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ABSTRACT

Following a series of controversial social media posts by actress Gina Carano, a cast member of the Disney+ *Star Wars* series, *The Mandalorian*, Disney terminated her employment on the show and announced that Carano would not appear in any future *Star Wars* projects. According to Disney, Carano was terminated because the views expressed in her posts did not align with the company's values. Carano filed suit against Disney, claiming Disney violated California state labor laws that generally prohibit employers from sanctioning employees for their political activities. In response, Disney claims that the First Amendment right of expressive association provides an absolute defense to Carano's action. Disney argues that this right allows an employer who is engaged in expressive activity, or protected speech, to terminate employees who the employer believes will interfere with or compromise the message the employer wants to send with its speech, even when that termination would otherwise violate the law. In essence, Disney is arguing that the high-profile, controversial positions Carano has taken detracts viewers of *The Mandalorian* from the show's messages, and that the First Amendment protects its decision to terminate her employment as a result. This article examines case law on the right of expressive association, as well as the main arguments made by each of the parties in the case, to conclude that the weight of authority is on Disney's side.

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I. INTRODUCTION

In 2018, actress Gina Carano was hired by Disney to play the role of Cara Dune on the Disney+ *Star Wars* series, *The Mandalorian*.[2] Carano's character was "an instant fan favorite," making such an impact in the first two seasons of *The Mandalorian* that in late 2020, Carano was informed that her character would be a lead character in a new *Star Wars* spinoff series entitled *Rangers of the New Republic*.[3] This came to an end on February 10, 2021, when Disney announced that due to Carano's expression of controversial political opinions on social media, particularly one in which she "trivialize[d] the Holocaust by comparing criticism of political conservatives to the annihilation of millions of Jewish people," she had been terminated from her role as Cara Dune.[4] Later that year, Disney cancelled its planned *Rangers of the New Republic* series that was to feature Carano's character.[5]

In response, Carano filed suit against Disney for wrongful termination, based on California laws that generally prohibit employers from sanctioning employees for their political activities.[6] Disney's defense to Carano's claims was that the First Amendment protected their decision to terminate Carano. In particular, Disney argued that because it was an entity engaged in creating expression, or protected speech, its termination of Carano was protected by a First Amendment principle that prevents the government from requiring "an employer engaged in speech to speak through an employee whose own views or public profile could compromise the employer's own message, even if the employee does not express her views on the job."[7] As Disney explained it,

> 'requiring an artistic organization to hire as its speakers people who are associated with [a controversial political] position will undermine its ability to send the particular aesthetic or artistic message that it wants to send,' because 'hearing even neutral artistic material from someone who has become well-known for political views may make that material seem ideologically laden, or at least may significantly distract from the artistic message.'[8]

Thus, Disney argued that audience awareness of Carano's controversial public stances on political issues, combined with her continuing presence on *The Mandalorian*, or the planned *Rangers of the New Republic* series, might alter or distract audiences from whatever artistic messages Disney sought to provide with those programs.[9] As such, Disney claimed the First Amendment protects it from any government action requiring it to continue to employ Carano on those shows, or from punishing Disney for terminating her employment as a result.[10]

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[2] Compl. at 6, Carano v. Walt Disney Co., No. 24-cv-1009 (C.D. Cal. filed Feb. 6, 2024) [hereinafter Carano Complaint].
[3] *Id.* at 7-8.
[4] *Id.* at 8.
[5] Liz Declan, *How Star Wars Reworked Cancelled TV Show Rangers of the New Republic*, SCREEN RANT (Apr. 20, 2024), https://screenrant.com/star-wars-rangers-of-the-new-republic-reworked/.
[6] Carano Complaint, *supra* note 2, at 49-52.
[7] Motion to Dismiss Plaintiff's Complaint at 3, No. 24-cv-1009 (C.D. Cal. Filed April 9, 2024) [hereinafter Disney Motion] (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573-75 (1995)).
[8] *Id.* (citing and quoting Eugene Volokh, *Reasons Not to Limit Private-Employer-Imposed Speech Restrictions: The Employer's Own Free Speech Rights?*, REASON: THE VOLOKH CONSPIRACY (Aug. 5, 2022), https://reason.com/volokh/2022/08/05/reasons-not-to-limit-private-employer-imposed-speech-restrictions-the-employers-own-free-speech-rights/ [hereinafter Volokh, *Online 2022*]).
[9] *Id*. (citations omitted).
[10] *Id*. at 2-3 (citations omitted).

This article focuses on the First Amendment issues raised by Carano's claims and Disney's defense to those claims. Part II provides an overview of Carano's allegations and Disney's response and defense to those allegations. Next, Part III of the article examines the level of First Amendment protection—or the lack thereof—provided to employees against their employers. Part IV then focuses on the First Amendment right of expressive association, and the two leading Supreme Court cases dealing with that right: *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* (1995)[11] and *Boy Scouts of America v. Dale* (2000).[12] In addition, other significant cases that apply the principles of those two cases are examined. Then, in Part V, the principles from these cases are applied to the present case, in conjunction with further consideration of Carano's arguments and Disney's responses to those arguments. Part VI of the article concludes that the weight of authority supports Disney's First Amendment defense to Carano's claims and explores the implication of such a decision on other actors.

II. CARANO'S COMPLAINT AND DISNEY'S RESPONSE

In February 2024, actress Gina Carano filed a lawsuit against Disney, Lucasfilm, and Huckleberry Industries (collectively, Disney or Defendants) for wrongful termination. As noted, Disney terminated Carano's employment as an actor playing the role of Cara Dune on the *Star Wars* TV series *The Mandalorian*, over posts Carano had made on her social media sites "expressing her personal political views, opinions and beliefs."[13] Carano argues that her termination had nothing to do with her performance as an actress, but rather was "because her political opinions did not align with those of Disney management."[14]

Carano's complaint details her experiences posting on social media, and the responses of Disney and other social media users to her social media posts and interactions. As Carano describes, she posted and participated in social media discussions on a number of hot-button issues, including the Black Lives Matter movement,[15] Covid-lockdowns,[16] and voter fraud in the 2020 election.[17] As Carano explains it, "over the summer of 2020 [she] was constantly harassed and bullied on social media to support various causes, adopt various ideologies, and hold herself out in certain ways in her social media profiles."[18] According to Carano, she was harassed for not espousing progressive viewpoints,[19] including being called "a racist for not publicly adopting the Black Lives Matter moniker and a 'transphobic bitch' for not including pronouns in her profile's

[11] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).
[12] Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).
[13] Carano Complaint, *supra* note 2, at 2-4.
[14] *Id.* at 9 ("Elon Musk, the owner of X, formerly known as Twitter, announced last August that he would pay the legal bills of employees who had been fired for their posts on his platform. He later agreed to fund Carano's lawsuit against Disney."). Gene Maddaus, *Disney Argues It Had a First Amendment Right to Fire Gina Carano for Offensive Posts*, VARIETY (Apr. 10, 2024), https://variety.com/2024/biz/news/disney-gina-carano-first-amendment-fired-1235966434/.
[15] Carano Complaint, *supra* note 2, at 11-15.
[16] *Id*. at 18.
[17] *Id.* at 28-30 (citations omitted).
[18] *Id*. at 11.
[19] *Id*. at 10.

biography section."[20] Carano's social media interactions on her unwillingness to list pronouns on her profile in support of transgender rights[21] illustrate the types of social media interactions in which Carano involved herself.

Carano reports that she was constantly harassed and pressured on social media to add pronouns to her profile.[22] This harassment increased after Carano allegedly liked a post that some viewed as being unsupportive of the transgender community.[23] Subsequently, Carano was maligned by social media users for not including pronouns in her profile.[24] One such post stated, "Gina just so you know, pronouns are a part of most languages and putting them in your bio is just a decent thing to do . . . So you liking tweets that mocks that just sits wrong with many people."[25]

In response to the criticism and "abuse," Carano listed the words "boop/bop/beep" in her profile, referencing sounds *Star Wars* droids would make.[26] Deleting the post after a short time,[27] Carano explained on social media that she previously hadn't understood why people were putting pronouns in their profiles, but after talking to one of her co-stars about it, she did now. She accompanied the explanation with a post that stated, "I won't be putting them in my bio but good for all of you who choose to. I stand against bullying, especially the most vulnerable & freedom to choose."[28] Carano reports that this resulted in "many praising her for standing up to bullies and others accusing her of mocking transgender individuals."[29]

In a later post, Carano explained to a social media user who didn't understand the controversy that,

> They're mad cuz I won't put pronouns in my bio to show my support for trans lives. After months of harassing me in every way. I decided to put 3 VERY controversial words in my bio ... beep/bop/boop. I'm not against trans lives at all. They need to find less abusive representation.[30]

In another post, Carano stated, "I don't think trans people would like all of you trying to force a woman to put something in her bio through harassment & name calling EVERYDAY for MONTHS. Such as 'Racist' 'Transphobe' 'Bitch' 'Weirdo' 'I hope you die' 'I hope you lose your career' 'your fat, you're ugly'."[31]

In one of its court filings, Disney characterizes Carano's boop/bop/beep post as "openly mocking those with different views … "[32] On the other hand, one of Carano's social media posts explains that "Beep/bop/boop has zero to do with mocking trans people," but rather "to do with exposing the bullying mentality of the mob that has taken over the voices of many genuine

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[20] *Id*. at 11 (citing Joanna Robinson, *As Gina Carano and Star Wars Fans Clash, Hero Worship Turns to Scorn*, VANITY FAIR (Nov. 19, 2020), http://tinyurl.com/3849dku5).
[21] *Id*. at 19-25.
[22] *Id*. at 19.
[23] *Id*. at 20 (discussing Spencer Baculi, *The Mandalorian Star Gina Carano Accused of Transphobia for Refusal to List Pronouns in Twitter Bio*, BOUNDING INTO COMICS (Sept. 14, 2020), http://tinyurl.com/5n7xszmn).
[24] *Id.* at 20-21.
[25] *Id*. at 21.
[26] *Id*. at 21, 25.
[27] *Id*. at 21.
[28] *Id*. at 22.
[29] *Id*.
[30] *Id*. at 23.
[31] *Id*.
[32] Disney Motion, *supra* note 7, at 5.

causes."[33] Carano further explained that she thought that referencing droid noises "would simply be a playful way to defuse all the harassment she had received on social media and 'a fun way of expressing independence and freedom to do whatever you want to do with your social media accounts' and respond to 'the trolls and bots, nothing more.'"[34] Carano also reports that many trans people came to her support, pointing to a post that said, "I stand with Gina, coming from a trans person and hearing everything that was going on, none of you respected consent at all. Harassing an individual to do something and then get mad when they make a harmless joke about it, it's fucking childish. Gina, you're amazing!"[35]

In addition to the beep/bop/boop post, Disney found other Carano social media posts troublesome,[36] and Carano's complaint describes some of the actions taken by Disney in response to those posts. These include her being subjected to long phone calls in which she was criticized and asked to explain her social media interactions,[37] being required to meet with representatives of GLAAD (Gay & Lesbian Alliance Against Discrimination),[38] and demanding that Carano issue a public apology for some of her posts.[39] As Carano characterizes it, Disney was "dismay[ed] that Carano's political views did not match what they expected from their stars."[40] Disney wanted Carano "to 'grow' and 'learn'" from the pronoun controversy, and until she did, Disney would not "allow her to speak to the media or include her in any promotions."[41]

In early 2021, Carano learned that Disney was monitoring a series of social media posts that called for Disney to "#FireGinaCarano."[42] In response, Carano subsequently made a post intended "to highlight the injustice of the mob seeking to destroy someone simply because of their political beliefs."[43] That post read:

> Because history is edited, most people today don't realize that to get to the point where Nazi soldiers could easily round up thousands of Jews, the government first made their own neighbors hate them simply for being Jews. How is that any different for hating someone for their political views?[44]

Disney subsequently released the following public statement to announce Carano's termination: "'Gina Carano is not currently employed by Lucasfilm and there are no plans for her to be in the future. Nevertheless, her social media posts denigrating people based on their cultural and religious identities are abhorrent and unacceptable.'"[45] In addition, Disney's CEO at the time, Bob Chapek stated that Carano was fired because she did not align with the company's values of respect, decency, integrity, and inclusion.[46]

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[33] Carano Complaint, *supra* note 2, at 24.
[34] *Id*. at 25.
[35] *Id*.
[36] *Id*. at 26-28.
[37] *Id*. at 26.
[38] *Id*.
[39] *Id*.
[40] *Id.* at 30.
[41] *Id.* at 27.
[42] *Id.* at 31.
[43] *Id.* at 34.
[44] *Id.* at 33.
[45] *Id*. at 8 (citing Daniel Holloway, *Lucasfilm, UTA Drop 'Mandalorian' Star Gina Carano Following Offensive Social Media Posts*, VARIETY (Feb. 10, 2021), http://tinyurl.com/3ac2rybe).
[46] *Id*. at 9 (citing Naledi Ushe, *Disney CEO Says Company Stands for 'Values That Are Universal' in Wake of Gina Carano's Firing*, PEOPLE MAG. (Mar. 9, 2021), http://tinyurl.com/mvkz39pe).

Carano asserts that with the Holocaust post, she was not "'denigrating people based on their cultural and religious identities,' as Lucasfilm claimed. Rather, she was doing just the opposite, opposing such denigration and targeting of people just because they hold different beliefs."[47] Carano explained that she chose to speak out on these issues because she believed people were being silenced and felt that fostering discussion was a positive step.[48] Carano claims she "was not seeking a political platform," but understood that simply expressing her views made her a target.[49] Carano also asserted that she had "constantly called for respect and decency when speaking with people and for respect and decency to be shown, as she did, when discussing important public issues."[50] Carano goes on to claim that by terminating her due to the content of her posts, Disney was "accusing her of the very things she fought against – the denigration of other people."[51]

In its motion to dismiss Carano's complaint, Disney provided its explanation for Carano's termination: "As Carano's own fame rose with her character's, Carano began engaging with show fans and the public in a manner that, in Disney's view, came to distract from and undermine Disney's own expressive efforts."[52] More specifically, Disney alleged that through social media, "Carano made public declarations blaming pandemic-related closure orders and vaccine mandates for causing widespread suicides and murders, attacking the legitimacy of the 2020 Presidential election, and mocking people who identify their pronouns to show support for transgender rights."[53] According to Disney, though, "[t]he coup de grace came in February 2021, when Carano admittedly reposted on Instagram a post comparing criticism of politically conservative viewpoints to the Holocaust in Nazi Germany."[54] Disney states that "Carano's decision to publicly trivialize the Holocaust by comparing criticism of political conservatives to the annihilation of millions of Jewish people—notably, not 'thousands'—was the final straw for Disney."[55] Thus, Disney asserts that it ended its employment of Carano in its *Star Wars* series to ensure their artistic programing was not associated with Carano's "offensive" public comments.[56]

Carano's lawsuit alleges that Disney's termination of her employment because of her social media posts violated California labor law prohibitions against employers forbidding or preventing employees from engaging or participating in politics.[57] Carano also alleges that Disney violated another California labor law provision which prohibits employers from attempting to coerce or influence an employee's political activities by threatening to terminate their employment.[58] Furthermore, Carano claims that Disney violated California law by

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[47] *Id.* at 37.
[48] *Id*. at 32 (citing The Federalist, *The Gina Carano Interview: The Mandalorian Star Takes FDRLST Behind the Scenes Of Her Life & Politics*, YOUTUBE (Jan. 13, 2021), http://tinyurl.com/asprmk5h).
[49] *Id*. at 32 (citing The Federalist, *The Gina Carano Interview: The Mandalorian Star Takes FDRLST Behind the Scenes of Her Life & Politics*, YOUTUBE (Jan. 13, 2021), http://tinyurl.com/asprmk5h).
[50] *Id.* at 37.
[51] *Id.*
[52] Disney Motion, *supra* note 7, at 1.
[53] *Id.* at 1-2.
[54] *Id.* at 2.
[55] *Id.*
[56] *Id.* at 13.
[57] Carano Complaint, *supra* note 2, at 49-50 (citing CAL. LAB. CODE § 1101 (1937)).
[58] *Id.* at 50 (citing CAL. LAB. CODE § 1102 (1937)).

discriminating against her on the basis on her sex,[59] alleging that male coworkers who made social media posts like hers were not sanctioned or terminated for those posts.[60]

Disney argues that the First Amendment provides Carano the right to express her views "free from *government* sanction. But Disney—a private entity—has the right to disagree with Carano, as well as the right to decide that her presence would impair its artistic message."[61] Disney thus asserts "a constitutional right not to associate its artistic expression with Carano's speech,"[62] based on the principle that "a creative production enterprise [such as itself] is entitled to broad deference in deciding which performers to employ to express its artistic messages."[63] Accordingly, Disney argues that the First Amendment provides it with a complete defense to Carano's claims.[64]

Disney elaborates on its defense, arguing that the First Amendment "bars the state from dictating to expressive enterprises what to say, how to say it, and whom to say it through."[65] To support its argument, Disney points to *Boy Scouts of America v. Dale* for the principle that "a state cannot force an employer engaged in speech to speak through an employee whose own views or public profile could compromise the employer's own message, even if the employee does not express her views on the job."[66] This can be labelled the right of expressive association.[67] Accordingly, Disney argues that it has a First Amendment right to decide which messages it wants to convey to its audience through its programs and actors.[68] This includes the right to exclude actors from its programs that it believed "would impair its ability to convey its own preferred message."[69] Accordingly, Disney argues that it has a First Amendment "right to protect its own speech from association with Carano's high-profile, controversial speech."[70]

III. FIRST AMENDMENT PROTECTION (OR THE LACK THEREOF) FOR PRIVATE-SECTOR EMPLOYEES

The First Amendment provides protection to employees—and employers—from the government, but it does not protect private sector employees from their employers.[71] Private sector employers, who are not government entities, are "legally incapable of violating anyone's

[59] *Id.* at 55 (citing CAL. GOV'T CODE § 12940 (1980)).
[60] *Id.* at 55-56.
[61] Reply Memorandum for Walt Disney Co. at 14, Carano v. Walt Disney Co., No. 24-cv-1009 (C.D. Cal. 2024) [hereinafter Disney Reply].
[62] Disney Motion, *supra* note 7, at 2.
[63] *Id.* at 1.
[64] *Id.* at 2.
[65] *Id.* at 2-3 (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573-75 (1995)).
[66] *Id*. at 3 (citing Boy Scouts of Am. v. Dale, 530 U.S. 640, 650-53 (2000)).
[67] *See Dale*, 530 U.S. at 648.
[68] Disney Motion, *supra* note 7, at 11.
[69] *Id.* at 6.
[70] *Id.* at 7.
[71] Andrew Kragie, *Free Speech Rights in Private Employment? The First Amendment, the Present Patchwork, and a Balanced Improvement*, 21 FIRST AMEND. L. REV. 222, 229 (2023).

First Amendment rights."[72] As Disney is a private sector employer,[73] the First Amendment does not protect Carano from Disney retaliating against her because of her speech.[74]

Furthermore, private employment in the U.S. is generally assumed to be "at will," meaning either the employer or employee can end the relationship at any time.[75] Because employment at will does not restrict an employers' rights to sanction or terminate employees, courts have allowed employers to restrict employee speech within the workplace as well as outside of it.[76] Accordingly, at-will workers can be fired for exercising their free speech rights.[77]

Employment at-will is the legal default that applies in the absence of an agreement between the parties to the contrary. Employers and employees may agree that the employment relationship is on some other basis, such as a fixed term through contract or a collective bargaining agreement with a union.[78]

Private sector employees are provided some federal protections, including through federal laws that prohibit discrimination based on race, sex, national origin, and the like.[79] Through anti-discrimination laws, private employees are protected from being fired or retaliated against based on their membership in protected classes.[80] However, these laws do not protect employees based on their speech.[81]

State law may also provide employees with some protections, although according to one estimate, state protections against employer retaliation for employees' private speech or political activities only cover about half of Americans.[82] These protections typically come from state statues or constitutions.[83] In California, where Carano based her claims, the law generally prohibits employers from terminating employees for engaging in political activities.[84] However, these federal and state protections are exceptions to the employment-at-will doctrine, which, absent an employment contract to the contrary, allows employers "to terminate employment at any time and for any reason or no reason at all, though not for a reason that is specifically

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[72] *Id.* at 229 (quoting Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 819 (4th Cir. 2004) (en banc) (rejecting First Amendment claims of private-sector worker fired after refusing to remove Confederate-flag stickers from his toolbox)).

[73] *See, e.g.*, Dante Chinni, *The Enormous Numbers Behind DeSantis' Fight with Disney*, NBC NEWS (Apr. 23, 2023), https://www.nbcnews.com/meet-the-press/data-download/enormous-numbers-desantis-fight-disney-rcna81019.

[74] It should be noted that Carano makes no allegations that Disney violated her First Amendment rights.

[75] Ann C. McGinley & Ryan P. McGinley-Stempel, *Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media*, 30 HOFSTRA LAB. & EMP. L.J. 75, 83 (2012) (citing HORACE GAY WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877)).

[76] *Id.* at 78 (citing City of San Diego v. Roe, 543 U.S. 77 (2004) (stating that the employer did not violate the employee's First Amendment rights when it fired him for actions taken outside of the workplace)).

[77] Kragie, *supra* note 71, at 226.

[78] *Id.* at 224-25.

[79] Chloe M. Gordils, *Google, Charlottesville, and the Need to Protect Private Employees' Political Speech*, 84 BROOKLYN L. REV. 189, 190 (2018) (citing U.S. CONST. amend. I; Eugene Volokh, *Can Private Employers Fire Employees for Going to a White Supremacist Rally?*, WASH. POST: VOLOKH CONSPIRACY OPINION (Aug. 16, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/08/16/can-private-employers-fire-employees-for-going-to-a-white-supremacist-rally/?utm_term=.a33081c522f9 [https://perma.cc/EW59-9ENH]).

[80] *Id*. (citing 42 U.S.C. § 2000e-2(a)).

[81] Kragie, *supra* note 71, at 234.

[82] Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 297 (2012).

[83] Gordils, *supra* note 79, at 190 (citing Mark T. Carroll, *Protecting Private Employees' Freedom of Political Speech*, 18 HARV. J. ON LEGIS. 35, 41 (1981)).

[84] Carano Complaint, *supra* note 2, at 49-50, 55-56 (citing CAL. LAB. CODE § 1101).

prohibited by law.[85] And in the case of expressive association, a company's termination of an employee for a reason otherwise forbidden by law may nevertheless be protected under the First Amendment.[86]

IV. THE RIGHT OF EXPRESSIVE ASSOCIATION

The right of expressive association has been characterized by the Supreme Court as "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[87] The Court has also described this First Amendment right as a "right to associate for the purpose of speaking,"[88] which is closely linked to the First Amendment guarantees of freedom of speech and freedom of association.[89] Constitutional protection has been accorded to the right of expressive association because the "right to speak is often exercised most effectively by combining one's voice with the voices of others,"[90] which can promote and enhance "'[e]ffective advocacy of both public and private points of view, particularly controversial ones.'"[91]

To help support its First Amendment defense, Disney points to an article written by one of Carano's lawyers, Eugene Volokh, arguing that "Carano's own counsel has acknowledged that 'organizations that create speech products may be free to refuse to include speakers whose outside speech undermines the organization's message.'"[92] Volokh's justification for this is that,

> 'requiring an artistic organization to hire as its speakers people who are associated with [a controversial political] position will undermine its ability to send the particular aesthetic or artistic message that it wants to send,' because 'hearing even neutral artistic material from someone who has become well-known for political views may make that material seem ideologically laden, or at least may significantly distract from the artistic message.'[93]

Volokh notes there are a variety of ways that an employee's speech might damage an employer, such as by disparaging or otherwise adversely reflecting on the employer, or by alienating or causing negative reactions from the employer's customers or other employees.[94] In these ways, being required to employ a person who publicly holds certain views might undermine the

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[85] Cynthia Estlund, *Can Employees Have Free Speech Rights Without Due Process Rights (in the Private Sector Workplace)?*, 2 J. FREE SPEECH L. 259, 263 (2022) (citation omitted).
[86] *See* Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 578-79 (1995); Boy Scouts of America v. Dale, 530 U.S. 640, 659-61 (2000).
[87] Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984).
[88] Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 68 (2006) (citing *Dale*, 530 U.S. at 644).
[89] U.S. CONST. amend. I.
[90] *Roberts*, 468 U.S. at 622.
[91] N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988) (quoting and citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958)).
[92] Disney Motion, *supra* note 7, at 3 (citing Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 334 (2012) [hereinafter Volokh, *Journal Article 2012*]).
[93] *Id.* (citing Volokh, *Online 2022*, *supra* note 8).
[94] Eugene Volokh, *Should the Law Limit Private-Employer-Imposed Speech Restrictions?*, 2 J. FREE SPEECH L. 269, 273-74 (2022) [hereinafter Volokh*, Journal Article 2022*].

employer's ability to effectively express its own messages.[95] Thus, argues Volokh, an employer can reasonably dissociate from their employee when the employee's speech or politics alienates coworkers, customers, or political figures. [96] As a result, employers that make speech products "may be free to refuse to include speakers whose outside speech undermines the organization's message."[97] Volokh suggests that this principle has particular force "for employees such as broadcasting and print reporters, opinion columnists, actors, and the like."[98]

This right of expressive association is not absolute.[99] "Infringements on that 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."[100] In addition, this principle doesn't apply to employers and employees who are not creating speech products like movies and television shows that qualify as protected speech.[101] Disney, as the producer of movies and TV shows, is engaged in creating speech products, as would be the actors performing in those productions. However, as Volokh explains, most employees don't speak on their employer's behalf.[102] For employees such as these, and for employers not engaged in speech, "state law can protect employee political activity 'without violating the employer's free speech rights.'"[103]

The government may violate this right of expressive association when it "interferes with individuals' selection of those with whom they wish to join in a common endeavor."[104] One way that this might occur could be through a government regulation that requires a group to include members the group doesn't want, as this may affect a group's expression and how that expression is understood by the audience.[105] Such a requirement can violate a group's right of expressive association as the forced inclusion of a person can significantly affect the group's ability to advocate its preferred viewpoints.[106] The freedom of association thus "'plainly presupposes a freedom not to associate.'"[107]

Forcing a group to accept an unwanted member that affects the group's speech is similar to compelled speech, which is generally prohibited by the First Amendment. As the Supreme

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[95] *Id.* at 280.
[96] *Id.* at 301.
[97] *Id*. at 334 (citing Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 892, 904–06 (1st Cir. 1988) (suggesting that symphony might well have a First Amendment right to refuse to let plaintiff narrate a performance, even if the reason for the refusal stemmed from plaintiff's past speech and would therefore presumptively violate the Massachusetts Civil Rights Act); Gombossy v. Hartford Courant Co., No. X07CV095033169S, 2010 WL 3025512, at *4 (Conn. Super. Ct. June 29, 2010) (concluding that the First Amendment allowed a newspaper to fire someone based on his past articles for the newspaper); *see also* Epworth v. Journal Register Co., 12 Conn. L. Rptr. 585 (1994)).
[98] Volokh, *Journal Article 2022*, *supra* note 94, at 283.
[99] *Roberts*, 468 U.S. at 623.
[100] *Id.* (citing Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91-92 (1982); Democratic Party of United States v. Wisconsin, 450 U.S. 107, 124 (1981); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam); Cousins v. Wigoda, 419 U.S. 477, 489 (1975); American Party of Texas v. White, 415 U.S. 767, 780-781 (1974); NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 486, 488 (1960)).
[101] Disney Motion, *supra* note 7, at 3 (citing Volokh, *Journal Article 2022*, *supra* note 94, at 334).
[102] *Id.* (citing Volokh, *Journal Article 2022*, *supra* note 94, at 2).
[103] *Id.* at 3-4 (citing Volokh, *Online 2022*, *supra* note 8, at 2.).
[104] *Roberts*, 468 U.S. at 618.
[105] Boy Scouts of Am. v. Dale, 530 U.S. 640, 648, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000) (quoting *Roberts*, 468 U.S. at 623).
[106] *Id.* (citing New York State Club Ass'n., Inc. v. City of New York, 487 U.S. 1, 13 108 S. Ct. 2225 (1988)).
[107] *Id.* (quoting *Roberts*, 468 U.S. at 623).

Court has observed, "freedom of speech prohibits the government from telling people what they must say."[108] For example, the Court found a state law requiring schoolchildren to recite the Pledge of Allegiance and salute the flag unconstitutional.[109] It similarly found a law requiring New Hampshire motorists to display the state motto on their license plates unconstitutional.[110]

However, compelled speech violations are not limited to cases where individuals are required to communicate a government-mandated message.[111] They can also occur when a speaker is forced to present or provide a platform for another speaker's message[112] in such a way that the first speaker's message is altered or affected as a result.[113] Thus, courts have held that government actions compelling individuals to express or support views they find objectionable violate the First Amendment.[114] Consequently, a speaker has "the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents."[115]

For a group to be protected by the First Amendment right of expressive association, courts must first determine whether the group engages in expressive association.[116] It is not necessary that a group's purpose is to disseminate a particular message for this protection to apply.[117] Thus, this protection is not limited to advocacy groups.[118] However, for a group to be protected by the right of expressive association, it must engage in some type of expression.[119]

Just as a group need not have the objective of disseminating a message for protection to apply, neither must the group have a specific, defined message that it wishes to disseminate.[120] For example, the Supreme Court has stated that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."[121] In addition, it is not necessary that every group member agrees on every issue for the group's policy to qualify as expressive association. [122] Moreover, whether a court agrees or disagrees with the message disseminated by a group does not factor in this analysis.[123] As the Supreme Court has stated, the protections of the First Amendment here do not "belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find

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[108] Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 61, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006).
[109] *Id*. (citing W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943)).
[110] *Id*. (citing Wooley v. Maynard, 430 U.S. 705, 717 (1977)).
[111] *Id*. at 63.
[112] *Id*. (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 566 (1995) (state law cannot require a parade to include a group whose message the parade's organizer does not wish to send); Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 20-21 (1986) (plurality opinion) (state agency cannot require a utility company to include a third-party newsletter in its billing envelope); Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (right-of-reply statute violates editors' right to determine the content of their newspapers)).
[113] *Id*.
[114] Green v. Miss U.S.A., LLC, 52 F.4th 773, 783 (9th Cir. 2022) (quoting Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2463 (2018)).
[115] *Pac. Gas & Elec.*, 475 U.S. at 14 (citing Buckley v. Valeo, 424 U.S. 1, 49, and n. 55 (1976)).
[116] Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).
[117] *Id*. at 655.
[118] *Id*. at 648.
[119] *Dale*, 530 U.S. at 648.
[120] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569-70 (1995).
[121] *Id*.
[122] *Dale*, 530 U.S. at 655.
[123] *See id.* at 661.

misinformed or offensive."[124] Thus, for protection to apply, "[a]n association must merely engage in expressive activity that could be impaired" by the government action.[125] The article next provides an overview of the leading cases in which a group's right of expressive association was found to have been violated.

IV. CASES ON THE RIGHT OF EXPRESSIVE ASSOCIATION

One of the leading Supreme Court opinions on expressive association, and a case on which Disney heavily relies for its defense, is *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*.[126] In this case, the Irish-American Gay, Lesbian & Bisexual Group of Boston (GLIB) was denied permission to participate in a Saint Patrick's Day parade sponsored by the South Boston Allied War Veterans Council (the Council).[127] GLIB argued that its exclusion from the parade violated Massachusetts' public accommodations law, which "prohibits discrimination on the basis of 'race, color, religious creed, national origin, sex, sexual orientation . . ., deafness, blindness or any physical or mental disability or ancestry' in 'the admission of any person to, or treatment in any place of public accommodation, resort or amusement.'"[128] The issue for the Court in the case was whether Massachusetts could require the parade organizers, who were private citizens, to include marchers that convey a message they do not support. "[129] The Court held that such a requirement violates the First Amendment.[130]

The *Hurley* Court was first tasked with determining whether the parade constituted expression implicating the First Amendment.[131] Finding that the term "parade" indicated "marchers who are making some sort of collective point, not just to each other but to bystanders along the way,"[132] the Court concluded that parades are a form of expression.[133] In coming to this conclusion, the Court specified that "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 Schoenberg, or Jabberwocky verse of Lewis Carroll."[134] Thus, speakers retain their First Amendment protection even if their speech does not focus on a single, clearly defined message.[135] Elaborating on this point, the Court noted that the Council, as the parade's sponsor

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[124] 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2317 (2023) (citing Federal Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 468-469 (2007) (opinion of Robert, C. J.) (observing that "a speaker's motivation is entirely irrelevant" (internal quotation marks omitted)); National Socialist Party of America v. Skokie, 432 U.S. 43, 43-44 (1977) (per curiam) (upholding free-speech rights of participants in a Nazi parade); Snyder v. Phelps, 562 U.S. 443, 456-57 (2011) (same for protestors of a soldier's funeral)).
[125] *Dale*, 530 U.S. at 655.
[126] 515 U.S. 557 (1995).
[127] *Id.* at 560-61.
[128] *Id.* at 572 (citing MASS. GEN. LAWS § 272:98 (1992)).
[129] *Id.* at 559.
[130] *Id.*
[131] *Id.* at 567-68.
[132] *Id.* at 568 (citing SUSAN DAVIS, PARADES AND POWER: STREET THEATRE IN NINETEENTH-CENTURY PHILADELPHIA 171 (1986)).
[133] *Id.*
[134] *Id.* at 569.
[135] *Id.* at 569-70.

and organizer, "selects the expressive units of the parade from potential participants, and though [this] may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day."[136]

The *Hurley* Court also found that GLIB's marching in the parade would likewise send a message, although it too might not be "a narrow, succinctly articulable message."[137] Allowing that GLIB's message "is not wholly articulate," the Court nevertheless found that,

> a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals.[138]

Thus, even though it was not the purpose of the parade to express any views about sexual orientation, the Court nevertheless allowed the parade's organizers to exclude certain people from participating in the parade.[139]

The Court noted that every "participating unit" marching in a parade "affects the message conveyed by the [parade's] private organizers."[140] As a result, the Court found that requiring the organizers to include a group in the parade that they would otherwise exclude required the organizers to alter the parade's expressive content.[141] Here, the Court observed that "'all speech inherently involves choices of what to say and what to leave unsaid,'" meaning that "one who chooses to speak may also decide 'what not to say.'"[142] Thus, requiring the parade organizers to allow GLIB to march in the parade violated the fundamental First Amendment principle that speakers have autonomy to decide their own messages.[143] As the Court explained it, regardless of the Council's reason for excluding GLIB, the Council's choice in the matter is beyond the government's control.[144]

The basis for GLIB's claim that it had the right to be included in the parade was Massachusetts' public accommodations law, which prohibited discrimination on the basis of sexual orientation, among other things.[145] The Court observed that laws such as this are a legitimate use of state power when a legislature believes a particularly group has been the victim of discrimination, and as such, typically do not violate the First Amendment.[146] The Court also observed that the statute did not target the content of speech, but was rather focused on prohibiting discrimination against particular individuals in the provision of goods and services.[147] However, the Court reasoned,

> [w]hen the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever

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[136] *Id.* at 574.
[137] *Id.*
[138] *Id.*
[139] *Dale*, 530 U.S. at 655.
[140] *Hurley*, 515 U.S. at 572.
[141] *Id.* at 572-73.
[142] *Id.* at 573 (quoting and citing Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 11 (1986) (plurality opinion) (emphasis in original omitted)).
[143] *Id.* at 572-73.
[144] *Id.* at 575.
[145] *Id.* at 572 (citing MASS. GEN. LAWS § 272:98 (1992)).
[146] *Id.* (citing New York State Club Ass'n., Inc. v. City of New York, 487 U.S. 1, 11-16 (1988); Roberts v. United States Jaycees, 468 U.S. 609, 624-626 (1984); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-262 (1964)).
[147] *Id.*

> extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end,[148] this objective conflicts with a speaker's right to choose the content of its messages.

The Court thus concluded that "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[149] As a result, requiring the Council to include GLIB in the parade would force the Council to alter the message it wished to send with the parade,[150] which the Court found violated the First Amendment.[151]

The other leading Supreme Court case on expressive association which Disney heavily relies on to support its argument is *Boy Scouts of America v. Dale*.[152] In that case, James Dale, an openly gay man, was an adult member of the Boy Scouts and an assistant troopmaster.[153] Dale was informed by the Boy Scouts that his membership in the organization was revoked following the publication of a newspaper interview in which Dale discussed the need for homosexual teenagers to have gay role models. The reason provided for the revocation was that the Boy Scouts forbade homosexuals from being members.[154] Dale filed suit against the Boy Scouts, alleging that the organization had violated New Jersey's public accommodations law by revoking his membership because of his sexuality.[155]

To determine whether the Boy Scouts were protected by the First Amendment right of expressive association, the Supreme Court first considered whether the Boy Scouts "engage in some form of expression, whether it be public or private."[156] The Court observed that the Boy Scouts' general mission is "'To instill values in young people.'"[157] The Court further observed that the Boy Scouts sought to instill these values in its members by "having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values—both expressly and by example."[158] This led the Court to conclude that by seeking to instill such values, the Boy Scouts engaged in expressive activity.[159]

Having determined that the Boy Scouts engage in expressive activity, the Court was then required to determine whether requiring the Boy Scouts to include "Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints."[160] The Court accepted the Boy Scouts' assertion that it did "'not want to promote

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[148] *Id*. at 578.
[149] *Id*. at 579.
[150] *Id*. at 559.
[151] *Id*.
[152] 530 U.S. 640 (2000).
[153] *Id*. at 644.
[154] *Id*. at 644-45.
[155] *Id*. at 645.
[156] *Id*. at 658.
[157] *Id*. at 649.
[158] *Id*. at 649-50.
[159] *Id*. at 650 (citing Roberts v. United States Jaycees, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) ("Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.")).
[160] *Id*.

homosexual conduct as a legitimate form of behavior.'"[161] On this point, the Court observed that the New Jersey Supreme Court had come to a contrary conclusion.[162] The New Jersey Supreme Court concluded that excluding members based on their sexual orientation was inconsistent with the Boy Scouts' diversity initiatives and objective to reach "all eligible youth.."[163] The U.S. Supreme Court rejected this reasoning, stating that "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."[164] Noting that some members of the Boy Scouts may disagree with the organization's position on homosexuality, the Court found that the First Amendment does not require that every member of the group must agree on every issue for the group's policy to be expressive association.[165] The Court thus concluded that,

> The Boy Scouts has a First Amendment right to choose to send one message but not the other. The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.[166]

Having found that the Boy Scouts position on homosexuality qualified as expressive activity, the Court then had to "determine whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not 'promote homosexual conduct as a legitimate form of behavior.'"[167] On this point, the Court observed that just as it gave "deference to an association's assertions regarding the nature of its expression, [it] must also give deference to an association's view of what would impair its expression."[168] Here, the Court found that just as GLIB's marching in the St. Patrick's Day parade would have sent a message that the parade's organizers did not want to provide, so too would Dale's serving as an assistant scoutmaster have provided a message contrary to the Boy Scouts' beliefs.[169]

The Court's application of the state public accommodations law to require the Boy Scouts to allow Dale to serve as an assistant scoutmaster "would significantly burden the organization's right to oppose or disfavor homosexual conduct."[170] The court found that the government interests meant to be promoted by the state's public accommodations law did "not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association," leading the Court to hold that the application of the state's public accommodations law in this instance violated the First Amendment.[171] At the same time, the Court observed that it did not matter whether the Court felt that "the Boy Scouts' teachings with respect to homosexual conduct are

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[161] *Id.* at 651.
[162] *Id.* at 646-47 (quoting Dale v. Boy Scouts of Am., 734 A.2d 1196, 1223-24 (1999).
[163] *Id.* at 650-51 (quoting *Dale*, 734 A.2d at 1226).
[164] *Id.* at 651 (citing Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 124 (1981) ("As is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational."); Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 714 (1981) ("Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection.")).
[165] *Id.* at 655.
[166] *Id.* at 656.
[167] *Id.* at 653.
[168] *Id.* (citing *La Follette*, 450 U.S. at 123-24 (considering whether a Wisconsin law burdened the National Party's associational rights and stating that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party")).
[169] *Id.* at 654.
[170] *Id.* at 659.
[171] *Id.*

right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message."[172]

Both *Hurley* and *Dale* are U.S. Supreme Court decisions dealing with state public accommodation laws. Lower courts have also applied Hurley and Dale to public accommodations laws, and in other contexts as well. One such case *is Green v. Miss USA*, in which Anita Green, an openly transgender female, was denied permission to participate in the Miss United States of America Pageant (Pageant) for failing to meet the organization's requirement that she be a "natural born female" to be eligible to compete.[173] Green then sued the Pageant, arguing that the "natural born female" requirement violated Oregon's public accommodations law.[174] The Pageant's defense was that the forced inclusion of Green in the pageant would infringe on its free speech rights.[175]

To begin, the Ninth Circuit Court of Appeals observed that First Amendment protection was not limited to written or spoken words [176] and included "'various forms of entertainment and visual expression as purely expressive activities.'"[177] More specifically, this protection extends to beauty pageants, as beauty pageants blend speech with live performances, including music and dance, to convey a message. While the specific content of this message can differ from one pageant to another, it is widely recognized that beauty pageants are typically intended to represent the "ideal vision of American womanhood."[178] As the court saw it, pageants offer communities a platform to express and define their standards of appropriate femininity, both for their own members and for the audience.[179]

Regarding the Miss USA Pageant specifically, the court observed that the Pageant's requirements included that "contestants be 'between 18-28 years of age,' have 'never posed nude in film or print media,' and not be married or have given birth . . . and most relevant to our case, contestants must also be 'a natural born female.'"[180] The court observed that applicants who violated these requirements could be excluded from participating in the pageant, because, as the pageant explained it, such violations were inconsistent with their vision and message and did not further their efforts to produce community role models. [181]

Considering the way in which a pageant "expresses its view of womanhood," the court observed that a pageant speaks through its contestants. In other words, who a pageant allows to compete, and how it evaluates those contestants, determines the pageant's message.[182] On this

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[172] *Id.* at 661.
[173] Green v. Miss U.S.A., LLC, 52 F.4th 773, 777 (9th Cir. 2022).
[174] *Id.*
[175] *Id.* at 779.
[176] *Id.* at 780 (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995)).
[177] *Id.* (citing Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1060 (9th Cir. 2010)).
[178] *Id.* (citing MARGOT MIFFLIN, LOOKING FOR MISS AMERICA: A PAGEANT'S 100-YEAR QUEST TO DEFINE WOMANHOOD 9 (2020)).
[179] *Id.* (citing NINA BROWN ET AL., PERSPECTIVES: AN OPEN INTRODUCTION TO CULTURAL ANTHROPOLOGY 389 (2d ed. 2020)).
[180] *Green*, 52 F.4th at 778.
[181] *Id.*
[182] *Id.* at 780 (citing Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1062 (9th Cir. 2010) ("The process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds.") (emphasis omitted)).

point, the court observed that not allowing Green to compete "reinforces the Pageant's message that the ideal model of femininity is necessarily biologically female," which would be contradicted if the pageant were forced to include Green.[183]

Responding to the argument that one participant's inclusion would not significantly affect the message provided by the pageant,[184] the court stated that "'[s]peech must be viewed as a whole, and even one word or brush stroke can change its entire meaning.'"[185] The court noted that "'in *Hurley*, the Supreme Court determined that one banner in a parade of 20,000 participants changed the expressive content of the entire parade.'"[186] The reason for this was "because the parade's 'overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole.'"[187] The Supreme Court thus concluded that because the inclusion of GLIB's banner would have affected the overall message of the St. Patrick's Day parade, the parade's organizers had the right to decide whether or not to include that message.[188]

The court further observed that "[l]ike a parade, a pageant operates by 'combining multifarious voices' to make some 'sort of collective point.'"[189] In the present case, the Pageant defined,

> 'women' as being natural born females. The most natural and effective way for the Pageant to express this message is through its uniform selection of only biological females as pageant contestants. Therefore, allowing for the inclusion of even a single non-biological female as a 'woman' would certainly be an expressive decision revising the Pageant's definition.[190]

The court thus found that applying the state public accommodations law here would force the Pageant to allow Green to compete, which would alter its message. This was determined to be a content-based regulation and the court applied a strict scrutiny test.[191]

Applying strict scrutiny, the court noted that to be found constitutional, a content-based regulation must be shown by the government to be "narrowly tailored to serve compelling state interests.'"[192] The court observed that the interest advanced by the state, "'eliminating discrimination against LGBTQ individuals,'" to be a compelling interest, but found that "broad formulation" to be insufficient.[193] Here, the court also noted that courts have long been reluctant "to enforce anti-discrimination statutes in the speech context. '[A]s compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the First Amendment.'"[194] The implication of this was that "while 'antidiscrimination laws are generally constitutional, ... a 'peculiar' application that required speakers 'to alter their expressive content'

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[183] *Id*. at 790.
[184] *Id*. at 786.
[185] *Id*. (quoting Brush & Nib Studios v. City of Phoenix, 448 P.3d 890, 909 (Sup. Ct. Ariz. 2019)).
[186] *Id*. (quoting *Nib Studios*, 448 P.3d at 909).
[187] *Id*. (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 577 (1995)).
[188] *Id*. at 785 (citing *Hurley*, 515 U.S. at 574-75).
[189] *Id*. (citing *Hurley*, 515 U.S. at 568-69).
[190] *Id*. at 786 (emphasis omitted).
[191] *Id*. at 791 (citing Riley v. National Federation of Blind, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech.")).
[192] *Id*. (citing Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).
[193] *Id*. at 792 (citing *Hurley*, 515 U.S. at 577-78).
[194] *Id*. (citing Telescope Media Grp. v. Lucero, 936 F.3d 740, 755 (8th Cir. 2019)).

was not.'"[195] Having determined that applying the anti-discrimination law in the present case would alter the Pageant's message,[196] the court then noted, "[w]hen considering antidiscrimination interests in the special context of First Amendment expressive activity, the Supreme Court has directed lower courts to 'prevent the government from requiring [private organizations'] speech to serve as a public accommodation for others.'"[197] The court thus concluded that "[f]orcing the Pageant to accept Green as a participant would fundamentally alter the Pageant's expressive message in direct violation of the First Amendment."[198]

In another case, *Claybrooks v. ABC*, two African-American men, Nathaniel Claybrooks and Christopher Johnson, sued ABC after they unsuccessfully applied to be the "Bachelor" on the ABC reality show, *The Bachelor*.[199] They alleged that ABC intentionally cast only white Bachelors and Bachelorettes, fearing that the show's predominantly white viewers would find an interracial romance controversial.[200] The plaintiffs further alleged that "*The Bachelor* and *The Bachelorette* 'are examples of purposeful segregation in the media that perpetuates racial stereotypes and denies persons of color of opportunities in the entertainment industry.'"[201] The plaintiffs stated that because they and other minority applicants did not have an equal opportunity to contract to be the Bachelor or Bachelorette, ABC was in violation of a statute prohibiting discrimination in the formation of contracts.[202]

The court observed that the case involved two potentially conflicting governmental interests: preventing racist contracts and First Amendment free speech rights.[203] The court noted that the parties agreed that *The Bachelor* and *The Bachelorette* qualified as speech protected by the First Amendment; however, they disagreed on whether the casting decisions for those shows were also protected by the First Amendment.[204]

Considering the programs' casting, the court observed that casting decisions help determine an entertainment production's creative content, as producers rely on cast members to carry out the creative vision they have for the final production they want to provide to the public. As a result, "regulating the casting process necessarily regulates the end product."[205] This led the court to conclude that both the casting and resulting work are protected by freedom of speech.[206]

The court further observed that while media companies are subject to laws of general applicability, the Supreme Court has explicitly determined that the First Amendment can take precedence over antidiscrimination laws when it comes to protected speech,[207] then described the Supreme Court's holding in *Hurley* as an example of this.[208] The court reasoned that applying the

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[195] *Id*. (citing *Telescope Media*, 936 F.3d at 755; Christian Legal Soc'y v. Walker, 453 F.3d 853, 863 (7th Cir. 2006) ("[T]he Supreme Court has made it clear that antidiscrimination regulations may not be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint.")).
[196] *Id*.
[197] *Id*. (citing *Telescope Media*, 936 F.3d at 755).
[198] *Id*. at 783.
[199] Claybrooks v. ABC, Inc., 898 F. Supp. 2d 986, 989 (M.D. Tenn. 2012).
[200] *Id*.
[201] *Id*. at 990.
[202] *Id*. (discussing 42 U.S.C. § 1981).
[203] *Id*. at 992.
[204] *Id*. at 993.
[205] *Id*. at 999.
[206] *Id*. (alteration in original).
[207] *Id*. at 993 (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 568 (1995)).
[208] *Id*. at 993-96.

anti-discrimination law in the present case "would force the defendants to employ race-neutral criteria in the casting process," which would result in the government regulating "speech based on [its] content—i.e., the race(s) of the Shows' respective cast members."[209] This led the court to conclude that the shows' casting decisions were entitled to "First Amendment protection against the application of anti-discrimination statutes to that process."[210]

The court observed that the plaintiffs here "essentially seek to co-opt the Shows to showcase the plaintiffs' own preferred message of racial acceptance."[211] The court noted that:

> The defendants convincingly argue that applying anti-discrimination laws to casting decisions in this manner would threaten the content of various television programs and television networks. For example, the legality of any network targeting particular demographic groups would be called into question, including, *inter alia*, the Lifetime Network (targeted to female audiences), the Black Entertainment Channel (targeted to African-Americans), Telemundo (targeted to Latinos), the Jewish Channel, the Christian Broadcast Channel, the Inspiration Network (targeted to Protestants), and LOGO (targeted to gays and lesbians) . . . Similarly, the content of any television show that does not have a sufficiently diverse cast would be or would have been subject to court scrutiny, such as *The Jersey Shore* (all white cast members), *The Shahs of Beverly Hills* (a show about Persian-Americans living in Los Angeles), [and] *The Cosby Show* (a show with an African-American cast) . . . To the extent that these networks and programs discriminated and discriminate in their casting choices, would they not be subject to civil liability under prevailing state and/or federal antidiscrimination statutes, but for the First Amendment?[212]

The court went on to acknowledge that the:

> The plaintiffs' goals here are laudable: they seek to support the social acceptance of interracial relationships, to eradicate outdated racial taboos, and to encourage television networks not to perpetuate outdated racial stereotypes. Nevertheless, the First Amendment prevents the plaintiffs from effectuating these goals by forcing the defendants to employ race-neutral criteria in their casting decisions in order to "showcase" a more progressive message.[213]

All of this led the court to the conclusion that "whatever messages *The Bachelor* and *The Bachelorette* communicate or are intended to communicate—whether explicitly, implicitly, intentionally, or otherwise—the First Amendment protects the right of the producers of these Shows to craft and control those messages, based on whatever considerations the producers wish to take into account."[214] Consequently, the First Amendment protected the shows' producers' right "to select the elements (here, cast members) that support whatever expressive message the Shows convey or are intended to convey."[215]

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[209] *Id.* (alteration in original).
[210] *Id.*
[211] *Id.* at 996.
[212] *Id.*
[213] *Id.* at 1000.
[214] *Id.* (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995) ("A speaker has the autonomy to choose the content of his own message"); McDermott v. Ampersand Publ'g, LLC, 593 F.3d 950, 962 (9th Cir. 2010) (approving district court's refusal to grant injunction reinstating newspaper's discharged editorial staff members and reporters, because, "telling the newspaper that it must hire specified . . . editors and reporters . . . is bound to affect what gets published. *To the extent the publisher's choice of writers affects the expressive content* of its newspaper, the First Amendment protects that choice.") (emphasis added)).
[215] *Id.* (citing *Hurley*, 515 U.S. at 574).

Finally, in *Moore v. Hadestown Broadway*, Kim Moore, a black actress, was hired to perform in the Broadway musical *Hadestown*.[216] Moore was hired to be a member of the "Workers Chorus," which consisted of several actors performing as "Workers" within the Workers Chorus.[217] At one point in the show's run, the Workers Chorus was made up entirely of black cast members, including Moore.[218] This led the musical's choreographer David Neumann to email the cast of musical to apologize for the musical's providing a "white savior story" due to the all-black Workers Chorus.[219] Neumann's email stated that he and the show's producers did not view Orpheus, the main character, as a white savior.[220] Nevertheless, Neumann explained, the staging of the show with a white Orpheus, a white Hades, and an all-black Workers Chorus may have unintentionally told a harmful white savior story.[221] Seeking to avoid this, producers terminated Moore's employment as a member of the Workers Chorus and replaced her with a white actor.[222] Moore then sued the musical's production company (Production Company) for racial discrimination.[223]

The Production Company argued that it had a constitutional right to make casting decisions.[224] The Production Company argued that "[b]ecause the decision of whom to cast in its Musical is a form of creative expression protected by the First Amendment," the Production Company's decision to terminate Moore's employment to prevent the show from providing the unintended "white savior" message was protected.[225] The court accepted this explanation for Moore's termination, and found that this exercise of the Production Company's "creative expression and artistic decisions," including those involving casting, were protected by the First Amendment.[226] The court thus concluded that enforcing Moore's racial discrimination claims would infringe on the Production Company's First Amendment rights.[227] As the court explained, the First Amendment "forbids compelling a theater company to stage a performance in a manner that expresses a story the theater company does not wish to tell."[228]

In making its decision, the court relied on the analogous case of *Claybrooks v. ABC*, involving applicants for *The Bachelor*.[229] The court compared the two cases and noted that the present case involving the termination of the plaintiff's employment, rather than the defendants' decision not to cast aspiring Bachelors' before hiring them, did not affect the applicability of that case.[230] The court found this difference to be immaterial, as the "First Amendment protects [the Production Company's] creative decision to express its preferred message regardless of whether it made the decision in its initial casting calls or after the unintended message was brought to its

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[216] Moore v. Hadestown Broadway, LLC, 2024 U.S. Dist. LEXIS 40245, at *1-2 (S.D.N.Y. Mar. 7, 2024).
[217] *Id.* at 2.
[218] *Id.*
[219] *Id.*
[220] *Id.* at 3.
[221] *Id.* at 2-3.
[222] *Id.* at 4-5.
[223] *Id.* at 5-6.
[224] *Id.* at 42.
[225] *Id.*
[226] *Id.* at 47-48.
[227] *Id.* at 47.
[228] *Id.* at 53.
[229] *Id.* at 54-56 (discussing Claybrooks v. Am. Broad. Cos., 898 F. Supp. 2d 986 (M.D. Tenn. 2012)).
[230] *Id.* at 56.

attention after several performances of the Musical, as was the case here."[231] The court went on to observe that "[p]roducers of live theater may be required to make regular casting decisions based on how the cast composition affects the story in future performances. That may include removing cast members whose inclusion expresses unintended messages or adding actors whose inclusion conveys the message the producers intend to express."[232] Thus, "[b]ecause Defendant continues to stage regular performances of the Musical, the First Amendment's protection of its casting decision did not expire once a cast had been initially assembled."[233]

V. APPLICATION OF THE LAW TO THE PRESENT CASE

This article now turns to applying the principles on the First Amendment right of expressive association in the cases discussed above to Carano's claims and Disney's defense. First, to determine whether the right of expressive association applies in this case, it must be determined whether Disney "engage[s] in some form of expression, whether it be public or private."[234] Disney argues that it is engaged in expressive activity by creating and broadcasting *The Mandalorian*, and that television programs have been held to be expressive works protected by the First Amendment.[235] *The Mandalorian* is thus protected expression, and Disney, as its producer, engages in expressive association.

Disney then argues that it has a First Amendment right to decide that Carano's continued participation in its programming "would impair its artistic message."[236] To support this, Disney argues that employers that engage in expression have a First Amendment right to choose the employees that serve as the conduits of that expression, even when such choices would otherwise violate antidiscrimination laws.[237] Disney points to the Supreme Court decisions in *Hurley* and *Dale* for the proposition that "the state cannot force an employer engaged in expressive activity to express its message through speakers who, in the employer's view, would impair the employer's ability to convey its own preferred message."[238]

Carano's response to Disney's arguments here is to assert that the law does not provide expressive entities with as great a degree of protection as Disney claims, arguing that "no court has held that media employers have an absolute right to 'exclude' actors because of their viewpoints—religious, political, or otherwise."[239] Disney acknowledges that this protection does not provide "blanket immunity" to expressive entities,[240] explaining that the protection has limited scope.[241] For example, Disney notes that this protection only applies to employers

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[231] *Id.* at 56-57.
[232] *Id.* at 57.
[233] *Id.*
[234] Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).
[235] Disney Motion, *supra* note 7, at 12 (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981); Tamkin v. CBS Broad., Inc., 193 Cal. App. 4th 133, 143 (2011) ("The creation of a television show is an exercise of free speech.")).
[236] *Id.* at 13 (emphasis in original).
[237] *Id.* at 8.
[238] *Id.* at 8-9.
[239] Pl.'s Resp. to Def.'s Mot. at 4, Carano v. Walt Disney Co., No. 24-cv-1009 (C.D. Cal. 2024) [hereinafter Carano Response].
[240] Disney Motion, *supra* note 7, at 10.
[241] *Id*. at 10.

engaged in speech.[242] Moreover, as "the overwhelming majority of Disney's employees do not create speech products, their employment would not normally affect the company's art" and thus would not implicate the right of expressive association.[243] Furthermore, even for "the small subset of [Disney] employees" engaged in creating expressive works for the company, the right of expressive association would only apply to employment decisions "made to control one's own speech, such as avoiding associations that could 'impart[] a message' the speaker 'do[es] not wish to convey.'"[244] Disney explains that under the principles described in *Hurley* and *Dale*,

> Disney, not Carano (or the state), has the sole right to decide what artistic speech to produce and how to produce it. The rule also means that Disney, not Carano (or the state) is solely entitled to decide what messages it seeks to convey in its art and what associations might impair those efforts.[245]

Disney argues that it does not matter whether viewers of *The Mandalorian* who considered Carano's statements would find them as offensive as Disney did.[246] Rather, Disney argues, it has a right not to be forced to have its creative speech diluted by viewers thinking about her speech at all.[247]

Carano asserts that a flaw in Disney's argument is that Disney does not explain how Carano's off-the-job social media posts affected Disney's speech,[248] nor does Disney identify any particular message of theirs that was affected by Carano's social media comments.[249] As a result, Carano argues, Disney is unable to prove that Carano's off-screen remarks burden Disney's on-screen messaging.[250] This failure to identify the message that would be affected by Carano's continued employment, Carano argues, distinguishes her case from *Dale.* In *Dale*, the Court was able to conclude that "retaining an openly gay man as an Assistant Scoutmaster would undermine the Boy Scouts' message about sexual purity and 'significantly affect [the Boy Scouts'] expression.'"[251] Carano likewise distinguishes *Green*, in which the court explained that "forcing the pageant to accept a male contestant, even one who had undergone hormone and surgical treatments to appear female, would deny the pageant the ability to communicate its message."[252] According to Carano, in both cases, "the question was whether the employees' speech sufficiently 'undermine[s] the employer's message.'"[253] That, Carano argues, is a question of fact, "and cannot be based either on 'simply ... asserting' a conflict or relying simply on potential public disapproval of an actor's beliefs."[254]

In contrast to Carano's assertions on these points; however, courts have not required a specific message to be identified for the right of expressive association to apply. As the Supreme Court has stated, "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as

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[242] *Id*. at 11 (citing Volokh, *Online 2022*, *supra* note 8).
[243] *Id*. at 10.
[244] *Id.* (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 559 (1995)).
[245] *Id.* at 14.
[246] *Id.*
[247] *Id.* (citing Boy Scouts of Am. v. Dale, 530 U.S. 640, 654 (2000)).
[248] Carano Response, *supra* note 240, at 6.
[249] *Id.* at 12.
[250] *Id.*
[251] *Id.* at 12-13 (citing *Dale*, 530 U.S. at 656).
[252] *Id.* at 13 (citing Green v. Miss U.S.A., LLC, 52 F.4th 773, 782-83 (9th Cir. 2022)).
[253] *Id*. at 16 (citing Volokh, *Online 2022*, *supra* note 8).
[254] *Id*. (citing *Dale*, 530 U.S. at 653).

the exclusive subject matter of the speech."[255] In fact, the Court has specified that "a narrow, succinctly articulable message is not a condition of constitutional protection" in these circumstances.[256] Furthermore, the Court has highlighted the importance of giving "deference to an association's assertions regarding the nature of its expression."[257] Disney elaborates on these principles, arguing that *Hurley* clearly establishes that "[b]ecause the First Amendment safeguards the right 'not to propound a particular point of view,' a speaker may choose to exclude 'a message it did not like from the communication it chose to make,' even if the speaker itself did 'not produce a particularized message.'"[258] Indeed, Disney argues, "the *Hurley* Court 'did not insist on knowing the exact reason why the parade organizers wished to exclude [the gay, lesbian and bisexual group].'"[259]

However, while it may not be necessary for Disney to specify a message (or messages) that are provided by *The Mandalorian*, courts should nevertheless consider whether Carano's continued inclusion in the program would significantly affect Disney's "ability to advocate public or private viewpoints."[260] In this case, Carano made a number of highly visible, public statements that were at odds with Disney's positions on a number of issues.[261] In its public announcement of Carano's termination, Disney noted that Carano's "social media posts denigrating people based on their cultural and religious identities are abhorrent and unacceptable.'"[262] Disney is also on record as saying that they fired Carano because she did not align with company values of respect, decency, integrity, and inclusion.[263] As Carano herself puts it, she "was fired, not for her performance as an actress, but because her political opinions did not align with those of Disney management."[264] In its Motion to Dismiss Carano's Complaint, Disney confirms these reasons for Carano's termination.[265]

Considering whether Carano's continued inclusion in the program would affect Disney's ability to express its preferred message, it seems likely that, given the "high-profile" nature of Carano's comments,[266] at least some audience members would be aware of those comments. Continuing to employ Carano on *The Mandalorian*, or on other *Star Wars* projects, could have sent the message that Carano's statements and positions were acceptable to Disney. To avoid this, Disney terminated Carano. As Disney explains, "Disney declined to continue engaging Carano as an actor in the Star Wars franchise to avoid associating that artistic programming with Carano's controversial—indeed offensive, to Disney and many Star Wars fans—public comments."[267]

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[255] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569-70, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995).
[256] *Id.* at 569.
[257] *Dale*, 530 U.S. at 653 (citing Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 123-24, 101 S. Ct. 1010, 67 L. Ed. 2d 82 (1981) (considering whether a Wisconsin law burdened the National Party's associational rights and stating that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party")).
[258] Disney Reply, *supra* note 61, at 5 (citing *Hurley*, 515 U.S. at 574-75).
[259] *Id.* (citing Green v. Miss U.S.A., LLC, 52 F.4th 773, 786 (9th Cir. 2022)).
[260] *Dale*, 530 U.S. at 650.
[261] Carano Response, *supra* note 240, at 1-2.
[262] Carano Complaint, *supra* note 2 at 8 (citing Holloway, *supra* note 45).
[263] *Id.* at 9 (citing Ushe, *supra* note 46).
[264] *Id.*
[265] Disney Motion, *supra* note 7, at 2.
[266] *Id.* at 6-7.
[267] *Id.* at 13.

Disney further argues that it is not necessary for it to provide evidence that Carano's speech would significantly burden its speech, pointing to *Dale*. Disney notes that in *Dale*, the Boy Scouts revoked Dale's membership because of the message it believed would be sent by Dale's serving as an assistant scoutmaster.[268] Disney notes that the *Dale* Court "held that it was required to give 'deference to [the] association's view of what would impair its expression.'"[269] Thus, the *Dale* court did not require the Boy Scouts to prove how Dale's continued presence in the Scouts would affect its message.[270] Instead, the Court found that Dale's presence itself would send a message.[271]

As further support, Disney points to two post-*Dale* Ninth Circuit decisions, those in *McDermott v. Ampersand Publishing* and *Green v. Miss USA*.[272] In *McDermott*, Disney explains, "the Ninth Circuit held that a newspaper could not be forced to hire editors who expressed viewpoints on union-related topics with which the newspaper disagreed, explaining that '[t]o the extent that the publisher's choice of writers affects the expressive content of its newspaper, the First Amendment protects that choice.'"[273] Disney points out that the *McDermott* court's holding was based just "on the 'risk' that reinstating the editorial writers would 'affect[] the expressive content of [the] newspaper.'"[274] Similarly, the *Green* court "did not demand evidence that 'the inclusion of only a single participant' would 'significantly affect'" the message provided by the pageant.[275] Instead, the court held that the Pageant, and not the courts, had the "'final say'" over the message to be provided by the pageant.[276] Thus, courts have provided significant deference to organizations' determinations on how the messages the organizations sought to provide would be affected by the inclusion of particular individuals.[277]

Carano also argues that Disney was not entitled to terminate her simply because they disapproved of comments she made while off the job.[278] Disney's response was that it is irrelevant that Carano's comments were made outside of work.[279] Disney argues that "[t]hat distinction was flatly rejected in *Dale*, which held that it was irrelevant whether Dale would 'disseminat[e] views on sexual issues' while on the job."[280] In fact, the *Dale* Court determined that "the Boy Scouts had the right to avoid the 'presence of' an individual who was 'on record as disagreeing with Boy Scouts policy' while speaking in his personal capacity."[281] Thus, reasoned the Court, "even if Dale never aired his views while on the job, his mere 'presence' at work—regardless of what he said there—would interfere with the Boy Scouts' preferred messaging."[282]

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[268] *Id.* (citing Boy Scouts of Am. v. Dale, 530 U.S. 640, 645 (2000)).
[269] *Id.* (citing *Dale*, 530 U.S. at 653).
[270] *Id.* at 14 (citing *Dale*, 530 U.S. at 653-54).
[271] *Id.* (citing *Dale*, 530 U.S. at 653).
[272] *Id.* (referencing McDermott v. Ampersand Publ'g, LLC., 593 F.3d 950 (9th Cir. 2010); Green v. Miss U.S.A., LLC, 52 F.4th 773 (9th Cir. 2022)).
[273] *Id.* at 8 (citing *McDermott*, 593 F.3d at 953, 962).
[274] *Id.* at 13 (citing *McDermott*, 593 F.3d at 953, 962-63).
[275] *Id.* at 13-14 (citing *Green*, 52 F.4th at 786).
[276] *Id.* at 14 (citing *Green*, 52 F.4th at 786).
[277] *See McDermott*, 593 F.3d at 953, 962-63; *Green*, 52 F.4th at 786.
[278] Carano Response, *supra* note 240, at 17 (citing Moore v. Hadestown Broadway, LLC, No. 23-cv-4837, 2024 WL 989843, at *20-21 (S.D.N.Y. Mar. 7, 2024); Rowell v. Sony Pictures Television Inc., No. LA CV15-02442, 2016 WL 10644537, at *10 (C.D. Cal. June 24, 2016)).
[279] Disney Reply, *supra* note 61, at 5.
[280] *Id.* (citing Boy Scouts of Am. v. Dale, 530 U.S. 640, 655 (2000)).
[281] *Id.* (citing *Dale*, 530 U.S. at 656, 645).
[282] Disney Motion, *supra* note 7, at 15 (citing *Dale*, 530 U.S. at 655-56).

Disney further argues that actors, as messengers, are part of the message provided by a program.[283] Thus, it argues, requiring an artistic organization to hire an actor who publicly espouses controversial positions would undermine the organization's "ability to send the particular aesthetic or artistic message that it wants to send."[284] To support this contention, Disney points to the Ninth Circuit's statements in *Green* that "the 'interdependent dynamic between medium and message is well-established and well-protected in our caselaw,'"[285] and that "there is often 'no daylight between speech and speaker.'"[286] To put it another way, how an audience interprets or understands a message is intertwined with the speaker that delivers that message. Disney also points to the First Circuit case of *Redgrave v. Boston Symphony Orchestra*,[287] which similarly recognizes "the inherent correspondence between message and messenger, observing that an artistic work could be 'compromised or ineffective' if forced into association with an actor who espoused controversial views."[288]

In *Redgrave*, actress Vanessa Redgrave sued the Boston Symphony Orchestra (Symphony) after it cancelled a contract for Redgrave to narrate a performance of Stravinsky's *Oedipus Rex*. The Symphony cancelled Redgrave's contract because her support of the Palestine Liberation Organization had resulted in protests against her participation in the performance. Redgrave sued for breach of contract and violation of her civil rights under the Massachusetts Civil Rights Act (MCRA).[289] In its defense, the Symphony asserted that it cancelled the performance because it believed its protected artistic expression would be "compromised or ineffective" if associated with Redgrave.[290]

The *Redgrave* court observed that "[p]rotection for free expression in the arts should be particularly strong when asserted against a state effort to compel expression, for then the law's typical reluctance to force private citizens to act, augments its constitutionally based concern for the integrity of the artist."[291] The court further observed that it had not discovered a case in which the state had been allowed to compel expression.[292] The court's conclusion thus was that it did not believe that the state legislature "enacted the MCRA in an attempt to have its courts, at the insistence of private plaintiffs, oversee the editorial judgments of newspapers, the speech-related activities of private universities, or the aesthetic judgments of artists."[293] Although the

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[283] Disney Reply, *supra* note 61 at 8 (citing Volokh, online 2022, *supra* note 8 (emphasis omitted)).
[284] Disney Motion, *supra* note 7, at 3 (citing Volokh, online 2022, *supra* note 8).
[285] Disney Reply, *supra* note 61, at 9 (citing Green v. Miss U.S.A., LLC, 52 F.4th 773, 780 (9th Cir. 2022)).
[286] *Id.* (citing *Green*, 52 F.4th at 781).
[287] 855 F.2d 888 (1st Cir. 1988) (en banc).
[288] Disney Reply, *supra* note 61, at 9 (citing Redgrave v. Bos. Symphony Orchestra, 855 F.2d 888, 905 (1st Cir. 1988) (en banc)).
[289] *Redgrave*, 855 F.2d at 890.
[290] *Id*. at 905.
[291] *Id*. (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (invalidating a compulsory flag salute statute); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating a statute forcing newspapers to print candidates' replies to editorials, as an impermissible burden on "editorial control and judgment"); Wooley v. Maynard, 430 U.S. 705 (1976) (invalidating penalty for refusal to display "Live Free or Die" motto on license plate); Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1 (1986) (plurality opinion) (invalidating requirement that utility place consumer group's newsletter in utility's mailings to customers)).
[292] *Id*. at 906.
[293] *Id*.

court did not reach the First Amendment issue,[294] it held for the Symphony.[295] Disney argues that the *Redgrave* court's holding bolsters its argument that,

> the artistic creator must be free to decide for itself whether the actor's presence impairs the art, including because viewers will be unlikely to suppress thoughts about the off-screen controversy and appreciate the art on its own terms. The First Amendment does not require artistic creators to accept such 'compromis[ing]' of their works.[296]

Nor, Disney argues, does the First Amendment "permit litigants and courts to second-guess the creator's own determination that its artistic message will be impaired by unwanted association with someone else's speech."[297] To support this, Disney points to the Supreme Court's statement in *Dale* that "'[a]s we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.'"[298] As discussed above, lower courts have similarly deferred.[299]

Finally, in support of her claims, Carano points to what she regards as similar social media statements made by her co-workers that did not result in those employees being sanctioned or terminated by Disney.[300] However, the Supreme Court in *Dale* addressed this issue, stating that "it is not the role of the courts to reject a group's expressed values because they . . . find them internally inconsistent."[301] Moreover, the *Dale* Court said that "[t]he fact that the organization . . . tolerates dissent within its ranks[] does not mean that its views receive no First Amendment protection."[302] For example, to support his case, Dale argued that the Boy Scouts did not revoke the membership of heterosexual scoutmasters who disagreed with the Scouts' official position on homosexuality. The Court found this irrelevant, reasoning that having an "openly avowed homosexual and gay rights activist" serving as a scoutmaster sent a very different message than having a heterosexual scoutmaster who was on record as disagreeing with the Boy Scouts' policy.[303]

Carano further argues that Disney's terminating her because of her comments, "but turn[ing] a blind eye to her male co-stars' speech on the same topics [made] her termination impermissible sex discrimination as well."[304] In its response, Disney points to *Dale* for the principle that "it is 'irrelevant' whether an entity 'choose[s] to send one message but not the other' by dissociating itself from only some speakers."[305] As a result, Disney argues, its "choice to remain associated with other actors, including Pedro Pascal, the star of *The Mandalorian*, as

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[294] *Id*. at 911 ("in view of our obligation to avoid the unnecessary decision of federal constitutional questions, we see no need to discuss the existence or content of a First Amendment right not to perform an artistic endeavor.").
[295] *Id*. at 912.
[296] Disney Motion, *supra* note 7, at 9 (citing *Redgrave*, 855 F.2d at 905).
[297] *Id*.
[298] *Id*. (citing Boy Scouts of Am. v. Dale, 530 U.S. 640, 655 (2000)).
[299] *See* McDermott v. Ampersand Publ'g, LLC, 593 F.3d 950, 953, 962-63 (9th Cir. 2010); Green v. Miss U.S.A., LLC, 52 F.4th 773, 786 (9th Cir. 2022); *supra* notes 272-77 and accompanying discussion.
[300] Carano Complaint, *supra* note 2, at 36-37, 41-48.
[301] *Dale*, 530 U.S. at 651 (citing Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 124 (1981) ("As is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational."); Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 714 (1981) ("Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection.")).
[302] *Id*. at 656.
[303] *Id*. at 655-56.
[304] Carano Response, *supra* note 240, at 11.
[305] Disney Motion, *supra* note 7, at 15 (citing *Dale*, 530 U.S. at 655-56).

well as Mark Hamill, the lead figure of the *Star Wars* franchise—despite their occasional social-media posts—does not undercut Disney's First Amendment defense."[306] Disney argues that "[i]t is thus irrelevant that Carano believes her statements are not so different than other actors.' Disney was entitled to decide for itself whether and how statements by other actors affected Disney's message, as well as how best to address the articulation of Disney's message through its art."[307]

VI. Conclusion

While there are many similarities between Carano's lawsuit and the expressive association cases discussed previously, there are also some potentially significant differences. First, those cases generally dealt with anti-discrimination laws intended to prevent discrimination against those in protected classes.[308] In the cases discussed above, the relevant classes involved sexual orientation,[309] gender,[310] and race.[311] In those cases, courts allowed the employers or speakers to discriminate based on the plaintiffs' identities, after determining that requiring the inclusion of the plaintiffs would have altered the message the speakers wished to send.[312] However, it should be noted that the Supreme Court has stated that such laws might nevertheless be applicable in such situations if the government can show that the laws are narrowly tailored to achieve compelling government interests.[313]

Carano's lawsuit is not brought under an anti-discrimination law.[314] Instead, her lawsuit is based on California laws that prohibit employers from taking adverse actions against employees for their political views or activities.[315] The U.S. Supreme Court has not ruled on a case involving expressive association in which an employee was terminated for expressing their political views, potentially in violation of laws which would prohibit this. Instead, the Supreme Court cases most relevant to the current case involved speakers taking actions against an organization's members or participants based on their identity. Thus, in the two leading Supreme Court cases discussed previously, the defendants' actions were based on the participants' or member's homosexuality.[316] Furthermore, neither of these cases involved an employment relationship. GLIB was seeking to participate in a parade in *Hurley*,[317] while Dale was a member and volunteer of the Boy Scouts in *Dale*.[318] However, at least one lower court case did involve an

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[306] *Id.* at 15 (citing Carano Complaint, *supra* note 2, at ¶¶ 128-43).
[307] Disney Reply, *supra* note 61, at 6.
[308] *Hurley*, 515 U.S. at 572 (1995) (citing MASS. GEN. LAWS ch. 272, §98 (1992)); *Dale*, 530 U.S. at 645).
[309] *Hurley*, 515 U.S. at 560-61; *Dale*, 530 U.S. at 644-45.
[310] Green v. Miss U.S.A., LLC, 52 F.4th 773, 777 (9th Cir. 2022).
[311] Claybrooks v. ABC, Inc., 898 F. Supp. 2d 986, 989 (M.D. Tenn. 2012); Moore v. Hadestown Broadway, LLC, 2024 U.S. Dist. LEXIS 40245, *4-6 (S.D.N.Y. 2024).
[312] *Hurley*, 515 U.S. at 559; *Dale*, 530 U.S. at 654.
[313] *U.S. Jaycees*, 468 U.S. at 623 (1984).
[314] Carano Complaint, *supra* note 2, at 55-56 (part of Carano's lawsuit, not dealt with in detail in this article, claims that she was discriminated against on the basis of gender, alleging that her male counterparts expressed views similar to hers, but were not similarly treated by Disney).
[315] Carano Complaint, *supra* note 2, at 49-52.
[316] *Hurley*, 515 U.S. at 560-61; *Dale*, 530 U.S. at 644-45.
[317] *Hurley*, 515 U.S. at 560-61.
[318] *Dale*, 530 U.S. at 644.

employment relationship, that being *Moore*, the case involving a black actress' employment being terminated because producers believed her inclusion contributed to the show *Hadestown*'s sending an unintended "white savior" story.[319]

In addition, it may be significant that political speech, and not identity, is the basis for the employer's action here. The plaintiffs' speech was not at issue in most of the cases discussed above. *Dale* is one exception, in that the plaintiff's potential speech about homosexuality likely contributed to the Boy Scout's decision to terminate his association with the organization.[320] Another case in which action was taken against an individual for their political views is *Redgrave*, in which the Boston Symphony cancelled a contract for Vanessa Redgrave to perform with the symphony following her controversial statements expressing her support of the Palestinian Liberation Organization.[321] While the court in that case did not rule on the First Amendment issue, it did express its support for the Symphony's wish to not have its performance associated with Redgrave and her views.[322]

If these differences are not so significant as to lead the courts to a different conclusion than in the *Hurley*, *Dale*, and the cases discussed above, it seems that the weight of authority in this case is on Disney's side. In producing *The Mandalorian* television series, Disney is clearly engaging in speech protected by the First Amendment.[323] As the entity providing the speech here, which makes Disney the speaker in this case, Disney is entitled to craft its own message to be provided by that program, even if that is not a "single, articulable message."[324] Furthermore, Disney is entitled to a certain degree of deference in the decisions it makes about the messages it provides in its speech, and the program components it chooses to include to contribute to those messages.[325] As the *Claybrooks* and *Hadestown* courts determined, casting decisions impact the messages provided by a production and are thus protected by the First Amendment.[326] Further, as the *Hadestown* court observed, this protection continues to apply after initial casting decisions have been made, as it may be that the composition of the cast may later affect the message provided by the production, meaning producers must have the right to make cast changes in an ongoing program.[327]

Should the courts rule for Disney in this case, this would provide a warning for actors and actresses that are politically active, even if that activity is limited to expressing their views on the issues of the day on social media. Engaging in discussion and debate on various issues with other social media users, as Carano did, could provide employers dissatisfied with the employee's positions and statements with grounds upon which to terminate the actor's employment.

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[319] Moore v. Hadestown Broadway, LLC, No. 23-CV-4837, 2024 U.S. Dist. LEXIS 40245, at *2-6 (S.D.N.Y. Mar. 7, 2024).
[320] *Dale*, 530 U.S. at 645, 655-56.
[321] Redgrave v. Bos. Symphony Orchestra, 855 F.2d 888, 890 (1st Cir. 1988).
[322] *Id*. at 911.
[323] *See* Disney Motion, *supra* note 7, at 12 (citing Schad v. Mount Ephraim, 452 U.S. 61, 65 (1981); Tamkin v. CBS Broad., Inc., 122 Cal. Rptr. 3d 264, 271 (Cal. Ct. App. 2011) ("The creation of a television show is an exercise of free speech.")).
[324] *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569-74 (1995).
[325] *See Dale*, 530 U.S. at 653 (citing Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 123-24 (1981) (considering whether a Wisconsin law burdened the National Party's associational rights and stating that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party")).
[326] Claybrooks v. ABC, Inc., 898 F. Supp. 2d 986, 999 (M.D. Tenn. 2012); Moore v. Hadestown Broadway, LLC, No. 23-CV-4837, 2024 U.S. Dist. LEXIS 40245, at *47-48 (S.D.N.Y. Mar. 7, 2024).
[327] *Moore*, 2024 U.S. Dist. LEXIS 40245, at *56-57.

Consequently, a ruling for Disney here may provide the companies that employ such actors a great deal of leeway to terminate them because of the views they express, and actors would seemingly have little protection against this. Such a ruling could thus discourage the speech of actors, in that they may refrain from expressing their views on social and political issues for fear of being terminated. Reducing speech in this way is an outcome that courts may wish to avoid.

In addition, a ruling for Disney in this case would also raise a host of questions about the extent of employers' right of expressive association in contexts such as this. For example, what categories of employees does this apply to? Is it limited to those that appear before the public in the employer's speech, meaning primarily actors and actresses? Behind-the-scenes employees such as writers and directors also contribute to the messages provided by their employer's speech. Would the right of expressive association similarly protect the termination of their employment for expressing their views on social and political issues? What about others who make a creative contribution to a television show or similar production? Cinematographers, set designers, lighting designers, and even hair, wardrobe, and makeup personnel all arguably can make contributions that can affect how the production is received and understood by the audience. Would they be covered as well? While the answers to these questions are beyond the scope of this paper, should entertainment companies come to rely on the right of expressive association to support the termination of employees that would otherwise violate the law, these are questions the courts may have to address.