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 (Hon. Michael W. Mossman)

# Brief of Arkansas, Alabama, Arizona, Idaho, Louisiana, Mississippi, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, and Texas as Amici Curiae in Support of Appellee


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## IDENTITY AND INTEREST OF AMICI

Amici are the States of Arkansas, Alabama, Arizona, Idaho, Louisiana, Mississippi, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, and Texas.

The Amici States have an important interest in ensuring that their citizens are guaranteed the full and equal privileges afforded by places of public accommodation. They have an equally compelling interest in ensuring that their citizens enjoy the constitutionally protected rights of free speech and expressive association. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). Indeed, our federal Constitution protects every person's fundamental "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

## INTRODUCTION

This case is about the Miss United States of America Pageant's fundamental right to express its own message about womanhood. Miss United States maintains that women are natural born females, and its pageant both celebrates and promotes its view of womanhood. Plaintiff Anita Noelle Green—a natal male presenting as female—disagrees with the pageant's message and desires to be a beauty-pageant contestant.

Rather than seeking to compete in a pageant with a more compatible view of womanhood, Green invokes the coercive authority of Oregon's antidiscrimination law against Miss United States. Green seeks to compel the pageant to allow "openly transgender" persons, Appellant's Br. at 1, to contend for the title of "Miss United States of America." "[S]uch compulsion . . . plainly violates the Constitution" because it would force Miss United States and others "to endorse ideas they find objectionable." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018). Indeed, the First Amendment protects everyone's freedom to associate for expressive purposes—a freedom that "plainly presupposes a freedom not to associate" with those who would impair one's message. *Roberts*, 468 U.S. at 623.

Recognizing that Miss United States is predominantly engaged in expressive activity, the district court held that the forced inclusion of Green would significantly affect the pageant's ability to express its viewpoints and that Miss United States' interest in expressive association outweighed Oregon's interest in antidiscrimination. *Green v. Miss United States of Am., LLC*, No. 3:19-CV-02048-MO, 2021 WL 1318665, at *13-15 (D. Or. Apr. 8, 2021). The district court therefore granted summary judgment to Miss United States, holding that that Green's inclusion in the pageant would violate the pageant's fundamental right to expressive association. *Id.* at 15. This Court should affirm.

## ARGUMENT

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Yet this lawsuit seeks to do exactly that—compel Miss United States to include the "openly transgender" Green in pageant that celebrates and promotes natural-born females. Appellant's Br. at 1. Green's antidiscrimination claim is misplaced because this is not a case about discrimination. It is a case about free speech and association—fundamental liberties enjoyed by every American.

### I. Robust protections for freedom of association safeguard the rights of all Americans, including the LGBTQ community.

"As the definition of 'public accommodation' has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000). This fact likely explains why the First Amendment freedom of association is sometimes seen as threatening efforts to guarantee full inclusion of LGBTQ people in American life. But a fuller view recognizes that freedom of association is important for all Americans, including LGBTQ Americans.

A. The right of individuals to associate with one another in clubs, societies, and other venues has a long history and is integral to the protection of other liberties. *See Dale*, 408 U.S. at 647-48. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958), for instance, the Court recognized that compelled disclosure of the NAACP's membership would hinder those members' lawful association by exposing them to public hostility. *See Bates v. City of Little Rock*, 361 U.S. 516, 527 (1960) (holding that a city could not require the NAACP to submit membership lists). A few years later, the Court further protected "the right of the NAACP and its members and lawyers to associate" for the purpose of vindicating civil rights. *NAACP v. Button*, 371 U.S. 415, 428-29 (1963). And the Court later recognized that freedom of association is fully protected on college and university campuses. *Healy v. James*, 408 U.S. 169, 180-81 (1972).

Relying on those decisions, lower federal courts have long protected the fundamental associational rights of LGBTQ people. In 1974, for example, the First Circuit held that a gay student organization's efforts "represent but another example of the associational activity unequivocally singled out for protection in the very 'core' of association cases decided by the Supreme Court." *Gay Students Org. of Univ. of New Hampshire v. Bonner*, 509 F.2d 652, 660 (1st Cir. 1974) (recognizing that freedom of association protects the rights of LGBTQ people to congregate for the purpose of expressing their opinions).

Other circuits and lower courts followed suit. *See Gay All. of Students v. Matthews*, 544 F.2d 162, 166 (4th Cir. 1976) (university's refusal to register a gay-advocacy organization on the same terms and conditions as other organizations violated students' freedom of association); *Gay Lib v. Univ. of Missouri*, 558 F.2d 848, 854 (8th Cir. 1977) (upholding homosexual members of the university community's right to associate); *Gay Student Servs. v. Texas A&M Univ.*, 737 F.2d 1317, 1330 (5th Cir. 1984) (upholding the associational rights of a gay student group); *Student Coal. for Gay Rts. v. Austin Peay State Univ.*, 477 F. Supp. 1267 (M.D. Tenn. 1979) (holding that a university's refusal to recognize a gay-rights student organization violated its members right of association); *Wood v. Davison*, 351 F. Supp. 543, 549 (N.D. Ga. 1972) (upholding the associational rights of members of a homosexual student organization to use university facilities).

B. "[F]reedom of association . . . has long been held to be implicit in the freedoms of speech, assembly, and petition," *Healy*, 408 U.S. at 181, and the vindication of LGBTQ people's other First Amendment rights necessarily depend on strong protections for associational freedom "as an indispensable means of preserving other individual liberties." *Roberts*, 468 U.S. at 618.

In *Norma Kristie, Inc. v. Oklahoma City*, 572 F. Supp. 88, 92 (W.D. Okla. 1983), for example, the court upheld the Miss America Gay Pageant's First Amendment claim against a public venue that sought to cancel a lease for its event.

The court expressly relied on *Gay Activists Alliance v. Board of Regents of the University of Oklahoma*, 638 P.2d 1116 (Okla. 1981), a freedom-of-association case that, in turn, relied heavily on the federal-court decisions discussed above. *See id.* at 1119-23; *see also, e.g.*, *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988) (relying on freedom-of-association decisions to overturn a university's denial of funding for a gay and lesbian student association).

In fact, even associational decisions that some LGBTQ activists have criticized have played a critical role in protecting the First Amendment rights of the LGBTQ community. For example, in *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995), the Court required the University of Virginia to fund a student organization that published articles on homosexuality, among other topics, from an evangelistic Christian perspective. *Id.* at 826. Less than two years later, however, the Eleventh Circuit relied on *Rosenberger* to require a university to fund the Gay and Lesbian Bisexual Alliance on equal terms as other student organizations. *Gay Lesbian Bisexual All. v. Pryor*, 110 F.3d 1543, 1548-50 (11th Cir. 1997).

Similarly, in *Boy Scouts of America v. Dale*, the Court upheld the scouting group's expressive-associational right to exclude a scoutmaster who publicly declared that he was homosexual. 530 U.S. at 661. Yet, in *Dale*'s wake, the court in *Apilado v. N. Am. Gay Amateur Athletic All.*, 792 F. Supp. 2d 1151, 1160 (W.D.

Wash. 2011), upheld the right of the North American Gay Amateur Athletic Alliance to disqualify a team with too many non-gay players from its tournament. In turning away the plaintiffs' challenge under Washington's public-accommodation law, the court expressly relied on *Dale* for, among other things, the proposition that "freedom of association . . . plainly presupposes a freedom not to associate." *Id.* (quoting *Dale*, 530 U.S. at 648).

In sum, there is no tension between robust associational freedom and inclusion. Instead, the freedom of association contributes to a healthy civil society composed of a diversity of associations by allowing groups to enforce inclusion criteria that not everyone can meet. For people who desire to participate in distinctive associations whose character differs from society at large, including LGBTQ Americans, strong protections for freedom of association are essential.

## II. Miss United States is an expressive association deserving First Amendment protection.

As a pageant organization, Miss United States brings people together to celebrate and promote women. Its pageant is a paradigm of expressive activity, and nothing about that pageant or the nature of its expression deprives it of First Amendment protection.

### A. Pageants are quintessentially expressive.

Alongside producing "books, plays, and movies," *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011), producing a pageant is a quintessentially expressive activity. Indeed, by "provid[ing] opportunities for public expression and negotiation of standards and values," the "beauty contest stage is where" feminine ideals "are made public and visible." Colleen Ballerino, et al., *Beauty Queens on the Global Stage: Gender, Contests, and Power* 2, 3 (1996). "Beauty pageants provide communities with the opportunity to articulate the norms of appropriate femininity both for themselves and for spectators alike." Nina Brown, et al., *Perspectives: An Open Introduction to Cultural Anthropology* 389 (2d ed. 2020); *see also, e.g.*, Bernie Wayne, "There She is, Miss America" (E.B. Marks Music Corp. 1955) ("There she is, Miss America / There she is, your ideal"). Whereas the Boy Scouts seeks to instill certain values through the role modeling of its scoutmasters, *Dale*, 530 U.S. at 649-52, "the community tries to show" on the beauty pageant stage, "[t]his . . . is what our women are like," Brown, *supra*, at 390.

Like other pageants, Miss United States creates a stage for women who aim to embody a particular vision of the feminine ideal. And because "[b]eauty contests are places where cultural meanings are produced, consumed, *and* rejected," they necessarily "evoke controversy over qualities that should count in a competition." Ballerino, *supra*, at 2, 8 (emphasis in original). "[D]iscussing or debating

beauty always draws us into a conversation about basic, important matters, of values and essences." Richard Wilk, "Connections and Contradictions: From the Crooked Tree Cashew Queen to Miss World Belize," in Ballerino, *supra*, at 217.

Miss United States' eligibility criteria are plainly an expression of its values—they communicate a great deal to participants and spectators about the pageant's view of womanhood. By producing its pageant as the expression of its belief that women are, essentially, natural born females, Miss United States has staked out a definite position on this issue that not everyone will agree with. Indeed, it is precisely because Miss United States' pageant sends a message with implications for a state-law protected class that Green—a natal male presenting as female—seeks to invoke Oregon's antidiscrimination law to compel Miss United States to change those criteria. Green's lawsuit is, therefore, an effort to accomplish indirectly what everyone agrees cannot be done directly: force Miss United States to express different values more in line with what Green prefers.

**B. The contenders are the communication.**

Providing a person a platform does not necessarily affirm the position that person represents. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). Thus, universities frequently invite controversial speakers to campus events, and they do not thereby endorse those speaker's messages. But a different rule applies where the inclusion of a particular participant or contrary message will impair or

undermine the organizer's message. *See Dale*, 530 U.S. at 649-56; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995); *see also Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). And that rule—expressed most clear in *Hurley* and *Dale*—controls here.

The Miss United States Pageant's message is inextricably bound up with who it allows on stage. Miss United States produces its pageant for natural born females, and its selection of contestants expresses its view of womanhood. But Green—a natal male—also claims the right to participate. If Miss United States were to welcome Green to its stage, its message about womanhood would necessarily be impaired. Indeed, Green's message is precisely the opposite. Hence, as in *Hurley* or *Dale*, this is a case where providing Green access to a platform would significantly "impair the ability of [Miss United States] to express [its] views, and only those views, that it intends to express." *Dale*, 530 U.S. at 648; *accord Hurley*, 515 U.S. at 576 ("[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connection with the communication advanced, the speaker's right to autonomy over the message is compromised.").

"[T]he formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring in part). If Miss United States is to speak with its own

voice—and not another's—then its ability to say what "qualities . . . should count" in its pageant must be protected. Ballerino, *supra*, at 2. That is because "the membership is the message." *McDonald v. Longley*, 4 F.4th 229, 245 (5th Cir. 2021). Or, for Miss United States, in particular: the contenders are the communication. And "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts*, 468 U.S. at 623.

Moreover, even beyond the facts present here, subjecting Miss United States to Oregon's antidiscrimination law would hinder its message in other ways. The pageant's ability to evaluate its contestants, for example, would also be impaired. Would Miss United States remain free—as an expression of its message—to instruct its judges that being a natural born female counts in a contestant's favor and that lacking this quality counts against one? It is difficult to see how it could do so without running headlong into the same very antidiscrimination law under which Green's participation would be compelled. *See* Or. Rev. Stat. Ann. 659A.403(1) (providing that "[i]t is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities, and privileges of any place of public accommodation"). A court could determine that a rule disadvantaging contestants who are not natural born females results in unlawfully "deny[ing] full and equal . . . advantages, . . . and privileges" to people like Green. *Id.*

At bottom, compelling Miss United States to allow natal males as contestants would fundamentally transform the pageant, preventing it from expressing its own message and forcing it to performatively "endorse ideas [it] find[s] objectionable," *Janus*, 138 S. Ct. at 2464. Denying it "the right to express its values by associating with those contestants, and *only* those contestants, who, in the opinion of [Miss United States], share those values," *Revels v. Miss Am. Org.*, No. 7:02CV140-F(1), 2002 WL 31190934, at *8 (E.D.N.C. Oct. 2, 2002), would significantly impair the pageant's ability to speak with its own voice. The Supreme Court has never permitted this intrusion. Nor should this Court.

### C. This lawsuit concerns Miss United States' expressive activity.

The fact that Miss United States has some commercial aspects does not deprive it of expressive-associational freedom. *IDK, Inc. v. Clark Cty.*, 836 F.2d 1185, 1194 (9th Cir. 1988) (holding that commercial "organizations' claim on the first amendment is not diminished by their sale of expression"); *Norma Kristie, Inc.*, 572 F. Supp. at 91 (rejecting the claim that "the 'Miss Gay America Pageant' is not accorded Constitutional protection because it is a commercial enterprise"). On this point, the district court applied the approach of Justice O'Connor's concurrence in *Roberts*, 468 U.S. at 631, which distinguishes between primarily commercial and primarily expressive associations. The relevance of this distinction is not well established, and "the Supreme Court has never adopted" it. *IDK, Inc.*, 836

F.2d at 1199 (Reinhardt, J., dissenting). This Court should therefore reject such a distinction here.

Nevertheless, if this Court were inclined to follow Justice O'Connor's approach, "the inquiry should focus on the nature of the activity or internal operation sought to be brought into compliance with anti-discrimination law." Dale Carpenter, *Expressive Association and Anti-Discrimination Law after* Dale*: A Tripartite Approach*, 85 Minn. L. Rev. 1515, 1576-77 (2001). Under that framework, "[i]f the activity or internal operation at issue is primarily expressive, [it] should generally be exempt from compliance." *Id.* at 1577. That approach would also make sense here because, even though Miss United States has commercial aspects, the question is not whether the pageant may discriminate with respect to those commercial aspects. In other words, at issue is not whether Miss United States may discriminate in non-expressive employment decisions, such as in the hiring of secretarial or maintenance staff, for example. Rather, the question is whether it may decide who to put on its stage, under the lights, and in front of the camera to wear a sash bearing the pageant's logo—and maybe even its crown.

As a pageant organization, Miss United States is a quintessentially expressive association that no fair-minded person could regard as less than "quasi-expressive." *See id.* at 1576. And because the activity that Green seeks to subject to Ore-

gon's antidiscrimination law is the pageant itself—Miss United States' most obvious expressive activity—the pageant's freedom of expressive association should be protected.

### D. Competition is indispensable to Miss United States' form of expressive association.

Green is wrong to imply that the competitive aspect of Miss United States' pageant undermines its character as an expressive association. Miss United States is hardly unique as an expressive association in this regard. For example, in *Apilado,* the court recognized as an expressive association a gay softball league that sought to promote "the idea of athletic competition and good physical health" and to "strive[]for high standards of sportsmanship and conduct to attain fair play on and off the field." 792 F. Supp. 2d at 1161.

If Miss United States' contestants did not *associate*—if they altogether lacked common interests, ideals, and activities—one could reasonably question whether they were part of an association. But Miss United States' contestants unquestionably associate with one another as contenders for a crown in a common endeavor that is heir to the spirit of the ancient Greek festival of competitions. Debra Hawhee, *Agonism and Aretê,* Philosophy & Rhetoric, Vol. 35, No. 3 (2002), at 195; *see* Gregory Nagy, *A Poetics of Sisterly Affect in the Brothers Song and in Other Songs of Sappho,* 2 The Newest Sappho 460 (2016).

This ideal, familiarly exemplified by associations of persons in athletic games (i.e., the Olympics) also produced beauty contests crowning those who were most "beautiful and good." Hawhee, *supra*, at 189; Nagy, *supra*, at 481. In accordance with this ideal, it is only in rising to the challenge posed by the competition that true excellence can be expressed and celebrated. Therefore, the competitive aspect of the pageant is essential to drawing the contestants together and spurring them on to greater achievement and renown than they would otherwise attain on their own. The competition is an indispensable element of Miss United States' form of expressive association.

## III. The First Amendment protects Miss United States' right to tailor its own message.

Miss United States celebrates "ideal American womanhood" by "promot[ing] positive self-image" and "advocat[ing] a platform of community service." Appellee's Br. at 23 (citing 2-ER-224). Green suggests, however, that in light of Miss United States' measured manner of communicating its eligibility criteria, the Court should both refuse to recognize Miss United States' character as an expressive association and refuse to follow *Dale* in deferring to the pageant's interpretation of its message. But the fact that Miss United States is not aggressively evangelistic that "women are natural born females" does not detract from the fact that this is a *central* part of what it stands for and what it aims for its pageant to express.

Each "speaker has the right to tailor" its own message. *Galvin v. Hay*, 374 F.3d 739, 750 (9th Cir. 2004) (quoting *Hurley*, 515 U.S. at 573). Indeed, "speakers, not the government, know best both what they want to say and how to say it." *Id.* (quoting *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988)). Faulting Miss United States for failing to belabor its point about the biological aspect of womanhood would force it to alter the shape of its broader message: The pageant could no longer focus its message on women's empowerment because its constitutive stance on who counts *as a woman* would necessarily be front and center—an emphasis likely to alienate some of its audience. And although any loss of support may be offset by a gain of those enthusiastic about the changed accentuation, the fact remains that foregrounding this aspect of the pageant's viewpoint would necessarily result in a striking difference of messaging.

Miss United States has the right to decide that this aspect of its message is more effectively communicated to its audience by making it pervade the entirety of its expressive activity than by directly proselytizing for it. *See id.* (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971) ("[I]t is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.")).

Rejecting Miss United States' expressive-association claim on the basis that it has not been loud enough about this aspect of its message would also produce

counterintuitive consequences. Groups like Miss United States, desiring to preserve their identity and freedom of association, could not be content to communicate their views in a casual manner. Instead, they would have to emphasize this aspect in order to preserve the right to choose their own participants. *Cf.* Brief Amicus Curiae of Gays and Lesbians for Individual Liberty In Support of Petitioners, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), 2000 WL 228588, at *27-28 (similar point about the Boy Scouts). In brief, to retain the freedom of association, groups like Miss United States would have to *amplify* their women-are-natural-born-females message—a result that is hardly congenial to people like Green who vigorously dispute that message.

Against the backdrop of demands for inclusion of transgender persons, Miss United States' deliberate choice to produce the pageant for natural born females speaks volumes. In this way, Miss United States is like the athlete who chooses to take a knee while teammates and spectators all around stand and sing the national anthem. *Cf. Barnette*, 319 U.S. at 642 (holding that a flag salute requirement was unconstitutional as applied to schoolchildren who were Jehovah's Witnesses' members). There is no need to shout or gesture or otherwise try to draw attention to the fact because the expression itself puts the values on display for all attentive

observers to see. The fact that in 2021 Miss United States produces a beauty pageant where each contender is, and must be, a natural born female says all that needs to be said.

The First Amendment protects not only Miss United States' fundamental right to determine the content of its message but also its fundamental right to tailor that message of women's empowerment as it sees fit.

## IV. Without the freedom of expressive association beauty pageants' very existence would be jeopardized.

"[B]eauty contests are as American as apple pie and the Rockettes." Arthur Unger, *Beauty Pageants: The Debate—and High Ratings—Go On*, The Christian Science Monitor (September 16, 1983). They are a ubiquitous American tradition. Small-town "queen pageants" are a central feature of many local community festivals. Robert H. Lavenda, *Minnesota Queen Pageants: Play, Fund, and Dead Seriousness in a Festive Mode*, Journal of American Folklore, Vol. 101, No. 400 (Apr.-June 1988), at 168. These pageants "are often open to young women between the ages of 17 and 21," who "are not allowed to be married." *Id.* at 169, 172.

Major national pageants have similar requirements. Miss America requires that its candidates must be unmarried females "between the ages of 17 and 25."

*Become a Candidate*, Miss America Organization (2021);[1] *see* Eligibility and Assertions of Candidate to Participate in Competition(s) and Candidate Contractual Obligations for Miss America.[2] For their parts, both Miss Earth and Miss International accept as contestants only those who are "naturally born female," "single, never married, nor given birth to a child," and who are between the ages of 18 and 28 for the former or between 19 and 30 for the latter.[3]

Countless pageants across the country, both local and national, thus expressly distinguish who may compete on the basis of age, sex, and marital status. Here, Green brought an action against Miss United States for alleged gender-identity discrimination under the Oregon Public Accommodations Act (OPAA), Or. Rev. Stat. Ann. 659A.400 et seq. But that law also prohibits discrimination on the basis of age, sex, and marital status. *Id.* at 659A.403(1).

If Miss United States were subjected to the OPAA's prohibition on gender-identity discrimination, then it is difficult to see how it could avoid being subjected

[1] https://www.missamerica.org/sign-up.

[2] https://drive.google.com/file/d/16FLxd-7ZwQfmXp3Nu5aC3Y-DhyWUj2r1/view.

[3] *Frequently Asked Questions*, Miss Earth USA, https://www.missearthunitedstates.com/faq; *see How to Compete for Miss International*, Miss International Pageant, https://www.miss-international.us/miss-international-competing.php; *see also Why Enter?*, Miss USA, https://missusa.com/apply/; *F.A.Q.*, Miss World America, https://missworldamerica.com/faq/.

to the OPAA's prohibitions on discrimination with respect to other protected classes. That is, if the forced inclusion of natal males in Miss United States' pageant does not "impose any 'serious burden' on the organization's rights of expressive association," *Dale*, 530 U.S. at 658, then it is difficult to see how the forced inclusion of members of other protected classes could do so.

How could compelling the pageant to include a 35-year-old woman be a more serious burden than compelling it to permit the "openly transgender" Green to compete? Appellants' Br. at 1. Or how about a young man who is not transgender? Or a young woman who was previously married? These questions immediately arise from any decision subjecting Miss United States' pageant to the OPAA. Further, what about other types of pageants? Would a pageant for male contestants dressed "in female attire . . . to look like a woman," *Norma Kristie, Inc.*, 572 F. Supp. at 90, be required to permit women themselves to participate? Certainly, the loss of protections for freedom of association would affect all Americans.

The logical outcome of subjecting Miss United States to the OPAA would be to forbid pageants from establishing eligibility or evaluation criteria bearing on *any* protected class. But that would jeopardize the very existence of beauty pageants, resulting in exhibitions for which virtually anyone—male or female, young or old, etc.—might participate and win. These would be "beauty pageants" in

name only, and it is doubtful whether anyone would attempt to produce such an event.

But, short of this foreseeable consequence, subjecting Miss United States to Oregon's antidiscrimination law would more immediately deprive it of the ability to maintain its identity, destroying its distinctive character, and depriving civil society of a common American form of expressive association. The First Amendment does not countenance such a result.

## CONCLUSION

The Court should affirm the district court's judgment protecting Miss United States' fundamental right of expressive association.

October 29, 2021

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## CERTIFICATE OF SERVICE

I, hereby certify that certify that on October 29, 2021, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users.

/s/ *Nicholas J. Bronni*
Nicholas J. Bronni

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 4,692 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ *Nicholas J. Bronni*
Nicholas J. Bronni

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

**CERTIFICATE FOR PAPER COPY OF ELECTRONIC BRIEF**

Case No. 21-35228

My name is Nicholas J. Bronni. I certify that this brief is identical to the version submitted electronically on October 29, 2021.

/s/ *Nicholas J. Bronni*

Nicholas J. Bronni