September 1, 2020

IN THE SUPREME COURT OF THE UNITED STATES

No. 2020-2021

William DeNolf, Petitioner

v.

The City of Knerr, Respondent

On Writ of Certiorari to the Court of Appeals for the Fourteenth Circuit.

ORDER OF THE COURT ON SUBMISSION

IT IS THEREFORE ORDERED that counsel appear before the Supreme Court to present oral argument on the following two issues:

1. Whether, as applied to Petitioner William DeNolf, Section 3 of Ordinance 417 violates the First Amendment right to be free from compelled speech?

2. Whether, as applied to Petitioner William DeNolf, Section 4(b) of Ordinance 417 violates the First Amendment right of freedom of association?

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

Case No. 01-76320

WILLIAM DENOLF, Plaintiff-Appellant

v.

THE CITY OF KNERR, Defendant-Appellee

Appeal from the United States District Court for the Central District of Olympus.

Before ASHLYN ROBERTS, SHANE ROBERTS, and KYLE MAURY, Circuit Judges.

ORDER

A. ROBERTS, Circuit Judge, joined by S. ROBERTS, Circuit Judge:

In this appeal, Defendant-Appellant City of Knerr must defend against Plaintiff-Appellee William DeNolf's as-applied challenge under the First Amendment to the constitutionality of Sections 3 and 4(b) of City of Knerr Ordinance 417. Specifically, DeNolf's complaint alleges that Section 3 of Ordinance 417, the Public Accommodations provision, violates DeNolf's First Amendment right to be free from compelled speech by penalizing him for his refusal to provide a service for hire for a wedding between two people of the same sex. Furthermore, DeNolf's complaint alleges that Section 4(b) of Ordinance 417, the Contracts provision, violates DeNolf's First Amendment right to free association by allowing the City of Knerr to cancel an existing contract with DeNolf after it found that DeNolf made financial contributions to organizations labeled as hate groups by the Attorney General of the State of Olympus.

The District Court for the Central District of Olympus, Judge D.R. Fair presiding, ruled that the Public Accommodations and Contracts provisions of Ordinance 417 were constitutional as applied to DeNolf, and thus granted summary judgment to the City of Knerr.

We decide whether Sections 3 and 4(b) of Ordinance 417 are constitutional as applied to DeNolf. It is crucial to note what DeNolf's complaint has not alleged, and thus what is not preserved on this appeal. First, DeNolf has not brought a *facial* challenge to the constitutionality of Sections 3 and 4(b). Second, DeNolf has never challenged the constitutionality of Sections 3 and 4(b) of the Ordinance 417 under the Olympus State Constitution, or under any other law of Olympus or of the United States. Third, DeNolf has never challenged the constitutionality of Section 3 on grounds that it violates his right to free association; nor has DeNolf ever challenged the constitutionality of Section 4(b) on grounds that it violates his right against compelled speech. Fourth, DeNolf has never alleged that he did not know about the law or that it was being applied retroactively. Finally, DeNolf has not brought a free exercise claim. Because none of these issues were litigated in the District Court, they are not properly preserved before this Court on this appeal.

For the reasons below, the judgment of the District Court is **AFFIRMED**.

I.
BACKGROUND

This case presents only constitutional questions--there are no jurisdiction, standing, or other procedural issues, nor are there issues of statutory interpretation. In addition, all the parties stipulate to the undisputed materials facts, which appear below.

A. Ordinance 417

Over the years, the City of Knerr has enacted numerous civil rights laws that govern a wide array of activity including employment, housing, school populations, profiling, and public transportation. In response to a sudden rise in hate crimes,[1] the City of Knerr amended its Public Accommodations Code in January 2017 by enacting Ordinance 417 (the "Ordinance").[2] After finding that "[a] positive relationship between the City of Knerr's business community and consumers is important to the economic health of the City of Knerr" and that "[t]olerance of differences is an essential component of establishing this positive relationship," the City of Knerr enacted Ordinance 417 with the express purpose "to promote tolerance of all persons and to establish and to protect the civil rights of all persons in the City of Knerr." As discussed above, this case is about the constitutionality of Sections 3 and 4(b) as applied to DeNolf.

Section 3, the Public Accommodation provision, provides that "[n]o public place of accommodation in the City of Knerr engaged in commerce SHALL refuse to serve or provide service or sell goods or services to any person on the basis of race, color, religion, sex, sexual orientation, national origin, or residency status." And Section 4(b), the Contracts provision, provides that "[t]he City of Knerr will not enter into any contract or honor any contract with any person who or any business that knowingly and intentionally makes a financial contribution to any group or organization that the Attorney General of the State of Olympus designates a hate group."

B. The Controversy

DeNolf owns and operates a business in the City of Knerr called *Indulging Your Creativity* (the "business"). The business's website states that it specializes in "awards, invitations, stationery, banners, signs, printing, hand-made frames, calligraphy, apparel, lighting, engraving, and more." The business's motto is "if you can imagine it, we can create it!!!"

The business's website states it "performs services for all occasions." Its website describes DeNolf as "an artist who will work with clients to provide them with products that only I can

[1] Hate itself is not a crime. There needs to be criminal act motivated by some bias against another. The Federal Bureau of Investigation (FBI) defines hate crimes as a "criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity." The FBI uses the terms hate crime and hate motivated crime synonymously.

[2] Ordinance 417 is produced in full in Appendix I of this Order. Furthermore, the hate crime statistics that led the City to enact Ordinance 417, which are discussed in full *infra*, are found in Appendix II of this Order.

provide – ones that will enhance your celebration experience – especially weddings!!!" His advertisements, which appear on the Internet and in the phonebook, "guarantee customers a unique experience custom designed and created for each client." DeNolf's wedding services include hand-made stationery and banners in designs and fonts chosen by DeNolf to best suit each couple.

For the past ten years, DeNolf has done business directly with the City of Knerr. This work largely included making banners for events, which were displayed publicly, and creating plaques for awards given to citizens by the City. Each bore the name of the City of Knerr as well as a logo on the back (awards) or front (banners) identifying *Indulging Your Creativity* as the designer. In September 2017, DeNolf and the City of Knerr entered into a legally valid contract for the year 2018, in which DeNolf agreed to perform $7,500 worth of work for the City of Knerr.

It is indisputable that DeNolf, who is not a clergyman, sincerely believes that any participation on his part in same-sex marriage violates his religious beliefs. He does not want to express approval of same-sex marriage in any fashion. His opposition to same-sex marriage is not mentioned in his advertisements. His business, located at 10-9 House Street in Knerr, has a sign on the wall behind the counter that reads: "We reserve the right to refuse to serve anyone."

On July 6, 2018, Ali Zee stopped into DeNolf's shop to enquire about custom stationery for her upcoming wedding. Ms. Zee proposed that she would provide the text that DeNolf would hand-draw onto the stationery. They discussed a large banner and a custom designed frame, with artwork and calligraphy drawn by DeNolf, as well as inspirational messages that would be designed and printed by DeNolf on small pieces of paper and placed inside little clear glass bottles. These bottles would be placed at tables as party favors along with Hershey kisses. Ms. Zee told DeNolf that she was interested in having a special hand-painted design banner that would emphasize the couple's love for each other. Ms. Zee would select the language for the banner and for in the bottles. She also wanted to procure a hand-designed picture frame with inspirational language (to be suggested by DeNolf) for her spouse to-be, which would emphasize Ms. Zee's femininity and her joy and pride in her wedding. The frame would be a gift to Ms. Zee's spouse.

DeNolf assured Ms. Zee that he and his staff were artists and that they could provide whatever look she wanted. "We will express whatever message you want through our work," he told her. They looked through brochures and used an iPad to look at the store's website to review Ms. Zee's options. After about thirty minutes, Ms. Zee selected what she wanted. After Ms. Zee selected the products she wanted, DeNolf, who was needed in another part of the store, asked his assistant, David Moosmann, to have Ms. Zee fill out a few forms with her bridesmaids' names and the date of the wedding and its location. Then, Ms. Zee's fiancée, Mandy Beau, entered the store. Ms. Zee introduced Mr. Moosmann to Ms. Beau. At this point, DeNolf re-entered the room. Mr. Moosmann, after introducing Ms. Beau to his boss, asked if Ms. Zee and Ms. Beau would excuse them for a moment. Mr. Moosmann and DeNolf went into the back of the store. DeNolf reemerged and told Ms. Zee and Ms. Beau, "Look, y'all, I have some bad news. I'm afraid I cannot do the wedding." He stated that he "wished them well" and offered "to sell them all the paper products, plain frames, and empty bottles that they might wish to purchase" and to provide them with the name of someone who would work with them. Ms. Beau asked DeNolf why he changed his mind. DeNolf replied, "it's against my religious principles to participate in a same sex marriage." Pressed for more of an explanation, DeNolf said, "look, I am an artist; stationery, invitations,

banners, awards, and frames are my art form; the paper, vinyl, and wood you purchase are my canvas; the ink, fountain pens, and other materials I use are my artistic instrument. I express myself through my work, especially for weddings, I won't compromise my principles."

Ms. Zee and Ms. Beau left the store quite upset. They contacted Knerr City Attorney Karina Laigo. Laigo referred the case to the City of Knerr Commission on Civil Rights (the "Commission"). The Commission, led by its director Caroline Cordell, investigated the matter and, after a public hearing, which was described by both sides as cordial, the City of Knerr fined DeNolf $5,000 unless he agreed to perform the services that Ms. Zee and Ms. Beau sought.[3]

While DeNolf's matter was pending before the Commission, in a separate and unrelated matter, the City of Knerr was performing its annual review of business contracts to determine if the City had any existing contracts with persons or businesses that made financial contributions to designated hate groups, in violation of Section 4(b). This investigation, led by the City Clerk, Taylor Ledford, discovered that DeNolf had made four contributions of $500 each to four groups that the Olympus Attorney General, Husoni Raymond, had designated as hate groups.[4]

Pursuant to the Ordinance, the mayor of the City of Knerr, Matt Murphy, contacted DeNolf to inform him that the City was cancelling the September 2017 contract with DeNolf unless, in accordance with Section 5 of the Ordinance, DeNolf agreed to make a financial contribution or contributions totaling $2,000 to a group or groups identified by the City Council as committed to promoting Lesbian, Gay, Transgender, or Bisexual ("LGBT") rights. DeNolf rejected the proposal, asserting "I'll be damned if I will spend $2,000 to earn a contract for $7,500."[5]

C. Procedural History

After learning that his contract with the City was cancelled, DeNolf filed this lawsuit in the District Court for the Central District of Olympus. As discussed above, DeNolf's complaint alleges that Section 3 of Ordinance 417, the Public Accommodations provision, violates DeNolf's First Amendment right to be free from compelled speech by penalizing him for his refusal to provide a service for hire for a wedding between two persons of the same sex. Furthermore, DeNolf's complaint alleges that Section 4(b) of Ordinance 417, the Contracts provision, violates DeNolf's First Amendment right to free association by allowing the City to cancel an existing contract with DeNolf after a finding by the City that DeNolf made financial contributions to organizations designated as hate groups by the Attorney General of the State of Olympus. The District Court granted summary judgment to the City. DeNolf timely appealed.

---

[3] Notably, to date, the Commission has issued the same $5,000 fine to everyone found to have violated Section 3. None of the other cases involved either LGBT issues or same-sex marriage. Nevertheless, DeNolf has not alleged at any point in this litigation that the Commission treated him or his business differently than anyone else or any other business.

[4] All four organizations were designated as hate groups because of their refusal to sanction same-sex marriage. None were associated with any specific acts of violence. The list of hate groups was publicized on the Olympus Justice Department's website where anyone could view it.

[5] To be clear, DeNolf does not challenge the constitutionality of Section 5. Thus, any arguments challenging its constitutionality are not properly preserved before this Court.

D. Statistics Underpinning Ordinance 417

In 2017, a Gallup Poll found that 4.5% of Americans identify as LGBT.[6] This comes to 11,400,000 persons, or about 223,000 persons per state. Olympus is a state of 1,000,000 people. 50,000 (5%) of the residents of Olympus identify as LGBT. Among the fifty-one states, Olympus is estimated to have the forty-first highest LGBT total population. Yet, when measured by percentage of overall population, Olympus has the eighth highest LGBT population. Knerr, the capital of Olympus, is a city of 300,000 people. 30,000 (10%) of its residents identify as members of the LGBT community. Among American cities with populations above 100,000, the City of Knerr is estimated to have the sixth highest LGBT population in terms of population percentage.

The City of Knerr has found that its LGBT population engages in a sizable percentage of its overall commerce and that it is an important contributor to the City's tax base in terms of property and sales taxes. The City found that discrimination negatively has and can affect that population's contributions to its economy. Notably, there has been a boom in commerce related to weddings. This reflects a nationwide trend toward more same-sex marriages.[7] The City found that this industry produced a 2.5% increase in sales and business tax revenues from 2015 to 2017.

In 2018, the Federal Bureau of Investigation ("FBI") reported a total of 7,120 hate crime incidents in the United States. 7,036 involved a single bias and affected 8,446 victims. 84 involved multiple biases and impacted 173 victims. Of these 7,036 single-bias incidents, Race/Ethnicity/Ancestry Bias constituted 4047 (57.5%), Religious Bias constituted 1419 (20.1%), Sexual Identity Bias constituted 1196 (16.9%), Gender Identity Bias constituted 168 (2.3%), Disability Bias constituted 159 (2.5%), and Gender Bias constituted 47 (.7%). The average state had 137.9 reported single bias hate crimes.

The numbers for Olympus were about in-line with those figures. In 2018, Olympus had a reported 125 single bias hate crimes. 100 occurred in the City of Knerr. Of these 100 single bias hate crimes, Race/Ethnicity constituted 50 (50%), Religion constituted 17 (17%), Sexual Identity constituted 30 (30%), Gender Identity constituted 1 (1%), Disability constituted 1 (1%), and Gender constituted 1 (1%). This survey shows that other than single bias hate crimes related to Sexual Identity (which was up 33.6%) and Race/Ethnicity (which was down 16.11%) most single bias hate crimes in the City of Knerr comported with the national average.

The total number of single bias hate crimes in the City of Knerr remained fairly consistent between 2003 (when it started reporting hate crime data) and 2012. It saw a spike of 10% in 2012 when the number rose from 50 to 55. Since 2012, hate crimes reported in the City of Knerr have consistently grown with the largest increase coming in hate crimes that involve Sexual Identity. *See* Appendix II. This is in contrast to several of the cities that surround the City of Knerr.

---

[6] We rely on Gallup because the United States does not collect data on sexual orientation.

[7] Gallup reports that nationally the number of LGBT persons married to a same-sex partner rose by 29.11%—from 7.9% in 2015 to 10.2% in 2017. It also found that in 2017, 61% of same-sex cohabiting couples are now married. This is a 60.53% increase—from 38% to 61% and a 24.49% increase—from 49% to 61% in 2015 and 2016 respectively. Source: UCLA Law School's Williams Institute. The numbers in The City of Knerr are on par with the national averages.

II.
DISCUSSION

At the outset, we confirm that the District Court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1343(3). We also confirm that our jurisdiction rests on 28 U.S.C. § 1291. We review all questions *de novo*.

DeNolf challenges Section 3 and Section 4(b) under the First Amendment. First, DeNolf argues that by enforcing Section 3, the City of Knerr is compelling DeNolf to provide his services for hire for the wedding of Ms. Zee and Ms. Beau, thus compelling him to express a particular message – one that runs contrary to his sincere beliefs. Second, DeNolf argues that the enforcement of Section 4(b) punishes him for his political associations – that he is being found guilty by association. These are the only two issues on appeal. We address each issue in turn.

A. *Section 3 Does Not Violate DeNolf's Right Against Compelled Speech*

The argument that the state cannot compel speech is not new. The Supreme Court has decided a number of compelled speech cases. Some have pitted free association/exercise claims against forced compliance with civil rights laws. *See Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), *Norwood v. Harrison* (1973), 413 U.S. 455 (1973); *Newman v. Piggie Park Enters., Inc.*, 256 F.Supp. 941, 945 (D.S.C.1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir.1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).[8] What is new to federal cases is the idea that there is a free expression right against complying with a public accommodations law that seeks to protect persons on the basis of sexual orientation. Some state supreme courts have addressed this issue; the results are split. *Compare Elane Photography, LLC v. Willock*, 309 P.3d 53, 63–72 (N.M. 2013) (rejecting the idea that a public accommodations law compelled photographers to speak in violation of the First Amendment by requiring them to photograph a same-sex commitment ceremony, even though it is against the owners' personal beliefs), *with Brush & Nib Studio v. City of Phoenix*, 448 P.3d 890, 902–17 (Ariz. 2019) (ruling that a public accommodations law could not compel a business to create custom wedding invitations that celebrated same-sex wedding ceremonies in violation of the owners' sincerely held religious beliefs). We find that the Supreme Court of New Mexico has the correct rationale.

This case is about the freedom of speech and expression; not about the free exercise of religion. The First Amendment offers a general protection against compelled speech. This is especially true when one disagrees with the message. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). But it does not follow free expression is immune to all regulations. *See Johanns v. Livestock Mktg. Ass'n.*, 544 U.S. 550 (2005); *Glickman v. Wileman Bros. & Elliott, Inc*., 521 U.S. 457 (1997); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997). What is more, these facts involve commercial speech of a nature that is far different than the speech involved in *Nat'l Institute of Family and Life Advocates, v. Becerra*, 138 S. Ct. 2361 (2018). The speech here is more akin to that which the New Mexico Supreme Court in *Elane Photography* ruled must give way to the state's interests in enacting public accommodation laws.

[8] The 1967 ruling is not in the record. The 1966 and 1968 rulings are in the record.

Unlike the *Brush & Nib Studio* court, we do not find that the level of scrutiny applied in *Nat'l Institute of Family and Life Advocates* is the appropriate test. Rather, we find that the correct test is the one applied in *Turner*. That test, commonly referred to as intermediate scrutiny, requires that state regulations compelling speech "[1] further an important or substantial governmental interest unrelated to the suppression of free speech, provided the incidental restrictions [2] d[o] not burden substantially more speech than is necessary to further those interests." 520 U.S. at (internal citations and quotations omitted). Applying this test to the facts before us, we find that the state offers a sufficiently important or substantial interest (*i.e.* ensuring the equality of all of its citizens) and that any burden it imposes on speech are "essential" to achieving that objective (*i.e.* the only way to end discrimination is to ban discrimination). *Id.* at 235 (O'Connor, J., dissenting).

At the heart of this case is the idea that through his work DeNolf has engaged in some form of compelled expression. It is true that art can qualify for First Amendment protection. *Hurley*, 515 U.S. at 569. But we do not simply accept this argument on its face. Rather, we ask "(1) whether the speaker intends for the conduct to convey a particularized message, and (2) the likelihood [is] great that a reasonable third-party observer would understand the message." *Brush & Nib Studio*, 448 P.3d at 906 (internal citations and quotations omitted). We do not doubt that DeNolf believes his occupation causes him to engage in expressive conduct. That said, we are unpersuaded that anyone who viewed DeNolf's work for hire for the wedding in question would either view it as the product of expressive conduct, or that anyone would know that DeNolf's principles were compromised even if one knew he had performed the work.

Assuming *arguendo*, however, that viewers reach the conclusion that DeNolf fears, there is nothing to prevent DeNolf from issuing a disclaimer in his storefront or on-line. *See Elane Photography, LLC*, 309 P.3d at 69 (finding that "[r]easonable observers [were] unlikely to interpret Elane Photography's photographs as an endorsement of the photographed events"). Also, the Ordinance does not force DeNolf to express any particular viewpoint that would burden his ability to express what he believes. It is significant to note that combatting discrimination is a purpose that the Supreme Court has found "well within the State's usual power" to forbid. *Hurley*, 515 U.S. at 572. Moreover, laws similar to the one before us today "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Id*. at 572 (citations omitted).

If DeNolf is correct—which we doubt—and the state is forcing DeNolf to express a message by providing a particular service to a certain clientele, the message is one that is dictated by the City of Knerr, and all businesses that operate lawfully in the City of Knerr are subject to reasonable regulations. That reasonable regulations may affect businesses in ways they do not like is inevitable; but it is not necessarily fatal. Such scenarios would be decided under the government speech doctrine. While we adhere to the view that *Turner* provides the correct test, we apply the government speech doctrine and find that the City of Knerr satisfies it.

Under this doctrine, it has been "generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns." *Johanns*, 544 U.S. at 559 (citations omitted). The state's message will prevail when it is part of a larger "regulatory scheme." *Glickman*, 521 U.S. at 469. As with the advertising scheme in

Glickman, there are "[t]hree characteristics of the regulatory scheme at issue [that] distinguish it from laws that we have found to abridge the freedom of speech protected by the First Amendment." *Id.* These characteristics include whether the scheme: (1) "impose[s] no restraint on the freedom of any producer to communicate any message to any audience;" (2) "compel[s] any person to engage in any actual or symbolic speech;" and (3) "compel[s] the producers to endorse or to finance any political or ideological views." *Id.* at 469–70. We apply this doctrine to the facts here and find that the City of Knerr satisfies all three.

DeNolf's argument boils down to the idea that there is a First Amendment right not to respect the civil rights of others. This is a common complaint about many of our civil rights laws, and the Supreme Court has consistently rejected these arguments. It is an argument for which we have limited, if any, sympathy. The Supreme Court in *Norwood* found that the fact "[t]hat the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination." 413 U.S. 455, 463 (1973). More to the point, the Supreme Court held that:

> [A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.

Id. at 469–70. *See also Newman* 256 F. Supp. at 944–45 (noting that the Supreme Court has rejected the notion that one's beliefs provide a right to disobey public accommodations laws).[9]

In summation, compelled speech *might* run afoul of the First Amendment when the state obliges people "to express a message contrary to their deepest convictions." *Nat'l Institute of Family and Life Advocates*, 138 S.Ct. at 2379 (Kennedy, J., concurring). It would do so if the state fails to establish that the regulations fail the standards established in *Turner*, 520 U.S. at 186, or if the compelled "speech was, or was presumed to be, that of an entity other than the government itself." *Johanns*, 544 at 559. That is not an issue here—the message of tolerance is that of the state and the state satisfies the *Turner* standard.

B. *Section 4(b) Does Not Violate DeNolf's Right to Free Association*

The Ordinance is, in our view, a less than ideal law. In fact, if we were legislators, we would have voted against its adoption; if we were an executive with veto-power, we would have vetoed it. But we are judges, and our role is different. We do not judge laws or policies on their wisdom, but rather, we judge their constitutionality. The late Justice Antonin Scalia observed that stupid laws can still be constitutional. We affirm this today.

[9] Two years later, the Supreme Court agreed with the district court and termed the argument that there is a religious freedom not to comply with public accommodation laws "patently frivolous." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n. 5 (1968).

The dissent asserts that the ordinance violates DeNolf's rights under *United States v Robel*, 389 U.S. 258 (1967), *Healy v. James*, 408 U.S. 169 (1972), and *United States v. Eichman*, 496 U.S. 310 (1990). The dissent assumes that the state has punished DeNolf for his thoughts, beliefs, and associations. Although there may be a modicum of truth to this assumption, it does not transform the Ordinance from constitutional to unconstitutional. Simply put, the state can treat employees differently than the average person. *See Broadrick v. Okla.*, 413 U.S. 601, 606 (1973) (stating that "[a]ppellants do not question Oklahoma's right to place even-handed restrictions on the partisan political conduct of state employees."). Indeed, the Supreme Court has ruled that states can limit their employees' actions on behalf of political parties. *Id.* at 618; *Branti v. Finkel*, 445 U.S. 507, 518–20 (1980).

Hate speech is a form or subset of fighting words, and such speech expresses an idea. *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992). The Supreme Court has held that states can proscribe expressions that "'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Id.*, at 399 (internal citation omitted). It has also found that the state does not have to endorse speech that it rejects. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015) (holding that a private association "cannot force Texas to include a Confederate battle flag on its specialty license plates"). Nor does the state have to fund speech that it rejects. In fact, the state can make the receipt of public support conditional on certain factors including not uttering certain words or engaging in certain speech. *See Rust v. Sullivan*, 500 U.S. 173, 199 (1991) (holding "the employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority"). Even though this authority is not without limits, the present case does not present any of the scenarios that the Supreme Court in *Rust* recognized as being beyond the reach of public funding. *See id.* at 200.

Moreover, as in *Lyng v. Int'l Union, UAW*, 485 U.S. 360, 367 (1988), the Ordinance does not prevent DeNolf from associating with any group that he chooses; nor does it cause any association "to abandon or alter any of their activities or their basic goals, and therefore did not abridge the members' associational rights." *Id.* (internal citations and quotations omitted). It simply establishes that the state does not need to knowingly associate with such individuals when it spends public money.

The dissent argues that the Ordinance should be subject to "the most exacting scrutiny" under *United States v. Eichman*, 496 at 314 (1990) (internal citation omitted). We might agree if the Ordinance fined or imprisoned DeNolf for his speech or cost him his business. But it did not do that. It is true that some persons may elect not to contribute to hate groups. But if that happens: (1) it may be less to do with making an idea appear wrong than with economics; and (2) hate groups are left free to recruit members (membership is not a crime) including state employees or those with contracts such as DeNolf had (his contributions were not a crime). Unlike in *Eichman*, no idea or speech is censored here. The state is simply encouraging a redeeming value -- tolerance. Under *Rust*, financial incentives aimed at encouraging public policy are appropriate. 500 U.S. 173. Hate speech can be banned. *R.A.V.*, 505 at 385-386. Logically, it can be discouraged.

The dissent argues for the application of *Robel*. There, the Supreme Court held that a ban on hiring communists to work in the defense industry could only be upheld if it took into account "the quality and degree of membership" of the excluded worker and if it were "narrowly drawn." *Id*., at 262 and 266. This reliance is misplaced because the ordinance did not affect membership.

The District Court is **AFFIRMED** in full.

* * *

MAURY, Circuit Judge, dissenting:

The majority has properly identified and described the leading First Amendment cases that are relevant to the matter at hand. I cannot join the majority, however, because I arrive at a different conclusion when applying these cases to the facts before us. I agree there is a split among lower courts that may result in the Supreme Court resolving this issue. I write this dissent because I believe that going forward, free speech must win out.

I. **DISCUSSION**

A. Section 3 Violates DeNolf's Right to be Free from Compelled Speech

The majority, relying on Supreme Court precedent cited in *Brush & Nib Studio*, asks (1) "whether the speaker intends for the conduct to convey a particularized message, and (2) the likelihood [is] great that a reasonable third-party observer would understand the message." 448 P.3d 890, 906 (Ariz. 2019) (internal citations and quotations omitted). This approach is too narrow to assess the type of expression that is presented in the facts of the case before us. As the Court has noted, "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schonberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995) (internal citation omitted).

Whichever approach one takes, the one described in *Brush & Nib* or *Hurley*, I find that DeNolf means to convey a message when he provides services for a wedding and that those who view the invitations, the banner, the messages in the tiny bottles, and the custom-made frame will understand and appreciate that message. While I do not believe that the City of Knerr sought to suppress the expression of a specific idea, I do believe that DeNolf is being forced to engage in speech to which he objects against his will. Such compulsion violates the First Amendment.

I arrive at a different conclusion than the majority when it comes to the issues of compelled speech. Justice Robert Jackson famously wrote in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) that "[i]f 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." In my view, the Ordinance does just that. Such an effort cannot stand. It is unconstitutional.

Unlike the majority, I find *Nat'l Institute of Family and Life Advocates v. Becerra*, 138 S.

Ct. 2361 (2018) to be the controlling compelled speech case. In that case, the Court found that the standard used to judge commercial speech does not apply when a business is forced to express a state message with which it disagreed that was not related to "health and safety warnings . . . or purely factual and uncontroversial disclosures about commercial products." *Id.* at 2376. Instead, the test to apply to facts such as those in *Nat'l Institute of Family and Life Advocates* and those before us is strict scrutiny.

Combatting discrimination can be a heightened interest—even a compelling one. But, simply saying it is compelling does not make it so. DeNolf offered to sell products to Ms. Zee and Ms. Beau. He did not discriminate against them in the same way that the parties did in the race cases that the majority cites. *Cf. Norwood*, 413 U.S. 455 (1973); *Newman v. Piggie Park Enters., Inc.*, 256 F.Supp. 941, 945 (D.S.C.1966), *aff'd in relevant part and rev'd in part on other grounds,* 377 F.2d 433 (4th Cir.1967), *aff'd and modified on other grounds,* 390 U.S. 400 (1968). Even if the interest was compelling, the means are not narrowly tailored. The fact that DeNolf would have sold the raw materials and products which could have been self-finished or taken to another business to finish, or the fact that the City could have broadened the exemption under Section 6, compels such a conclusion.

In my view, while inapposite to the immediate case, the state also fails the standard established in *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997). In the absence of a ruling from above, it is not for this court to declare that protecting persons on the basis of sexual orientation is an important or substantial state interest. Even if this is an important or substantial interest, the City of Knerr's approach "burden[s] substantially more speech than is necessary to further" this interest. *Id.*, at 186.

In my opinion, the state's efforts, while laudable, must fail for many of the same reasons they failed in *Hurley.* This is in large part because, as with the parade organizers, there is no way for DeNolf to signify his disapproval to everyone who sees or hears about his work. Thus, in contrast to the facts of *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), which the majority cites on this very issue, the only way for DeNolf's rights to be protected is for DeNolf to be able to deny service to someone in instances such as these facts.

Comparisons to *Johanns v. Livestock Mktg. Ass'n.*, 544 U.S. 550 (2005) and *Glickman v. Wileman Bros. & Elliott, Inc*., 521 U.S. 457 (1997) are misplaced for the reason that, in those cases, the compelled speech was a condition of public financial support. There is no such condition in the immediate case. Nor is the majority correct when it concludes that the ordinance is a part of a larger regulatory scheme that is comparable to the scheme in *Glickman.*

If DeNolf is forced to perform this service, his rights of expression are violated. There is a split below. I find DeNolf's situation more analogous to the facts of *Brush & Nib Studio* than those of *Elane Photography.* Hopefully, in time, the Arizona Supreme Court's well-reasoned holding will win out and this split resolved in a manner that upholds the First Amendment.

B. Under Section 4(b) DeNolf's is Guilty by Association

The Supreme Court has clearly and unequivocally stated that "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the

expression of an idea simply because society finds the idea itself offensive or disagreeable." *United States v. Eichman*, 496 U.S. 310, 319 (1990) (internal citation omitted). The majority would have done well to keep that "bedrock principle" in mind, rather than affirm a law that it clearly dislikes. If a law is so questionable as to be labeled "stupid" then it likely is unconstitutional. Maj. Op. at 8.

In *Branti v. Finkel*, 445 U.S. 507 (1980), the Court affirmed that there are some positions or instances when an employee's political associations are relevant to the job itself. 445 U.S. at 518. This is not, as *Branti* itself notes, always the case. Rather, the "hiring authority" must "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id*. Such a law would need to be "narrowly drawn." *United States v Robel*, 389 U.S. at 266 (1967) and satisfy the standard laid out in *Broadrick v. Okla.*, 413 U.S. 601, 607 (1973) (holding that a law cannot be so vague that "'men of common intelligence must necessarily guess at its meaning.'") The City of Knerr has not met its burden.

Eichman establishes that the state cannot establish correct ideas. The state cannot adopt laws that disfavor membership in political groups associated with ideas that the state rejects. Such amounts to "guilt by association" which was banned in *Robel*, 389 U.S. 258, 265 (1967). The state cannot deny "rights and privileges solely because of a citizen's association with an unpopular organization." *Healy v. James*, 408 U.S. 169, 185–86 (1972). Section 4(b) as applied to DeNolf is such a provision, and as such, it violates the precedent established in *Healy* as well as in *Robel.*

I agree with the majority's statement of *Robel*, but I differ in its conclusion that *Robel* is inapplicable. DeNolf may not have been excluded from eligibility for a full-time public job, but that is a matter of semantics. Loss of a public contract is loss of public employment wages. Rather than apply *Robel*, the majority distinguishes the cases. I disagree. I view *Robel* as applicable and I find that DeNolf would prevail under its application.

For these reasons, I respectfully dissent.

APPENDIX I

ORDINANCE 417

THE PEOPLE OF THE CITY OF KNERR DO ENACT AS FOLLOWS:

PURPOSE: An Act to promote tolerance of all persons and to establish and to protect the civil rights of all persons in the City of Knerr.

Ordinance 417 of the City of Knerr Civil Rights Code is HEREBY amended as follows:

Section 1. Definitions

For purposes of this chapter, the following terms have the following meanings:

(a) Public places of accommodation are HEREBY defined as those engaging in commerce which are open to members of the public and/or other businesses. They include any business offering to sell or provide for sale, rental, or lease any legal goods or services. Places of public accommodation SHALL include, but are not limited to restaurants, bars, gasoline stations, or establishments that sell, rent, lease, or service automobiles; any retail store or wholesale store, department stores, movie theaters, sporting arenas, florists, hair salons, cosmetologists, urgent cares, barbershops, and any inn, bed and breakfast, motel, or hotel that offers five or more rooms for rent.

(b) Commerce includes the trade, sales, trafficking, and providing of goods and services.

Section 2. Findings

The City of Knerr Town Council finds and declares the following:

(a) A positive relationship between the City of Knerr's business community and consumers is important to the economic health of the City of Knerr. Tolerance of differences is an essential component of establishing this positive relationship.

(b) The United States Supreme Court has HELD that the Fourteenth Amendment to the United States Constitution protects all persons equally regardless of their race, color, religion, sex, sexual orientation, national origin, or residency status.

Section 3. Public Accommodations

No public place of accommodation in the City of Knerr engaged in commerce SHALL refuse to serve or provide service or sell goods or services to any person on the basis of race, color, religion, sex, sexual orientation, national origin, or residency status.

Section 4. Contracts

(a) The City of Knerr will not enter into any contract or honor any contract with any person found guilty of any hate crime as defined by the Laws of the State of Olympus.

(b) The City of Knerr will not enter into any contract or honor any existing contract with any person who or any business that knowingly and intentionally makes a financial contribution to any group or organization that the Attorney General of the State of Olympus designates a hate group.

Section 5. Penalties

Failure to comply with this Act is punishable by possible fine and/or loss of state license. Exceptions to this law can be made for persons who or businesses that make contributions to groups approved by the City Council provided that the amount be equal to the contribution total in question.

Section 6. Exemptions

Religious clergy and organizations are EXEMPT from this ordinance.

Section 7. Enforcement

The Knerr City Attorney **SHALL** have the authority to enforce this Act. This Act SHALL not be applied retroactively.

Section 8. Effective Date

This Act **SHALL** be effective beginning July 1, 2017.

APPENDIX II

Single Bias Hate Crimes in the City of Knerr

	Total	Race/Ethnicity	Religion	Sexual Identity	Gender Identity	Disability	Gender
2003	44	23	12	8	0	1	0
2004	46	23	12	9	1	0	1
2005	46	23	12	10	0	0	1
2006	48	24	13	10	1	0	0
2007	50	23	15	11	0	1	0
2008	50	25	14	9	0	1	1
2009	49	25	12	12	0	0	0
2010	50	23	14	10	1	1	1
2011	50	23	14	10	1	1	1
2012	55	28	16	10	0	1	0
2013	60	33	16	10	1	0	0
2014	65	35	15	15	0	0	0
2015	72	38	16	16	1	0	1
2016	80	40	17	20	1	1	1
2017	91	45	17	26	1	1	1
2018	100	50	17	30	1	1	1

TABLE OF AUTHORITIES

Issue 1 Cases

Issue 2 Cases