**No. 21-35228**

IN THE

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANITA NOELLE GREENE,

*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, United States District Judge

## BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

Jeffrey R. White
*Counsel of Record*
Amy L. Brogioli
*Associate General Counsel*
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street NW, Suite 200
Washington, DC 20001
(202) 944-2839
jeffrey.white@justice.org

*Attorneys for Amicus Curiae*

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae the American Association for Justice certifies that it is a non-profit voluntary national bar association. There is no parent corporation or publicly owned corporation that owns 10% or more of this entity's stock.

Respectfully submitted this 30th day of August, 2021.

/s/ Jeffrey R. White

JEFFREY R. WHITE
*Attorney for Amicus Curiae*

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## AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including discrimination cases. Throughout its 75-year history, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful injury.[1]

This case is of acute interest to AAJ and its members. Misreading the associational doctrine of the First Amendment as it was misread by the district court in this case, in a way that prevents a case from proceeding on the merits, creates major access to justice implications. It creates a new barrier to cases, including civil rights cases and tort claims, by cutting them off too early in the litigation. AAJ is concerned that should the decision below be allowed to stand it would close the courtroom door to those facing discrimination, including transgender persons.

[1] All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part. No person, other than amicus curiae, its members, and its counsel, contributed money that was intended to fund the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

1. The lower court erred in giving complete deference to Miss USOA's assertions about the nature of its "expressive purpose" pursuant to *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), and in granting summary judgment when a factual dispute remained. The U.S. Supreme Court only requires that a *degree* of judicial deference be given to a group's assertion about its "expressive purpose"—the deference to be given is not absolute. The district court, however, insisted that it *must* give deference to Miss USOA under *Dale*, when instead it should have conducted an independent analysis. In addition, the standards for summary judgment were not met in this case, and a factual dispute remained that was not appropriate to be decided at the summary judgment stage.

2. Miss USOA inappropriately relies on a discriminatory eligibility rule as the basis for First Amendment protection. Amicus submits that Miss USOA's exclusionary rule is not an "expressive purpose," but is in fact a mere "qualification" for participation in their pageants. The rule only allowing participation by "natural born females" bears no connection to the ability of Miss USOA to advocate for its objective. Admission of a particular group cannot impair a symbolic message created solely by the group's discriminatory membership policy, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 627 (1984), and the lower court erred in ignoring this precedent.

3. The district court's decision creates access to justice issues for litigants facing discrimination, including due to their race, gender, or sexual orientation. The court's ruling prematurely closes the courtroom door due to a weak, after-the-fact justification by Miss USOA regarding its "expressive purpose." Should the decision be allowed to stand, it will prevent other plaintiffs who are being discriminated against from having the opportunity to present full evidence to the factfinder.

## ARGUMENT

### I. THE LOWER COURT MISAPPLIED *BOY SCOUTS OF AM. V. DALE* AND ERRED IN GIVING COMPLETE DEFERENCE TO DEFENDANT MISS USOA UNDER IT.

At the crux of this case is Defendant Miss United States of America [Miss USOA[2]]'s argument that the forced inclusion of Ms. Green in its pageant would compel it to express a message it disagrees with: that Ms. Green is a natural-born female. 1-ER-5. The lower court granted summary judgment on the issue after briefing on the question of whether Miss USOA is an "expressive association" under the First Amendment. *Id*. at 3-4. In its discussion about expressive association under the First Amendment, the district court in this case relied heavily on *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). 1-ER-20-28. However, by failing to fully utilize

[2] The lower court mistakenly referred to Defendant Miss USOA as "Miss USA." *See* Plaintiff's Opening Brief 7 n.2. Amicus refers to Defendant as "Miss USOA" throughout this brief, and has altered quotations from the district court below to reflect this fact.

the standards for summary judgment and by reading what is actually a qualification of Miss USOA's (here, that a person must be a "natural born female" to participate as a contestant) as a matter of law rather than a factual dispute, the lower court misapplied *Dale* and erred in giving deference to Miss USOA's assertions regarding the nature of its expression.

**A. The standards for summary judgment were not met in this case.**

Here, there is a disputed issue regarding Defendant Miss USOA's expressive purpose, making summary judgment inappropriate. As the lower court notes, summary judgment is only appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). It is the *not* the function of a judge to draw "legitimate inferences from the facts" when he or she is ruling on a motion for summary judgment. *Anderson*, 477 U.S. at 255. *See also Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 142 (2000). Particularly in litigation where motive and intent play leading roles, summary judgment should be used sparingly. *Pollar v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962). "It is only when witnesses are present and subject to cross-examination that their

credibility and the weight to be given their testimony can be appraised." *Pollar*, 368 U.S. at 473. *See also* Samuel Issacharoff & George Loewenstein, *Second Thoughts about Summary Judgment*, 100 Yale L. J. 73, 76-77 (Oct. 1990).

These basic tenets of summary judgment do not disappear under *Dale* and were not met in this case, in which issues surrounding Miss USOA's claims that it expresses values and beliefs related to transgender women remain disputed. Plaintiff's Memorandum in Opposition to Defendants Motion for Summary Judgment 6-7 ("Plaintiff Memo"). For example, Miss USOA has celebrated drag queens in the past, in contradiction to its purported "expressive purpose" to celebrate *only* "natural born females." *Id.* at 7-8. Ms. Green presented evidence that Miss USOA has not expressed *any* values or beliefs related to transgender women other than their discriminatory eligibility rule. *Id.* at 6-7. These alone are genuine issues of material fact that should have been resolved in favor of Ms. Green, the nonmoving party, not in favor of Miss USOA.

The lower court did not do so. Instead, it appeared to draw inferences from the facts with which it was presented. For example, in discussing whether the message would be understood by those who hear it, the court stated that "key to my reasoning here is that I think beauty pageants are commonly understood to be bound up with notions of gender and sexual identity." 1-ER-17. The court also expressed its view that "Miss USOA's stance on who is a 'natural born female' might be subtle

to a casual viewer, but, according to Miss USOA, its stance is an important component of its overarching message, and it works hard to protect that message…I find that the record supports Miss USOA's assertions" and that "Miss USOA claims that expression is a significant and necessary component of its activities, and it seeks to control the content of expression in those activities. The record adequately supports those claims." 1-ER-27-28. The evidence, however, when viewed in the light most favorable to Ms. Green, does *not* adequately support these declarations. Ms. Green has put forth evidence to the contrary. *See generally, id.* When viewed in the light most favorable to her, there remain genuine issues of material fact that are not properly resolved by summary judgment.

Instead, these are determinations and inferences that are improper for a court to draw in favor of the *moving* party when deciding a summary judgment motion, particularly when motive and intent are at issue as they are here. *See Anderson*, 477 U.S. at 255; *Pollar*, 368 U.S. at 473. Miss USOA, the movant here, has not shown that there is no genuine dispute as to any material fact, and the lower court failed to resolve all doubts in favor of Ms. Green, the nonmovant. Thus, summary judgment should not have been granted. *Tolan*, 572 U.S. at 657.

1. *Misreading a qualification to be an expressive purpose is a factual dispute that cannot be resolved by summary judgment.*

In this case, Miss USOA's claims regarding its expressed values and beliefs related to transgender women are the subject of a factual dispute. As discussed in

Part II, *infra*, rather than being an "expressive purpose" of Miss USOA's, as determined by the lower court, amicus submits that the exclusory policy is in fact a qualification to participation that was misread by the court to be an "expressive purpose." *See Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). In misreading a qualification as an "expressive purpose," the court made its viewpoint so one-sided that Miss USA must prevail a matter of law rather than a factual dispute that should have been resolved through a grant of summary judgment. *See Anderson*, 477 U.S. at 255.

The issue about whether Miss USOA's message is negatively impacted by Ms. Green's, or any transgender female's involvement remains disputed. Ms. Green has asserted that the Miss USOA pageant does not associate for the purpose of *only* celebrating natural born females and that the pageant does not have any unique way in which it specifically celebrates natural born females versus celebrating *all* women. The fact that Miss USOA now claims that this is its purpose does not matter for purposes of summary judgment; the issue about whether a person must be a natural born female to participate is a mere qualification to participation or an expressive association remains disputed in this case, and amicus submits that the lower court misread this qualification to be an expressive purpose. At the very least, because this issue is clearly disputed, it was inappropriate to be resolved by summary judgment. Fed. R. Civ. P. 56(a).

*2.* Dale *requires that a message be longstanding, central, and sincerely held, which requirements were not met in this case.*

The message expressing that which is claimed to be an organization's "expressive purpose" must be longstanding and central, and sincerely held by the organization. *See Dale*, 530 U.S. at 653, 666, 675, & 688 (highlighting the importance of considering Boy Scouts' "sincerely held views" and "central tenets"); *Dale v. Boys Scouts of Am.*, 734 A.2d 1196, 1205-06 (N.J. 1999) (explaining that the Chancery court had found that the organization had a "longstanding antipathy toward" certain behavior). Moreover, "a group claiming infringement of its right to expressive association in violation of the First Amendment may not rely on generalizations to show a burden on its expression, but rather must support that claim of burden by evidence in the record." *Hamilton Cnty. Educ. Ass'n v. Hamilton Cnty. Bd. of Educ.*, 822 F.3d 831, 840 (6th Cir. 2016).

As the Court in *Dale* notes, such a message must be well-established and central because if an organization, such as Miss USOA, seeks protection as an expressive association, such as that accorded by the district court, its claimed message cannot be simply in response to litigation; it must be part of the core for which the group was established or have existed at some point long before the current controversy. *Dale*, 530 U.S. at 652 (pointing to Boy Scout messages that existed prior to litigation). Where there is reason to question a group's

discriminatory eligibility rule on these grounds, there is no place for summary judgment.

The requirements of a longstanding, central, and sincerely held message, not one that simply relies on generalizations, were not met in this case. The district court relied primarily on Miss USOA's general statements that it sought to promote only "biological" women. However, Miss USOA pointed to no specific statement or message regarding transgender women, rule what it means to be a woman, or limiting its message to cisgender women, apart from its discriminatory eligibility rule limiting participation to "natural born females."

Instead, the purpose of Miss USOA is to "encourage women to strive to ACHIEVE their hopes, dreams, goals, and aspirations, while making them feel CONFIDENT and BEAUTIFUL inside and out!" 1-ER-4. This purpose fits squarely with Ms. Green's purpose in entering the pageant and applies equally to both a transgender woman and persons born female. As explained by Ms. Green, Miss USOA "conveys no private or public message, values, or beliefs, regarding the meaning of womanhood, beauty, or femininity related to or being born a cisgender female…[and] also does not require its state directors to engage in any messaging or teachings to contestants or to the public regarding the meaning of 'womanhood,' being dependent on being born cisgender." Plaintiff's Memo 6. Moreover, Miss USOA's viewpoint that their message only applies to those born female did not exist

"long before the current controversy." *Dale*, 530 U.S. at 652. Thus, Miss USOA's claimed "expressive purpose" against the inclusion of transgender women was not and is not longstanding, central, or sincerely held. Instead, it is "unconnected to, and is mentioned nowhere in, the myriad of publicly declared values and creeds of the [organization]." *Id.* at 673 (Souter, J., dissenting).

The evidence in the record casts doubt on Miss USOA's claim that its message is a central tenet of the organization. As a result of this doubt, summary judgment should have been denied and Ms. Green should have been given the opportunity to have her case heard on the merits. Fed. R. Civ. P. 56(a); *Tolan*, 572 U.S. 657.

### B. Deference to be given to Defendants under *Dale* has limits and is not unfettered.

It is no question that the lower court gave deference to Miss USOA's view of what would impair its expression. 1-ER-29-30. However, what the district court did not recognize is that that the amount of deference that should be given to Miss USOA under *Dale* has limits. *Hamilton*, 822 F.3d at 841. Instead, the court gave Miss USOA's views about its expressed purpose complete, unlimited deference and failed to conduct an independent investigation into its expressive purpose or allow the facts to be further explored past the summary judgment stage.

The district court in *Green* focused heavily on the deference given to defendants in *Dale*. 1-ER-29-30 (explaining that the Court in *Dale* "showed substantial deference to [defendant's] own representations of what constituted their

expression *and* what might impair that expression" and had this deference "in the background" when examining whether inclusion would affect the expression). The district court ultimately held that "*especially in light of the deference I must give to Miss USOA under* Dale," the "forced inclusion of Ms. Green would significantly affect Miss USOA's ability to advocate its viewpoints on female identity and womanhood, which is the core expressive purpose of its pageants." *Id.* at 30 (emphasis added).

In contrast, the U.S. Supreme Court only requires that *a degree of* judicial deference be given to "an association's assertions regarding the nature of its expression." *Apilado v. North Am.*, 792 F.Supp.2d 1151, 1161 (W.D. Wash. 2011) (emphasis added) (citing *Dale*, 530 U.S. at 648). Some deference also must be given to a group's view of what might impair its expression. *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 600 (6th Cir. 2013). However, such deference has limits and is not absolute. *Hamilton*, 822 F.3d at 841 ("While we must 'give deference to an association's view of what would impair its expression,' *Dale*, 530 U.S. at 653 . . . we agree with the district court that 'such deference has its limits.'"). The Court in *Dale* itself recognized the limits of the deference to be given to a group, explaining that associations cannot "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its

message." 530 U.S. at 653. *See also Rumsfeld v. Forum for Acad. and Institutional Rights*, 547 U.S. 47, 69 (2006) (quoting *Dale*).

The dissenters in *Dale* expressed a similar concern, stating:

> An organization can adopt the message of its choice, and it is not this Court's place to disagree with it. But we must inquire whether the group is, in fact, expressing a message (whatever it may be) and whether that message (if one is expressed) is significantly affected by a State's antidiscrimination law. More critically, that inquiry requires our *independent* analysis, rather than deference to a group's litigating posture. Reflection on the subject dictates that such an inquiry is required.

*Dale*, 530 U.S. at 686 (Souter, J., dissenting) (emphasis in original).

A court can give the appropriate level of deference to an organization claiming expressive association while still finding that there exists one or more genuine issues of material fact. *See Stevens v. Optimum Health*, 810 F. Supp. 2d 1074, 1094-95 (S.D. Cal. 2011) ("[G]iving appropriate deference to Defendants' view of what would impair their expression, the Court finds that the competing affidavits submitted by the parties create a genuine issue of material fact as to whether application of [the Act] would violate Defendants' First Amendment rights to free expressive association") (citing *Dale*, 530 U.S. at 653) (internal citation and quotation marks omitted).

The lower court here posited that it "must" give deference to Miss USOA under *Dale*, acting as though its hands were tied in doing anything other than agreeing with the group. 1-ER-30. However, while that deference should be given,

it is not absolute and it does have limits, which the lower court failed to recognize. *Hamilton*, 822 F.3d at 841. The court should have exercised this limited deference when considering Miss USOA's views and conducted an independent analysis of its own.

## II. DEFENDANTS CANNOT RELY ON A DISCRIMINATORY ELIGIBILITY RULE AS THE BASIS FOR FIRST AMENDMENT PROTECTION.

The right to expressive association is a freedom protected by the First Amendment and refers to the right to associate for expressive purposes. *Our Lady's Inn v. City of St. Louis*, 349 F. Supp. 3d 805, 820 (E.D. Mo. 2018). Often, these purposes are political, however there is no requirement that an organization be primarily political. *Id.* at 821. The right was recognized by the U.S. Supreme Court in *NAACP v. Alabama*, 357 U.S. 449 (1958), in which the Court stated, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id.* at 460. But an organization cannot be allowed to use "expressive purpose" as a cloak for illegal exclusion of a disfavored group.

### A. There is a difference between a true "expressive purpose" and a "qualification."

*Our Lady's Inn* provides a helpful illustration of the difference between a true expressive purpose and a mere qualification. In that case, the mission of the

organization was "to encourage and assist homeless women to forgo abortion, and it call[ed] itself a life-affirming alternative to abortion." *Our Lady's Inn*, 849 F. Supp. 3d at 821 (internal quotation marks omitted). Not only did the organization communicate that mission, it provided support to pregnant women choosing not to have an abortion and participate in activities with the intent of raising awareness about "the dignity of life." *Id.* As explained by the court, forcing the inclusion of individuals who do not share that commitment against abortion would "significantly affect the ability of [the organization] to advocate for its services and encourage women to forgo abortion." *Id.* That is, their ability to operate with their views would "be hindered if they were required to employ dissenters from their pro-life message." *Id.* Like in *Roberts*, however, if it was exclusion on the basis of sex that was at issue, this reasoning would surely fail. In *Roberts*, "forcing the inclusion" of, for example, men, would not "significantly affect the ability" of the same organization to advocate for its viewpoint against abortion. 468 U.S. 609 (1984). Such an exclusion would amount to a qualification, not a "forced inclusion" in support of the group's expressive purpose. *See generally id.*

Similar hypothetical situations exist. For example, the associational issues are clear if a "save the elephants" group requires that its members actually want to save elephants from being hunted and killed. The group's purpose and potential success in accomplishing its purpose would be destroyed if poachers could take over the

majority of the membership. However, if the "save the elephants" group discriminated on the basis of the gender identity or sexual orientation of participants, there is no threat to the group's purpose and no cognizable associational right.

Through *Roberts*, 468 U.S. 609 (1984) and *Dale*, 530 U.S. 640 (2000), the U.S. Supreme Court addressed the right to expressive association and illustrated the distinction between an expressive purpose and qualification. *Roberts* dealt with whether application of a Minnesota statute that compelled the Jaycees organization to accept women infringed on the Jaycee's freedom of expressive association; the Court found that it did not. 468 U.S. at 622-29. *Dale* addressed whether the Boy Scouts of America had a First Amendment right to exclude a gay scout leader; the Court, however, held that the state's public accommodations law did not justify requiring Boy Scouts to include the leader. 530 U.S. at 659.

Despite their similarities, *Roberts* and *Dale* are not in conflict and can coexist. The claimed "expressive purpose" in each are distinguishable. *Roberts* deals with a discriminatory *qualification*: a regular membership policy that excludes women. 468 U.S. at 613. That is, their discriminatory eligibility policy excluding women held no

connection to the ability of the organization to advocate its objective.[3] *Id.* at 627; *Our Lady's Inn*, 349 F. Supp. 3d. at 821. *Dale*, however, focuses on a group that stands for a discriminatory worldview, Boy Scouts and their desire to not "promote homosexual conduct as a legitimate form of behavior," and an eligibility policy created to carry out that worldview. 530 U.S. at 641.

The same principles apply here. Like in *Roberts*, Miss USOA's claimed "expressive purpose" is not a discriminatory worldview, but is a discriminatory qualification. Namely, that it only accepts "natural born females" as contestants. 1-ER-4. The inclusion of transgender women in the Miss USOA pageant does nothing to hinder Miss USOA's ability to advocate for its purpose of "women empowerment, promoting positive self-image and advocating a platform of community service." *Id.* Unlike in *Our Lady's Inn*, Miss USOA had taken no action prior to litigation showing that it does not include "natural born females" other than, like in *Roberts*, its discriminatory eligibility rule. Plaintiff's Memo 6. In fact, Miss USOA's behavior

[3] The objective of the Jaycees, per its bylaws, was to pursue "such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations." *Roberts*, 530 U.S. at 612-13.

and decisions show that the opposite is true. *Id.* at 6-7. Thus, this case is more akin to *Roberts*, where it is a *qualification* at issue, not an expressive purpose. And it is in this way that *Roberts* and *Dale* are distinctive and not in conflict with one another.

### B. An organization's discriminatory eligibility rule cannot serve as its message.

Admission of a particular group cannot impair a symbolic message created solely by the group's discriminatory membership policy. *Roberts*, 468 U.S. at 627; *Rumsfeld*, 547 U.S. at 69. The lower court here ignored this precedent.

In order to prevail on a claim for the right to expressive association, a group must "be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion." *New York State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 13 (1988). Ultimately, a defendant cannot say "We discriminate and that's our protected message." There is no obstacle when an organization "seeks to exclude individuals who do not share the view that the club's members wish to promote," *id*. at 13, but the law does prevent "an association from using race, sex, and the other specified characteristics as shorthand measures…for determining membership." *Id.* The Court later, post *Dale,* expressed as much in *Rumsfeld*, stating "just as saying conduct is undertaken for expressive purposes cannot make it symbolic speech…so too a speaker cannot 'erect a shield' against laws requiring access 'simply by asserting'

that mere association 'would impair its message.'" 547 U.S. at 69 (quoting *Dale*, 530 U.S. at 653).

As explained by the Court in *Roberts*, the Jaycees allowed women to attend meetings, participate in projects, and take part in social functions. 468 U.S. at 621. Both women and men participated in activities central to the organization, including awards ceremonies and recruitment meetings. *Id.* And, "the Jaycees already invite[d] women to share the group's views and philosophy and to participate in much of its training and community activities." *Id.* at 627. The Court reasoned that, as a result of these behaviors, the Jaycee's claim that allowing women to become regular members would "impair a symbolic message" was "attenuated at best." *Id*.

As explained herein and in the record, Miss USOA does not have evidence to back up its claim that its message is more than just its discriminatory eligibility rule. There is nothing to suggest that promoting only cisgender women is a long-held ideology of Miss USOA's or that it is an ideology expressed in any other facet of the Miss USOA program. It has a discriminatory eligibility rule only—the women must be "natural born female" to participate—which should not be allowed to serve as Miss USOA's message.

**C. The right to associate for expressive purposes is not absolute.**

While the First Amendment protects the freedom of association, the right to associate for expressive purposes is not absolute. *Roberts*, 468 U.S. at 623. See also

*New York State Club Ass'n*, 487 U.S. at 13; *Dale*, 530 U.S. at 640; *Our Lady's Inn*, 349 F. Supp. 3d at 820. "Indeed, there is no independent First Amendment right of expressive association; the First Amendment protects the freedom of association *only in certain circumstances*." *A.M. ex rel. Youngers v. New Mexico Dep't of Health*, 117 F. Supp. 3d 1220, 1243 (D.N.M. 2015) (emphasis added).

"[T]he right to associate does not mean 'that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution.'" *Dale*, 530 U.S. at 678 (quoting *New York State Club Ass'n*, 487 U.S. at 13). Organizations with discriminatory membership policies have had their assertions of the right to associate rejected by courts. *See, i.e.*, *Runyon v. McCrary*, 427 U.S. 160, 175-76 (1976); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). "Infringements on th[is] right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623 (citing as examples *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-92 (1982); *Democratic Party of the U.S. v. Wisconsin*, 450 U.S. 107, 124 (1981); others). That is, if there "exists a sufficiently important state interest," then even a "significant interference" with the freedom of association may be allowable. *Wingate v. Gage Cnty. Sch. Dist., No. 34*, 528 F.3d 1074, 1080 (8th Cir. 2008) (citing *Norbeck v.*

*Davenport Cmty. Sch. Dist.*, 545 F.2d 63, 67 (8th Cir. 1976)). The Supreme Court itself confirmed that until *Dale*, it consistently "squarely held that a State's antidiscrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary membership policy." *Dale*, 530 U.S. at 679.

In this case, the lower court recognized that "the Court has also held that eliminating discrimination based on race or sex is a compelling state interest," 1-ER-19 (citing *Roberts*, 468 U.S. at 623), and that "Given…the evidence of historical discrimination against individuals based on gender identity, I think the state's interest in ending gender-identity discrimination in places of public accommodation is at least important or substantial." *Id.* at 19-20. Nevertheless, the court found that Miss USOA's interest in expressive association outweighs Oregon's interest in preventing discrimination based on gender identity by "closely analogiz[ing] the facts of this case to the facts of *Dale*." *Id.* at 32. In doing so, it erroneously treated the right to associate as absolute under *Dale*. If Miss USOA can rely on its discriminatory conduct as protected First Amendment beliefs, Oregon effectively loses its ability to protect groups such as transgender people. Because this right of Oregon is paramount and the right to associate for expressive purposes is not absolute, the district court should have recognized these limits in its discernment over Miss USOA's exclusionary membership policy.

## III. THE LOWER COURT'S DECISION CREATES SERIOUS CONSTITUTIONAL ACCESS TO JUSTICE ISSUES.

"The right to sue and defend in courts" is one of the highest privileges afforded to United States citizens. *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). "In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship." *Id.* This right is found in the Due Process Clause, and "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). Prematurely cutting off access to the courts harms that constitutional guarantee. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002). It is critical to look at Ms. Green's case through this lens.

As the lower court did here, misreading the associational doctrine of the First Amendment in a way that results in a grant of summary judgment, rather than allowing a case to proceed on the merits, creates major access to justice implications. Such a ruling ultimately creates a new barrier to cases, including civil rights cases and tort claims, by cutting them off too early at the summary judgment stage and preventing those facing discrimination from getting their day in court. *See generally* John Bronsteen, *Against Summary Judgment*, 75 Geo. Wash. L. Rev. 522 (2007).

Ending litigation at the summary judgment stage, on the basis of intimations or other weak justifications, prevents litigants from being allowed to present all of

their evidence to the factfinder and impairs the access mandate of the U.S. Constitution. However, providing access to the same litigant by letting the factfinder making determinations about whether the claimed "expressive purpose" is real, pretextual, or an after-the-fact rationale *does not* harm an organization's First Amendment rights of association. As explained by Professor Bronsteen:

> Defendants' usual behavior suggests that when they seek summary judgment, they do so either because they view it as an opportunity to win without the risk of losing (unlike a trial) or because they believe they have a better chance to win at summary judgment than at trial. Either explanation is deeply troubling. There is no reason that defendants should be privileged with a device that gives them two chances to win every lawsuit, whereas plaintiffs realistically have only one chance. Moreover, if it is true that a defendant has a better chance to win at summary judgment than at trial, then that bespeaks a severe flaw in our civil justice system because summary judgment by its nature should be granted only if a party is certain to win at trial. The purpose of summary judgment is certainly not to reach a different outcome from the one that would be reached at trial, but rather to avoid the cost of trial when the outcome is not in doubt.

Bronsteen, 75 Geo. Wash. L. Rev. at 538. When the questions in a case are evidently close, there should not be any harm in allowing a case to proceed to a decision on the full merits.

In this case specifically, allowing a case to proceed past the summary judgment stage supports the mandated access to justice without impairing associational rights. Here, the door has been prematurely closed on access to the courts due to a weak, after-the-fact justification: that Ms. Green was not allowed to participate because Miss USOA only allows participation by "natural-born females,"

which they do not believe Ms. Green to be. 1-ER-4-5. The evidence does not support Miss USOA's claim that such discrimination was indeed their viewpoint *or* the purpose of their organization. See Section I, *supra*. Instead, the evidence presented by Miss USOA contradicts the organization's claimed "purpose." Thus, access to justice principles and the Constitutional policy mandate tip the scales in favor of denying summary judgment and instead allowing the parties to put forth all material evidence.

## CONCLUSION

For the foregoing reasons, AAJ urges this Court to reverse the decision of the district court below.

Respectfully submitted,

/s/ Jeffrey R. White
Jeffrey R. White
*Counsel of Record*
Amy L. Brogioli
*Associate General Counsel*
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street NW, Suite 200
Washington, DC 20001
(202) 944-2839
jeffrey.white@justice.org

*Attorneys for Amicus Curiae*
*American Association for Justice*

Date: August 30, 2021

## 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 5,661 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 2016 in 14-point Times New Roman type style.

Date: August 30, 2021

/s/ Jeffrey R. White
JEFFREY R. WHITE

## CERTIFICATE OF SERVICE

I, Jeffrey R. White, counsel for amicus curiae and a member of the Bar of this Court, certify that on August 30, 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/ Jeffrey R. White
JEFFREY R. WHITE

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

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