has no speech right to engage in discrimination, but yet nevertheless

hold that such a right exists simply by recasting it as a form of expressive association. *See, e.g.*, 1-ER-6 ("[Defendant's] free speech rights do not trump application of [Oregon law] here, but its freedom-of-association rights do."); *cf. Norwood*, 413 U.S. at 469 (recognizing that discrimination can always be "characterized as a form of exercising freedom of association").

This Court in *IDK* adopted a commercial distinction, recognizing its particular necessity in the context of a claimed right to expressive association. *IDK, Inc. v. Cnty. of Clark*, 836 F.3d 1185, 1195 (9th Cir. 1988) (recognizing that drawing the distinction "will not always be easy"). Other courts have adopted this same distinction to place guardrails on the wide ramifications of a claimed right of expressive association, including on ordinary commercial regulation. *See, e.g.*, *U.S. v. Bell*, 414 F.3d 474, 485 (3d Cir. 2005) ("commercial transactions do not entail the same rights of association"). Indeed, *Dale* itself pointed to the same commercial distinction. 530 U.S. at 657 (distinguishing Boy Scouts of America from "clearly commercial entities"). And when the Supreme Court previously confronted expressive association defenses asserted by commercial entities engaged in speech for sale, it did not hesitate in rejecting them. *Hishon*, 467 U.S. at 78 (rejecting law firm's defense).

This commercial distinction is acutely relevant at any balancing stage of the constitutional analysis, when weighing the government's interest "on one side of

the scale" against any claimed expressive burden "on the other." *Dale* 530 U.S. at 659; *cf. Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (requiring close examination of "character and magnitude" of the purported burden on associational rights) (quotes omitted). The greater the commercialization, the stronger the government's interest and the weaker the association's purported burden. *See supra* § I.B; *IDK*, 836 F.2d at 1194 ("Legislatures, in regulating commercial activity, have severely limited the freedoms of speech and association.").

Any burden is particularly attenuated where a business is generally unselective in accepting virtually "all who are willing to pay the [required] fee" among those whom it serves. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Notably, a business can be unselective and open to the general public even if it does not serve everyone: a daycare, for example, is open to the general public even though it only accepts toddler-aged children.

An association's commercial activities may not always be dispositive, particularly within contexts expressly protected by the First Amendment; but they must be weighed as part of the balancing test, which the district court failed to do. *See* 1-ER-21-28 (considering only whether Defendant is an expressive association, as a threshold matter, outside the balancing test). The district court relied myopically on *Dale* for guidance in conducting the balancing test itself. 1-ER-32

("Lacking guidance on how to apply this balancing test, the best course here is to closely analogize the facts of this case to the facts of *Dale*."). But *Dale* did not involve a commercial business and thus offered no guidance on that critical issue, as explained above. *See supra* § I.B.

Here, Defendant is a for-profit company that owes its existence to a commercial purpose. Perhaps most importantly, it seeks to maximize the number of contestants, and thus unselectively solicits the general public in order to do so, because contestants are major profit generators: they each pay significant entry fees, sell advertisements, and recruit other contestants. *See, e.g.*, 2-ER-291 ($2,295 fee for national pageant); 2-ER-118 ($595 fee for state pageant); 2-ER-315 (acknowledgment of payment to Defendant "for the goods/services" provided). Prospective contestants are enticed with the potential of lucrative prize packages and other financial benefits from simply participating such as professional advancement. 3-ER-510. For instance, Defendant touts: "you can sell additional advertisements in the program book and earn money!" 2-ER-292 (capitalization omitted). Defendant replicates this business model through a licensing scheme in which it sells the right to produce state pageants for thousands of dollars. 4-ER-645. At the top of this pyramid sits the company, whose profits grow the more that the base beneath it expands. The factual record thus belies the district court's summary-judgment conclusion that Defendant has not "enter[ed] the marketplace

of commerce in any substantial degree." 1-ER-28.

The district court erroneously reasoned that Defendant's commercial solicitation of the general public supposedly "cuts both ways," because boosting its contestant base also "allows Miss USA to spread its message further." 1-ER-28 (implying that Defendant's commitment to its "expressive goals" was shown by actions "undercutting its bottom line"). By that logic, a restaurant that refused service based on race would have a stronger First Amendment claim because the more white customers it served, the more it too could "spread its message further." *Cf. FTC v. Super. Ct. Trial Laws. Ass'n*, 493 U.S. 411, 431-32 (1990) ("Every concerted refusal to do business with a potential customer or supplier has an expressive component" but creating a constitutional exception on that basis "would create a gaping hole in the fabric of [commercial regulation]"). Tellingly, even the district court seemingly agreed, in other parts of its opinion, that Defendant's "free speech rights do not trump application of [Oregon law] here." 1-ER-6.

Likewise, the district court wrongly confused ordinary commercial actions designed to protect the brand of a business with expressive activity, regarding such actions as proof that it was motivated by expression rather than profit. 1-ER-26. But most businesses also work hard to protect their image precisely because it affects their bottom line—and they do so through the same conduct as Defendant, such as managing the content of social media. In other words, that conduct is not

inconsistent with purely commercial goals.

When according proper weight to the commercial nature of Defendant's activities, there is no question that the compelling government interest in prohibiting discrimination by businesses tips any balance in favor of civil rights protection. Courts have similarly held that businesses have no expressive association right to refuse to serve customers based on their sexual orientation. *Arlene's Flowers*, 193 Wash. 2d at 532-33 (distinguishing between the regulation of commercial businesses versus other groups); *Gifford*, 23 N.Y.S.3d at 432-33. Indeed, the district court's own analysis of Defendant's expressive conduct claim—finding that any incidental burdens on expression were justified by the state's nondiscrimination interest, 1-ER-20—reveals why any balancing test under expressive association similarly weighs in favor of Plaintiff.

C. Treating Plaintiff Equally to Other Paying Contestants Does Not Constitute a Serious Burden on Defendant's Activities.

Any purported burden on Defendant is further attenuated by the fact that Oregon law only requires Defendant to provide Ms. Green with what it provides to every other contestant in exchange for their entry fee. Adherence to this requirement does not, in a "significant way," preclude any collective message that participants supposedly come together to communicate. *Rotary*, 481 U.S. at 548.

Abiding by Oregon's nondiscrimination law does not impose any greater burden on Defendant's claimed message than in the *Roberts* trio of cases

upholding nondiscrimination laws against expressive association defenses. In *Roberts*, the Jaycees' bylaws stated its organizational objective was to promote the interests of young men. 468 U.S. at 613. But the Supreme Court held that the inclusion of women would not impose "any serious burdens" on expressive association. *Id.* at 626. It refused to view the promotion of women as mutually exclusive with the promotion of men, finding that the Jaycees could continue to advance the interests of young men. *Id.* at 627. Notably, the Jaycees could still "exclude individuals with ideologies or philosophies different from those of its existing members." *Id.*; *accord N.Y. State Club Ass'n*, 487 U.S. at 13 (same).

Similarly, *Rotary* held that the inclusion of women did not "affect in any significant way the existing members' ability to carry out their various purposes" such as promoting humanitarian service and world peace. 481 U.S. at 548. The Court refused to credit the organization's claim that admitting women would "impair Rotary's effectiveness as an international organization." *Id.* at 549 n.8; *accord Hishon*, 467 U.S. at 78 (holding that law firm's expressive activity would not be inhibited by considering a woman for partnership).

Whether there is a "serious burden" on expressive association is not established by a litigant's mere assertions. For instance, the Supreme Court noted in *Rumsfeld* that "[t]he law schools *say* that allowing military recruiters equal access impairs their own expression by requiring them to associate with the

recruiters," but it emphasized that "a speaker cannot erect a shield against laws requiring access simply by asserting that mere association would impair its message." *Rumsfeld*, 547 U.S. at 69 (quotes omitted). Following *Rumsfeld*, lower courts have heeded that warning against uncritical deference to a group's assertions of serious burdens on expressive association. *See, e.g.*, *Rest. L. Ctr. v. City of New York*, 360 F. Supp. 3d 192, 216 (S.D.N.Y. 2019); *cf. Barrett v. Fontbonne Acad.*, No. NOCV2014-751, 2015 WL 9682042, at *8 (Mass. Super. Ct. Dec. 16, 2015) (recognizing that a defendant cannot "grant itself constitutional protection from anti-discrimination laws simply by saying the right words"). Those concerns are pronounced where the claimed expression is nothing more than the exclusionary policy itself, as all discrimination could otherwise become its own justification.

Here, merely treating Ms. Green on equal terms as every other paying contestant does not impose a serious burden on Defendant. To the extent Defendant seeks to promote "community service," "positive self-image," or achievement of "dreams, goals, and aspirations," it is free to do so—just as the Rotary Club could still promote humanitarian service while refraining from sex discrimination. 2-ER-224. Similarly, as to Defendant's mission of "women empowerment," or even its litigation-reframed "message of empowering biological women," a nondiscrimination requirement imposes no greater burden here than on the Jaycees' goal of promoting young men's interests. *Id.*; 2-ER-213. And to the

extent that the pageant provides an opportunity for all participants to improve themselves (such as with respect to interview skills, poise, and confidence) or enhance their career prospects, the record does not show how any of those goals would be impaired either. 2-ER-278; *cf. Lahmann*, 202 Or. App. at 147 ("the Eagles has not demonstrated any similar harm that accepting women would inflict on its effort or goals").

The facts here are different in degree and kind from those in *Dale*. The Boy Scouts sought to communicate that homosexuality is immoral to its members, and the Court found that plaintiff's inclusion would impose a significant burden on that message, particularly as a leader within the organization. *See Lahmann*, 202 Or. App. at 147 (contrasting the burden on the Boy Scouts in *Dale* "whose stated mission was the inculcation and transmission of values, including, centrally, the value that homosexuality was immoral and unclean"). Here, however, Defendant never claims to advance a message that transgender women should be disempowered, for instance, just as the Jaycees did not claim a similar goal with respect to women. Commercial regulation of Defendant's business, and the simple requirement to afford Ms. Green equal treatment to other paying contestants, does not constitute a significant burden on Defendant's expression.

CONCLUSION

The district court compromised the state's ability to fulfill one of its most critical functions—the vindication of civil rights—in a context falling squarely within the government's purview—the commercial sphere—without sufficient record support to justify the claimed constitutional right to discriminate. For the foregoing reasons, this Court should reverse the judgment of the district court.

Dated: August 30, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5). The brief is 6,886 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).

s/ Peter C. Renn
Peter C. Renn

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 30, 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.

s/ Peter C. Renn
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