

No. 26-286

IN THE
Supreme Court of the United States

OLYMPUS SPA, *et al.*,

Petitioners,

v.

ANDRETA ARMSTRONG, EXECUTIVE DIRECTOR
OF THE WASHINGTON STATE HUMAN
RIGHTS COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF EQUAL PROTECTION PROJECT
AS *AMICUS CURIAE*
IN SUPPORT OF PETITION**

RONALD E. CAHILL
Counsel of Record
BARNES & THORNBURG LLP
One Marina Park Drive
Boston, MA 02210
(617) 516-5310
rcahill@btlaw.com

Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	iv
INTEREST OF THE EQUAL PROTECTION PROJECT.....	1
STATEMENT OF THE CASE.....	2
I. Olympus Spa Bases Its Females-Only Policy in Nude Areas of the Spa on Korean Tradition, Christian Religion, and Common Sense	2
II. The Spa Does Not Discriminate, and Does Not Discriminate Against Transgender People.....	3
III. The Washington State Human Rights Commission Condemns as Discrimination the Exclusion of Men Who Present With Male Genitalia From Areas Where Women as Young as 13 Years Old Receive Traditional Spa Treatments in the Nude.....	4
IV. The Commission's Enforcement Against the Spa is Inherently Political and Partisan.....	6
V. Political Prosecution by the Commission has Damaged the Spa's Reputation and Relationship with Its Patrons	8
SUMMARY OF THE ARGUMENT	8
ARGUMENT	10

I. The Spa’s Admissions Policy Constitutes Expressive Conduct Protected by the First Amendment.....	10
A. The Spa’s Selection of Who May Enter Its Intimate Space is Inherently Expressive Under <i>Hurley</i> and <i>303 Creative</i>	10
B. The Ninth Circuit Erred by Finding the Spa’s Services Lack a “Kernel of Expression”.....	13
C. The Ninth Circuit’s Own Precedent in <i>Green v. Miss United States of America</i> Supports the Spa	14
II. The Commission’s Mandate Compels the Spa to Disseminate an Ideological Message in Violation of <i>Barnette</i> and <i>Wooley</i>	16
A. The Government Compels Affirmation of a Contested Ideological Position on Gender Identity	16
B. The Ninth Circuit Erred by Characterizing the Mandate as Merely “Incidental” to Conduct Regulation	19
III. The Spa Qualifies as an Expressive Association Whose Forced Inclusion of a Biological Male Impairs its Expressive Message Under <i>Boy Scouts v. Dale</i> ..	21
A. The <i>Dale</i> Framework Protects Groups That Engage in Any Form of Expression	21
B. The Panel Majority Overlooked the Cultural Component of the Spa’s Expressive Association..	21

C. Forced Inclusion Would Fundamentally Alter the Spa’s Expressive Message	22
IV. Certiorari Should Be Granted in This Case	23
CONCLUSION.....	25

TABLE OF CITED AUTHORITIES

Page(s)

Cases

<i>303 Creative LLC v. Elenis</i> , 600 U.S. 570 (2023)	9, 10, 12, 16, 18, 20, 23
<i>Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000)	9, 21, 22
<i>First Choice Women's Res. Centers, Inc.</i> <i>v. Platkin</i> , No. 24-781, 2025 WL 1678987 (June 16, 2025).....	1
<i>Green v. Miss United States of America</i> , LLC, 52 F.4th 773 (9th Cir. 2022)	14, 15, 16
<i>Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston</i> , 515 U.S. 557 (1995)	9, 10, 11, 13, 14, 15, 16, 18, 23
<i>Janus v. AFSCME</i> , 585 U.S. 878 (2018)	19
<i>Mahmoud v. Taylor</i> , 145 S. Ct. 2332, 2025 WL 815221 (Mar. 10, 2025).....	1
<i>NAACP v. Alabama ex rel. Patterson</i> , 357 U.S. 449 (1958)	21

<i>Olympus Spa v. Armstrong</i> , 169 F.4 th 817 (9th Cir. 2026)	2, 3, 4, 5, 9, 13, 19, 20
<i>Olympus Spa v. Armstrong</i> , 675 F. Supp. 3d 1168 (W.D. Wash 2023).....	3, 4, 5, 6
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984)	22
<i>Students for Fair Admissions v.</i> <i>Harvard</i> , 600 U.S. 181, 2022 WL 2919681 (May 9, 2022)	1
<i>West Virginia State Board of Education</i> <i>v. Barnette</i> , 319 U.S. 624 (1943)	9, 16, 17, 18, 23
<i>West Virginia v. B.P.J.</i> , 146 S.Ct. 2356 (2026)	20
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977)	16, 17, 18, 19, 23
Other Authorities	
First Amendment.....	1, 9, 10, 17, 21, 23
https://legalinsurrection.com/	2
https://www.pewresearch.org/politics/2024/06/06/genderidentity-sexual-orientation-and-the-2024-election/	7
Rule 37	1

Rule 37.2	1
-----------------	---

INTEREST OF THE EQUAL PROTECTION PROJECT¹

The Equal Protection Project (EPP), a project of the non-profit Legal Insurrection Foundation, is dedicated to the fair treatment of all persons without regard to race, ethnicity, or sex. EPP's guiding principle is that there is no "good" form of unlawful discrimination. The remedy for unlawful discrimination is never more unlawful discrimination.

Since its creation, EPP has filed civil rights complaints against more than two hundred seventy-five governmental and private entities and more than seven hundred fifty allegedly discriminatory programs. EPP has also previously filed briefs *amicus curiae* before this Court. *See, e.g., First Choice Women's Res. Centers, Inc. v. Platkin*, No. 24-781, 2025 WL 1678987, at *1 (June 16, 2025); *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2025 WL 815221 (Mar. 10, 2025); *Students for Fair Admissions v. Harvard*, 600 U.S. 181, 2022 WL 2919681 (May 9, 2022).

EPP supports the arguments of Petitioner as to the failure of the Ninth Circuit to uphold this Court's First Amendment precedent. The Equal Protection

¹ This brief conforms to the Court's Rule 37, in that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae* the Equal Protection Project of the Legal Insurrection Foundation funded its preparation or submission. All parties have been notified of EPP's intention to file this brief within the timeline set forth in Rule 37.2.

EPP is devoted to the fair treatment of all persons and to advancing free expression. EPP is part of an organization that publishes the Legal Insurrection website,² which provides news coverage and analysis, among other things, of the narrowing of viewpoint expression. EPP submits this brief to share its expertise on the punishment of those whose practices and associations are outside of the ideology of the institutions that license or regulate them and encourage the Court to grant the Petition for Certiorari.

STATEMENT OF THE CASE

I. Olympus Spa Bases Its Females-Only Policy in Nude Areas of the Spa on Korean Tradition, Christian Religion, and Common Sense

Olympus Spa (“the Spa”) is a traditional Korean spa that caters only to women. The Spa provides Korean body scrubs referred to as *seshin*. *Seshin* is an age-old body scrub technique requiring lengthy soaking while fully nude. The technique is performed in a warm pool to allow and enhance total skin exfoliation. Pet. 6-7; *Olympus Spa v. Armstrong*, 169 F.4th 817, 837 (9th Cir. 2026). The Spa also provides massages, which are given in the open while nude among approximately five tables. A female, including girls as young as thirteen who come with their mothers, receiving a Korean body scrub service

² <https://legalinsurrection.com/>

or massage at the Spa must do so unclothed. *Olympus Spa*, 169 F.4th at 838.

The Spa maintains a “females-only policy” under which it restricts admission to women—or, more specifically, individuals who “physically present[] in the nude as ... female.” The staff who provide these services are exclusively female and are known in the Korean tradition as *ddemiri*. These female employees refuse to perform massages or body scrubs on naked men. The Petitioners attribute the policy to their “traditional, theologically conservative” Christian values. They believe “that a male and female should not ordinarily be in each other’s presence while in the nude unless married to each other.” Pet. at 6-7. The Spa also feared that exposing female customers, especially minors, to male genitalia could subject Olympus Spa to criminal penalties under Washington’s laws on lewd conduct and public indecency. *Olympus Spa v. Armstrong*, 675 F. Supp. 3d 1168, 1182 (W.D. Wash 2023).

II. The Spa Does Not Discriminate, and Does Not Discriminate Against Transgender People

It is the policy of Olympus Spa not to discriminate on the basis of race, color, national origin, age, or disability. *Olympus Spa*, 675 F. Supp. 3d at 1180. The Spa asks no questions of its patrons regarding their sexual orientation and thus admits lesbians. It is also true that the Spa would admit transgender women who have undergone “sex confirmation surgery.” *Olympus Spa*, 675 F. Supp. 3d at 1180; Pet. at 10, 32-34 (The policy doesn’t care

about any prospective patron's identity, only anatomy.)

The Spa thus does not discriminate based on sexual orientation. Homosexual and transgender people are welcome—as long as they do not present in the nude with male genitalia in the Spa's sacred and intimate female spaces where women receive treatment while nude.

III. The Washington State Human Rights Commission Condemns as Discrimination the Exclusion of Men Who Present With Male Genitalia From Areas Where Women as Young as 13 Years Old Receive Traditional Spa Treatments in the Nude

The Complainant before the Washington State Human Rights Commission (“the Commission”) is a biological male who “identifies as a woman” but “has not undergone sex reassignment surgery.” *Olympus Spa*, 675 F. Supp. 3d at 1181; Pet. at 9-10. That is, the Complainant presents nude with male genitalia. According to the Commission, the denial to the Complainant of nude body scrub and message services in a female-only space where women receive services while nude is an act of discrimination based on “sexual orientation.” *Olympus Spa*, 675 F. Supp. 3d at 1182.

The Washington Law Against Discrimination (“WLAD”) was amended in 2006 to redefine “sexual orientation” as “heterosexuality, homosexuality, bisexuality, *and gender expression or identity*.” *Olympus Spa*, 169 F.4th at 827 (emphasis added). WLAD further defines explains:

As used in this definition, “gender expression or identity” means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-expression, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

Id. Under this expansive (and incomprehensible) definition, a man, who behaves like a man, would be discriminated against on the basis of his “sexual orientation” by the Olympus Spa’s females-only policy. The Commission does not concern itself with such men here, it acts only to apply the law on behalf of Complainant, a man who identifies as a woman despite presenting with male genitalia.

The complaint before the Commission argued that Complainant was denied services and told “that transgender women without surgery are not welcome because it could make other customers and staff uncomfortable.” *Olympus Spa*, 675 F. Supp. 3d at 1181. The Spa responded to the complaint in writing, explaining the cultural underpinnings of the services offered and that the nudity and females-only policy “cannot be segregated from the cultural requirements for *seshin* services.” *Id.* at 1182. The Spa also feared that exposing female customers, especially minors, to male genitalia could subject Olympus Spa to criminal penalties under Washington’s laws on lewd conduct and public indecency. *Id.*

In finding that the Spa violates the WLAD because it discriminates based on gender identity, the Commission explained that:

- The Spa “denies services to transgender women who have not had surgery ... because their physical appearance is not ‘consistent’ with the traditional understanding of biological women.”
- The WLAD “does not use genitals to define gender identity and ... recognizes that a person’s gender identity can be different from the biological sex assigned to that person at birth.”
- The Spa’s “biological women’ policy focuses on the genitals of patrons rather than allowing transgender women to access your facilities based on their gender identity.”

Id.

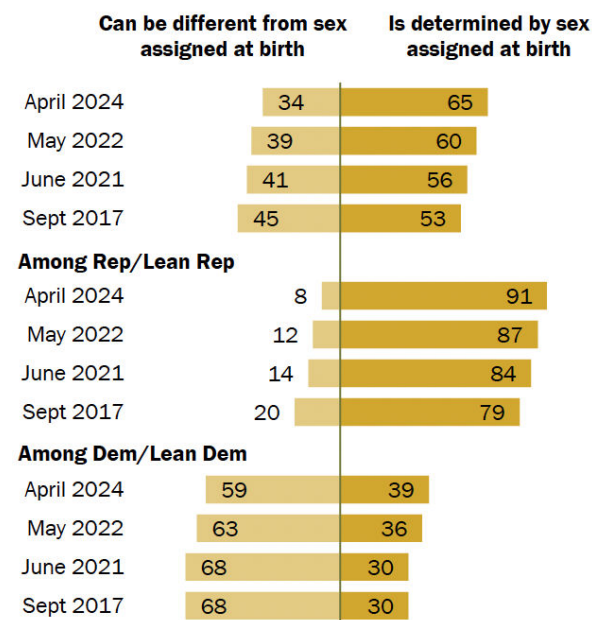
IV. The Commission’s Enforcement Against the Spa is Inherently Political and Partisan

The subject matter of the complaint, as well as the Commission’s treatment of it, is inherently political. Surveys show that growing numbers of Americans agree with the statement that gender is determined by sex at birth, with Republicans agreeing at a 91% rate and Democrats only agreeing at a 39%

rate.³ At the time the Commission opened its investigation (2022), there was more than a 50%

Growing share of voters say gender is determined by sex at birth

% of registered voters who say that whether a person is a man or a woman ...



Note: Based on registered voters. No answer responses not shown.

Source: Survey of U.S. adults conducted April 8-14, 2024.

PEW RESEARCH CENTER

swing in views between those leaning Democrat and those leaning Republican.

³ See, <https://www.pewresearch.org/politics/2024/06/06/genderidentity-sexual-orientation-and-the-2024-election/> (chart from the article provided in the text below).

The WLAD’s definition of “sexual orientation” reads on anything having to do with any gender—the Commission’s selection of who to prosecute enforces a partisan political view.

V. Political Prosecution by the Commission has Damaged the Spa’s Reputation and Relationship with Its Patrons

The Commission selectively threatened to prosecute the Spa, stating that “now is the time” to enter into a settlement or be referred for prosecution. Pet. at 12. To avoid prosecution, the Spa changed its entry policy and notice and underwent anti-discrimination training. *Id.*

Men, dressed as women, have now accessed the Spa, undressed in the locker room, and gone into the pool area. Pet. 12. Female patrons experienced “humiliation, trauma, and rage.” Pet. 13. These incidents “tremendously damaged [the Spa’s] reputation,” causing “loss in financial opportunities and extreme mental, and even physical pain.” *Id.*

SUMMARY OF THE ARGUMENT

The spa's mission—to provide traditional Korean body services exclusively to women, rooted in cultural, traditional, and religious beliefs about the female body—communicates a specific message about the nature of womanhood, bodily integrity, and the sacred space created for women in the Korean spa tradition. The spa's selection of who may enter its intimate, nude service environment is inseparable from the message it conveys.

The Ninth Circuit's decision below, *Olympus Spa v. Armstrong*, 169 F.4th 817 (9th Cir. 2026), fundamentally misapprehends the First Amendment's protection against compelled speech. The Commission's enforcement of the Washington Law Against Discrimination against Olympus Spa—a traditional Korean women's spa rooted in centuries of cultural tradition—compels the Spa to communicate the government's preferred ideological message about gender identity in violation of the principles established in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

Just as every participating unit in a parade affects the message conveyed by the organizers, *Hurley*, 515 U.S. at 572-573, the presence of a biological male in a space defined by its exclusively female character fundamentally alters the expressive content of the spa's services and the message its admissions policy communicates. Applying the principle from *Hurley* that the government cannot compel a speaker to include a message it does not wish to convey, the government mandate here compels the spa to communicate the government's preferred message about gender identity, which is exactly the kind of viewpoint-based compulsion the First Amendment forbids.

The panel majority erred by (1) dismissing the spa's admissions policy as lacking any expressive content, (2) treating the HRC's compelled affirmation

of equal access regardless of gender identity as merely "incidental" to conduct regulation, and (3) holding that the spa's commercial nature forecloses First Amendment protection. Each of these holdings conflicts with this Court's precedents and warrants review.

ARGUMENT

I. The Spa's Admissions Policy Constitutes Expressive Conduct Protected by the First Amendment

The Spa's admissions policy—limiting entry to biological women for the provision of intimate, nude Korean body services—is expressive conduct, and the government's mandate to alter that policy compels the Spa to communicate a message it does not wish to convey.

A. The Spa's Selection of Who May Enter Its Intimate Space is Inherently Expressive Under *Hurley* and 303 Creative

This Court has long recognized that the First Amendment protects not only written and spoken words but also expressive conduct—conduct sufficiently imbued with communicative elements. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In *Hurley*, the Court unanimously held that a state public accommodations law cannot be applied to force a private speaker to include in its expressive activity a message it does not wish to convey. 515 U.S. at 559.

The Court emphasized the foundational principle that a speaker has the autonomy to choose the content of its own message and to decide what not to say. *Id.* at 573.

Hurley addressed a St. Patrick's Day parade in which an organization ("GLIB") representing gay, lesbian, and bisexual descendants of Irish immigrants was excluded from the parade. *Id.* at 560-61. "If there were no reason for a group of people to march from here to there except to reach a destination," the Court noted, "they could make the trip without expressing any message." *Id.* at 568. Instead, the Court found that, in a parade, the marchers "are making some sort of collective point, not just to each other but to bystanders along the way." *Id.*

Similarly, the Spa's mission—to provide traditional Korean body services exclusively to women, rooted in cultural, traditional, and religious beliefs about the female body—communicates a specific message about the nature of womanhood, bodily integrity, and the sacred space created for women in the Korean spa tradition. The Spa's selection of who may enter its intimate, nude service environment is inseparable from the message it conveys.

Like the analysis of the parade in *Hurley*, a massage with no reason other than perhaps addressing a particular muscle strain might not be expressive, but the massage here is something more. Just as every participating unit in a parade affects the message conveyed by the organizers, the presence of a biological male in a space defined by its exclusively

female character fundamentally alters the expressive content of the Spa's services and changes the nature of its relationship with its patrons.

In *303 Creative*, the Court reaffirmed that Colorado could not use its public accommodations law to compel a website designer to create expressive content with which she disagreed. *303 Creative LLC*, 600 U.S. at 602-03 (2023). Like the Spa, the website designer in *303 Creative* was “willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender,” but would not produce content that “contradicts biblical truth,” regardless of who orders it. *Id.* at 582. The designer feared that the Colorado public accommodations law would “force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman.” *Id.* at 580. This Court concluded that Colorado could not so force her, finding that, “[n]o government ... may affect a speaker’s message by forcing her to accommodate other views.” *Id.* at 596 (internal quotation marks and citations omitted).

Also important here, the Court in *303 Creative* rebutted the notion that accepting payment for services prevents a business from selecting which parties it will provide those services to:

Does anyone think a speechwriter loses his First Amendment right to choose for whom he works if he accepts money in return? Or that a visual artist who accepts commissions from the public does the same?

Id. at 594.

The website designer can choose to turn down assignments when those assignments result in her expressing ideas with which she disagrees—just as the parade organizer in *Hurley* can turn down applicants to march who would cause the parade to express ideas with which they disagree. Here, where the Spa, by its operation, expresses traditional Korean (and religious) ideas regarding the nature of womanhood, bodily integrity, and the sacred space created for women in the Korean spa tradition, forcing the Spa to admit those who present with male genitalia into its intimate, nude service environment compels the Spa to convey a message with which it disagrees to both its employees and its patrons.

B. The Ninth Circuit Erred by Finding the Spa’s Services Lack a “Kernel of Expression”

The Ninth Circuit concluded that “the act of giving or receiving a Korean massage hardly contains even a ‘kernel of expression,’ let alone a quantity ‘sufficient to bring the activity within the protection of the First Amendment.’” *Olympus Spa*, 169 F.4th at 836. This holding misapplies the *Hurley* framework. The *Hurley* Court did not require the parade to prove that each individual marching unit was independently “expressive” in isolation. It instead recognized that the selection of who participates is itself protected speech because every participant affects the message conveyed. The Ninth Circuit improperly analyzed “the act of giving or receiving a Korean massage,” rather than recognizing that the

Spa's creation and maintenance of an all-female cultural space is the expressive activity, and the admission or exclusion of patrons is how the Spa speaks.

Hurley further noted that the act of marching from here to there to reach a destination might not be expressive, but that parades make “some sort of collective point, not just to each other but to bystanders along the way,” referring to the “inherent expressiveness of marching to make a point.” *Hurley*, 515 U.S. at 568. In the same way, the analysis here cannot rely on any one message, but must take into account the sum total of services provided to make a point to the Spa’s employees, patrons, and the wider community about Korean traditions and the sacredness of this intimate female space. *See, e.g.*, Pet. 7 (“The [Lee] family yearned to preserve Korean tradition and culture—and to share their heritage with the larger community . . . ‘Non-Koreans have flocked to Olympus Spa to learn and experience this Korean cultural tradition.’”).

The services provided by the Spa are inherently expressive and forcing a mixing of the sexes would transform its traditional services into something else entirely.

C. The Ninth Circuit’s Own Precedent in *Green v. Miss United States of America* Supports the Spa

Applying Oregon’s public accommodations law to force a beauty pageant to admit a transgender contestant violates the First Amendment’s protection

against compelled speech. *Green v. Miss United States of America, LLC*, 52 F.4th 773 (9th Cir. 2022). The court found that the pageant's selection of contestants was inseparable from its expressive message about womanhood, and that forced inclusion would fundamentally alter that message. *Id.* at 783-84.

The reasoning in *Green* applies directly here. The Spa's women-only admissions policy, like the beauty pageant's "natural born female" rule, communicates an expressive message about womanhood. *Id.* at 784 There is no meaningful difference between the Spa's message, 'biological women are welcome,' for patrons and the beauty pageant's message regarding 'natural born female' for contestants. Citing to *Hurley*, the *Green* court held, in words that are equally applicable here, first that defining a women-only group is expressive, and second that the inclusion of a biological male who identifies as female in such an association compels a contrary message:

The same holds true here. The Pageant allows only "natural born female[s]" to compete and enforces this requirement, and repeatedly maintains that it does not believe that biological males who identify as female are women. In fact, the Pageant explains that it communicates these views on womanhood *every* time it uses the word "woman," because the fact that the Pageant "does not adjectivize the word woman is part of the message: the word 'woman' so naturally means 'born female' that the Pageant does not

need or use qualifiers.” This is more than sufficient under current caselaw to substantiate the Pageant’s decision not to communicate a message contrary to that position. “The fact that the organization does not trumpet its views from the housetops ... does not mean that its views receive no First Amendment protection.” *Dale*, 530 U.S. at 656, 120 S.Ct. 2446.

Id. at 784-85.

The panel majority attempts to distinguish *Green* on the ground that a beauty pageant is “purely expressive activity” while a spa is “non-expressive commercial activity.” The panel gets this wrong. First, just like the marching in *Hurley*, the spa treatments, performed in a group setting and within the context of Korean and religious traditions, is inherently expressive. Further, as to the fact that the Spa charges money for its services, “none of that makes a difference.” *303 Creative*, 600 U.S. at 594.

In addition, exactly as in *Green*, it was the admission policy that is at issue—and the impact of that admissions policy on the overall expression. The panel’s attempt at distinguishing *Green* is unavailing.

II. The Commission’s Mandate Compels the Spa to Disseminate an Ideological Message in Violation of *Barnette* and *Wooley*

A. The Government Compels Affirmation of a Contested

Ideological Position on Gender Identity

Even if the Spa's services are characterized as non-expressive commercial activity, the Commission's specific mandate—requiring the Spa to remove its policy language and to publish an affirmation of equal access based on gender identity (actually, as the 9th Circuit recognized, the Spa's policy only applies to “preoperative transgender women”)—independently violates the First Amendment under the *Barnette*/*Wooley* line of cases.

In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the Supreme Court established the foundational principle 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.” *Id.* at 642. In *Wooley v. Maynard*, 430 U.S. 705 (1977), the Court held that “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all,” and that the state may not constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property. *Id.* at 714-15.

The question of whether a person who presents naked as male but identifies as a woman is, for purposes of intimate nude body services, a “woman,” is not a factual question with a neutral answer—it is a contested ideological and political question on which reasonable people, and many religious traditions, hold

sincere and deeply felt views. *Supra* at 6-7. The Commission’s requirement that the Spa publish an affirmation that it provides equal access based on gender identity compels the Spa to publicly endorse the government’s preferred answer to this contested ideological question—in its own voice, on its own website, as if it were the Spa’s own statement. This is the paradigmatic case of compelled ideological speech that *Barnette* and *Wooley* prohibit.

More importantly, the Commission here would force the Spa, and everyone else, to accept and repeat it’s political orthodoxy. The Spa speaks to Korean tradition and the sanctity of an intimate space for women. Of the Spa’s message:

No government . . . may affect a speaker’s message by forcing her to accommodate other views; no government may alter the expressive content of her message; and no government may interfere with her desired message.

303 Creative, 600 U.S. at 596 (quotations and citations omitted). The Commission here seeks to do exactly what this Court prohibits—the Commission would force the Spa to alter Korean tradition to accept its view that a preoperative man who identifies as a woman is a woman in the Spa’s Korean tradition. The Spa has tried to conform to the Commission’s orthodoxy, and its female patrons were terrified. *Supra* at 8.

As warned against in *Hurley*, the panel’s application of the public accommodations statute “had

the effect of declaring the sponsors' speech itself to be the public accommodation." 515 U.S. at 573. The same dynamic applies here: WLAD is being applied in a way that declares the Spa's expressive admissions policy itself to be the public accommodation subject to anti-discrimination mandates. That is, the panel would force the Spa to change the expression of its Korean tradition to accept and repeat the Commission's viewpoint.

B. The Ninth Circuit Erred by Characterizing the Mandate as Merely "Incidental" to Conduct Regulation

The Ninth Circuit held that the Commission's objection was to the practice described, not the message conveyed, and that the mandated changes were "plainly incidental" to conduct regulation. *Olympus Spa*, 169 F.4th at 830. This reasoning does not withstand scrutiny.

The Court in *Wooley* did not accept New Hampshire's argument that its license plate requirement was merely incidental to the state's interest in vehicle identification; it looked to whether the state was seeking to compel the dissemination of an ideological message. 430 U.S. at 716-17. Here, the Commission's mandate is not incidental to any neutral conduct regulation—it is specifically directed at compelling the Spa to publicly affirm the government's position on a contested question of gender identity.

Moreover, *Janus* reaffirmed that "when speech is compelled ... individuals are coerced into betraying

their convictions,” and that “forcing free and independent individuals to endorse ideas they find objectionable is always demeaning.” *Janus v. AFSCME*, 585 U.S. 878, 893 (2018). By analogy, the Spa's owners, who hold sincere religious and cultural beliefs about the nature of womanhood, are being forced to publicly endorse a view of gender identity that they find morally and religiously objectionable.

Finally, the panel decision notes that regulations that “requir[e] the dissemination of purely factual and uncontroversial information” is not reviewed as a content-based speech restriction. *Olympus Spa*, 169 F.4th at 829. The Commission’s requirements here are anything but “purely factual and uncontroversial information.” In fact, this Court has now held more than once that a policy that classifies individuals based on anatomy does not discriminate “based on gender identity or transgender status,” disagreeing with the Commission’s fundamental premise. *West Virginia v. B.P.J.*, 146 S.Ct. 2356, 2378 (2026) (citing *United States v. Skrmetti*, 605 U.S. 495, 517 (2025)).

Rather, this case is more like *303 Creative*, where:

To be sure, our cases have held that the government may sometimes require the dissemination of purely factual and uncontroversial information, particularly in the context of commercial advertising. But this case involves nothing like that. Here, [the Commission] does not seek to impose an

incidental burden on speech. It seeks to force an individual to utter what is not in her mind about a question of political and religious significance.

303 Creative, 600 U.S. at 596.

The panel was wrong—compelling the Spa and its owners to utter what is not in their minds about a question of political and religious significance is exactly what the Commission achieved.

III. The Spa Qualifies as an Expressive Association Whose Forced Inclusion of a Biological Male Impairs its Expressive Message Under *Boy Scouts v. Dale*

A. The *Dale* Framework Protects Groups That Engage in Any Form of Expression

The First Amendment's protection of expressive association is not reserved for advocacy groups—any group that engages in some form of expression, whether public or private, is entitled to protection. *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) The Court further held that courts must give deference to an organization's assertions regarding the nature of its expression and its view of what would impair that expression. *Id.* at 653.

B. The Panel Majority Overlooked the Cultural Component of the Spa's Expressive Association

The dissemination of culture falls squarely within the contours of First Amendment expression. “[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

The Spa preserves and advances centuries-old Korean cultural traditions through its all-female communal bathhouse services. Women gather to share and experience the physical and spiritual healing that traditional Korean culture provides through *jjimjilbang* (communal bathhouses) and *seshin* (scrubs and massages) provided by female *ddemiri* (employees). This advancement of Korean tradition falls within the scope of associating for “cultural ends” as recognized in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

**C. Forced Inclusion Would
Fundamentally Alter the Spa’s
Expressive Message**

The Spa's owners sincerely believe that the presence of a biological male in the intimate, nude service environment would fundamentally alter the expressive character of the spa—destroying the all-female space that is the very foundation of the Korean spa tradition. Under *Dale*, this is precisely the kind of assertion to which courts must defer. *Dale*, 530 U.S. at 653.

The forced inclusion of a biological male would send a message, both to the Spa's patrons and to the world, that the Spa accepts the government's view of

gender identity—a message the Spa does not wish to convey. This directly parallels the compulsion at issue in *Dale*, where the Court held that New Jersey's public accommodations law “would significantly affect [the Boy Scouts'] expression” by requiring inclusion of a person whose presence communicated a message contrary to the organization's views. *Dale*, 530 U.S. at 656.

IV. *Certiorari* Should Be Granted in This Case

This case presents an issue of exceptional and recurring national importance that this Court will confront in numerous contexts in the years ahead: whether the First Amendment permits governments to compel private speakers to affirm the state's preferred orthodoxy on gender identity as a condition of operating spaces historically reserved for women.

The question is not confined to Korean spas. Across the country, women's shelters, domestic violence refuges, rape crisis centers, athletic facilities, communal locker rooms, bridal salons, religious retreats, sororities, and similar sex-separated spaces all communicate—through their admissions policies and the environments they maintain—a message about the nature of womanhood, bodily privacy, and female solidarity. As state and local governments continue to expand gender-identity mandates through public accommodations laws, each of these spaces will face the same compelled-speech dilemma the Ninth Circuit blessed below: either publish the government's affirmation that sex-based distinctions are impermissible, or face enforcement and penalty.

The Ninth Circuit’s holding—that a business’s admissions policy lacks even a “kernel of expression” and that any mandated changes to published policy language are merely “incidental” to conduct regulation—provides a template for governments nationwide to circumvent this Court’s compelled speech precedent simply by labeling the speech compulsion as a regulation of discriminatory “conduct.” Left undisturbed, this reasoning will erode the protections of *Hurley*, *Barnette*, *Wooley*, and *303 Creative* in every case where a government agency demands that a private entity publicly affirm gender-identity orthodoxy as a condition of continued operation.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: September 29, 2026

Respectfully submitted,

RONALD E. CAHILL

Counsel of Record

BARNES & THORNBURG LLP

One Marina Park Drive

Boston, MA 02210

(617) 516-5310

rcahill@btlaw.com

Attorney for Amicus Curiae