No. 2020-2021

IN THE

Supreme Court of the United States

WILLIAM DENOLF

Petitioner

v.

THE CITY OF KNERR

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

CASES—CONTINUED Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case implicates the Free Speech Clause of the First Amendment of the U.S. Constitution: "Congress shall make no law. . . abridging the freedom of speech. . ."

Challenged by Petitioner are applications of two sections of the City of Knerr's Ordinance 417: Section 3 and 4(b). Section 3 states:

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

Section 4(b) states:

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

STATEMENT OF THE CASE

I Background

Petitioner William DeNolf is an artist and business proprietor in the City of Knerr. *Record* at 2. His business, *Indulging Your Creativity*, specializes in "awards, invitations, stationery, banners, [and] signs" among other things and "performs services for all occasions" *Id.* The business' website notes that DeNolf specializes in wedding products and that he "guarantee[s] customers a unique experience custom designed and created for each client." *Id.* at 3.

William DeNolf has also done business with the City of Knerr directly for the past ten years. *Id.* In the course of this work, has created "banners for events" and "plaques for awards given to citizens by the City." *Id.* In September 2017, DeNolf and the City agreed to a contract in which "DeNolf agreed to perform $7,500 worth of work for the City." *Id.*

In January 2017, the City of Knerr amended its Public Accommodations Code by enacting Ordinance 417. *Id.* at 2. It did so in response to "a sudden rise in hate crimes" and for the "express purpose to promote tolerance of all persons and to establish and to protect the civil rights of all persons in the City of Knerr." *Id* (internal quotations omitted).

II DeNolf's refusal to create art celebrating same-sex marriage

On July 6, 2018, Ali Zee entered DeNolf's shop to inquire about custom stationery for her upcoming wedding. Ms. Zee conversed with DeNolf for several minutes, during which time they

> discussed a large banner and a custom designed frame, with artwork and calligraphy drawn by DeNolf, as well as inspirational messages that would be designed and printed by DeNolf on small pieces of paper and placed inside little clear glass bottles.. . . Ms.

> Zee told DeNolf that she was interested in having a special hand-painted design banner that would emphasize the couple's love for each other. Ms. Zee would select the language for the banner and for in the bottles. She also wanted to procure a hand-designed picture frame with inspirational language (to be suggested by DeNolf) for her spouse to-be, which would emphasize Ms. Zee's femininity and her joy and pride in her wedding.

Id. at 3. DeNolf then left the room while Ms. Zee reviewed the options provided by the store, assisted by DeNolf's assistant, David Moosmann. *Id.* Some time later, Mandy Beau, Ms. Zee's fiancée entered the store. At this point, DeNolf re-entered the room. Upon realizing Ms. Zee and Ms. Beau were a same-sex couple, he told them that he "[couldn't] do the wedding," explaining that it was "against [his] religious principles to participate in a same sex marriage." *Id.* DeNolf offered to sell them paper product, plain frames, and empty bottles but refused to create custom work for them, explaining that his work was an "art form" and that he wouldn't "compromise [his] principles" by performing such an expressive task. *Id.* at 4.

Ms. Zee and Ms. Beau subsequently filed a complaint with the City. The City's Commission on Civil Rights then held an investigation and hearing, after which it fined DeNolf $5,000 unless he agreed to do the work Ms. Zee and Ms. Beau had requested. *Id.*

III The cancellation of DeNolf's contract under Section 4(b)

While reviewing business contracts, the City of Knerr determined that DeNolf had made four contributions of $500 each to four different groups designated as hate groups by the Attorney General of the State of Olympus. *Id.* These groups were designated as hate groups because of their refusal to sanction same-sex marriage. *Id.* Section 4(b) of Ordinance 417 states that the City DeNolf

was informed that his September 2017 contract would be cancelled unless DeNolf agreed to make an equivalent total financial contribution — $2000 — to groups committed to promoting LGBT rights. DeNolf chose to reject the proposal; the City proceeded in cancelling the contract. *Id.*

IV DeNolf files suit

DeNolf's lawsuit against the City, filed in the District Court for the Central District of Olympus, alleging that Sections 3 and 4(b) violated his rights to free speech and free association, respectively, under the First Amendment. *Id.* The District Court granted summary judgement in favor of the City; DeNolf appealed to the Fourteenth Circuit. The Fourteenth Circuit affirmed. *Id.* at 1.

SUMMARY OF ARGUMENT

The City's actions under Section 3 of Ordinance 417 constituted an unconstitutional infringment on William DeNolf's right to be free from compelled speech. Under *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), the City is not permitted to "prescribe what shall be orthodox in. . . matters of opinion," which they have done here by favoring support for same-sex marriage. The City's application of Section 3 violates the First Amendment for three main reasons: First, DeNolf's artwork that he produces through his business meet this Court's standard for First Amendment protection. Second, the City's regulation of DeNolf's speech is content-based, and so subject to strict scrutiny. And finally, the City's actions fail strict scrutiny.

The Court outlined the standard for conduct to receive First Amendment protection in *Spence v. Washington*, 418 U.S. 405 (1974), requiring "(1) [that] the speaker intends for the conduct to convey a particularized message, and (2) the likelihood [is] great that a reasonable third-party observer would understand the message." *Brush & Nib Studio v. City of Phoenix*, 448 P.3d 890, 906 (Ariz. 2019) (internal citations and quotations omitted). Here, DeNolf's art meets both of these prongs. First, the wedding decorations carry an unmistakable message: celebration of a marriage taking place and the institution of marriage as a whole. Second, a reasonable observer would understand that message of celebration and ascribe it to DeNolf. Because DeNolf is an artist who plays an intimate creative role in the works he produces for weddings, his creation of artwork for a same-sex wedding "would likely be perceived as having resulted from [a] customary determination about" the event: "that its message was worthy of presentation and quite possibly of support as well." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 575 (1995). It is not enough for DeNolf to be able to disclaim expression he is forced to produce afterwards; that is not an adequate substitute for full autonomy as a speaker.

Next, the City's regulation of DeNolf's speech under Section 3 is content-based. This Court has held in cases like *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) that facially content-neutral laws (including public accommodations laws, as in *Dale*) can be content-based regulations on speech as-applied to particular situations. In this case, the City's actions have the effect of "altering the content" of DeNolf's speech, by forcing him to create speech "that [he] would not otherwise make." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988). Under the Court's ruling in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), Section 3 applied to DeNolf also implicates viewpoint discrimination.

Because Section 3's application is content-based, it must be subject to strict scrutiny, which it fails. Even if the City has a compelling governmental interest in the abstract, its means are dramatically more restrictive on speech than is necessary to achieve that interest. The existence of effective, content-neutral alternatives "significantly undercuts any defense" of the City's application of Section 3. *Id.* at 395. One such alternative would be to allow artists the freedom to choose what messages they wish to express and not, while still ensuring that they must treat customers equally regardless of protected class with respect to an identical message they would express for a different client. The protection of this artistic freedom is fundamental to a pluralistic society, and the City cannot be allowed to trample over that First Amendment guarantee.

The City's application of Section 4(b) conditioned the receipt of monetary benefits upon DeNolf's exercise of First Amendment rights. Under the unconstitutional conditions doctrine articulated by this Court, requiring individuals to waive the exercise of constitutional rights in order to receive a benefit in effect inhibits and penalizes those rights. The unconstitutional conditions doctrine states that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597–598 (1972), as cited in

Rust v. Sullivan, 500 U.S. 173, 196 (1991) and *Branti v. Finkel*, 445 U.S. 507, 515 (1980). The City has imposed an unconstitutional condition by: (1) denying a benefit; (2) on a basis which infringes upon constitutionally protected interests; and (3) outside of the scope of recognized government authority.

The imposition of such a condition means that the City has infringed upon DeNolf's constitutionally protected interests; in this case, the Freedom of Association. Because this infringement cannot be "justified without reference to the content" of DeNolf's views, the appropriate standard of review is strict scrutiny. *U.S. v. Eichman*, 496 U.S. 310, 318 (1989). The City's application of Section 4(b) is neither necessary nor narrowly tailored to a compelling government interest.

Because the City's actions impose an unconstitutional condition on DeNolf's contract, infringing upon his First Amendment rights without meeting the appropriate standard of strict scrutiny, Petitioner respectfully asks this Court to hold that DeNolf's First Amendment right of association was violated by the City's actions.

ARGUMENT

I The Free Speech Clause prohibits the City of Knerr from compelling William DeNolf to produce artistic works celebrating same-sex marriage.

This Court has long recognized one's right to be free from compelled expression: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. In so applying Section 3, the City impermissibly violated this fundamental principle of First Amendment doctrine.

DeNolf seeks from this Court not a license to discriminate, only the vindication of his expressive freedom as an artist. That is what this case is about: DeNolf's right to choose "what to say, and what to leave unsaid" in his art. *Pacific Gas & Electric v. Public Utilities Commission*, 475 U.S. 1, 11 (1987).

In the case at bar, the lower court first erred in finding that DeNolf's expressive work did not receive First Amendment Protection. Next, it failed to recognize that strict scrutiny was the appropriate standard of review for the City's coercion of artistic conformity. Finally, the lower court incorrectly concluded that the City's actions could pass First Amendment scrutiny. For those reasons, this Court should reverse the Fourteenth Circuit's ruling in full and find the City's actions unconstitutional.

A. William DeNolf's artistic works receive First Amendment protection under the *Spence* test.

This Court first laid out the standard for determining whether expressive conduct qualifies for First Amendment protection in *Spence*, 418 U.S. 405, as cited in *Brush & Nib Studio*, 448 P.3d 890.

The Court outlined two requirements: "(1) [that] the speaker intends for the conduct to convey a particularized message, and (2) the likelihood [is] great that a reasonable third-party observer would understand the message." *Id.* at 906 (internal citations and quotations omitted). The Court further clarified the test in Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Boston, Inc., finding that "a narrow, succintly articulable message is not a condition for constitutional protection," setting aside *Spence*'s requirement that the message be "particularized." *Hurley*, 515 U.S. at 569. Here, DeNolf's creation of wedding decorations satisfies both prongs of the test.

1. The art the City seeks to compel DeNolf to create would convey a message of support for the practice of same-sex marriage.

The record makes apparent that DeNolf considers himself an artist and the works he produces through his business to be deeply expressive in nature. *Record* at 2, 3, and 4. In his view, to create decorations for a same-sex wedding would be to "participate" in it and would necessarily entail "express[ing] approval of same-sex marriage." *Id.* at 3.

It is also evident that DeNolf has a significant expressive role in the artwork he creates for his clients. The work DeNolf had initially discussed with Ms. Zee included hand-drawn calligraphy, custom-designed picture frames and banners, and multiple written messages to be composed by DeNolf. *Id.*

It follows then that DeNolf is not merely a conduit for others' speech but an active speaker himself when he creates artwork. It is clear that DeNolf's wedding decorations are intended to carry a message, because that is their entire purpose: to celebrate a wedding and for DeNolf, the institution of marriage as a whole.

2. A reasonable observer would understand the message being conveyed by the art.

The second prong of the *Spence* test requires that a reasonable observer would be likely to understand the message being conveyed. Here, a reasonable observer would not only understand that wedding decorations celebrate marriage, but also identify DeNolf with those messages.

To begin with, DeNolf has in the past identified his business as the creator of his works with a logo, *Id*, and a reasonable observer would recognize him or his business as the producer of the work. DeNolf's creation of artwork for a same-sex wedding "would likely be perceived as having resulted from [a] customary determination about" the event: "that its message was worthy of presentation and quite possibly of support as well." *Hurley*, 515 U.S. at 575.

Nor is the lower court's suggestion that DeNolf "issu[e] a disclaimer in his storefront or on-line [clarifying his beliefs]" sufficient to evade *Spence*'s reasonable observer analysis. *Record* at 7. First, this logic could be applied to literally any compelled speech case. Certainly, the children in *Barnette* were free to disavow the Pledge of Allegiance once it was over, but the Court still rejected the Pledge requirement as an unlawful infringment of their speech rights. *Barnette*, 319 U.S. 624.

Second, given that DeNolf creates decorations for third-party events, it is unlikely any notice he could reasonably spread to remedy misconceptions would reach the observers of his creations. Even putting that aside, this Court has often emphasized that "[were] the government. . . freely able to compel. . . speakers to propound political messages with which they disagree, . . . protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Pacific Gas & Electric*, 475 U.S. at 16, as cited in *Hurley*. Forcing DeNolf to actively propound his values to remedy the government's distortion of his speech is an intolerable substitute for DeNolf's right to be free from compelled speech, and one that this

Court has consistently rejected. *See, e.g.*, *Hurley*, 515 U.S. at 573 ("one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say"); *Pacific Gas & Electric*, 475 U.S. at 16 (invalidating compelled access to a private utility's bill and newsletter because the utility "may be forced either to appear to agree with the [intruding leaflet] or to respond"); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), as cited in *Hurley* (holding a newspaper's "choice of material . . . constitute[s] the exercise of editorial control and judgment" protected by the First Amendment).

B. The City's application of Section regulates speech based on its communicative content, and is therefore subject to strict scrutiny.

Because DeNolf's artwork is protected by the First Amendment, the City's regulation of said work must be subject to First Amendment scrutiny. To determine what level of scrutiny to apply, the Court must determine whether the law is content-neutral or content-based. *See generally Nat'l Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("our precedents distinguish between content-based and content-neutral regulations of speech"). As applied to DeNolf, Section 3 has the effect of altering the content of DeNolf's speech and is viewpoint discriminatory. Therefore, it is a direct restriction on the content of his speech, and must be reviewed under the most stringent form of review.

1. This Court has repeatedly found that facially content-neutral laws can operate as content-based laws when applied to particular situations.

Petitioner freely concedes that Section 3, as a public accommodations statute, is facially content-neutral and constitutionally permissible. But the fact of the matter is that when Section 3 is applied by the City to compel certain favored messages, it acts as a content-based regulation on said speech.

There is significant authority to support this proposition. In *Holder*, 561 U.S. 1 the Court explained that "a facially content-neutral statute that 'generally functioned as a regulation on conduct' was, as applied to plaintiffs a content-based statute because 'the conduct triggering coverage under the statute consisted of communicating a message." *Brush & Nib Studio*, 448 P.3d at 913 (quoting *Holder*). Similarly, in *Dale*, 530 U.S. 640, the Court found the application of a public accommodations statute to the Boy Scouts unconstitutional, because compelling the organization to admit gay members violated the organization's associational rights under the First Amendment. *Brush & Nib Studio*, 448 P.3d at 913. The same principle holds in this case.

2. The law as-applied alters the content of DeNolf's speech by forcing him to express the government's favored message.

It is inevitable that content-neutral restrictions on conduct will have some incidental effects on speech. But the City's application of Section 3 goes far beyond that, and "regulates [speech] based on hostility — or favoritism — to the underlying message expressed," which "the government may not [do]." *R.A.V.*, 505 U.S. at 386. By favoring a message of support for the practice of same-sex marriage and punishing DeNolf for his dissent, it has prescribed "what is orthodox in politics, . . ., religion, [and] . . . matters of opinion." *Barnette*, 319 U.S. at 642.

As the Court explained in *Riley*, 487 U.S. 781, as cited in *Brush & Nib* and *NIFLA*, laws that "mandate speech that a speaker would not otherwise make necessarily alter[] the content of the speech." *Id.* at 795. That is plainly the case here, as DeNolf refused to produce speech celebrating same-sex marriage, and the the City subsequently fined him $5,000 for said refusal. *Record* at 4. Because Section 3 when applied to speech in this way acts only upon speech relating to "race, color, religion, sex, sexual orientation, national origin, or residency status," it also compels speech based on the topic addressed, a clear content-based distinction. *Id.* at 14.

3. By coercing a message of support for same-sex marriage, the City further engages in viewpoint discrimination.

The City's actions in this case bear many similarities to the St. Paul bias-motivated crime ordinance struck down in *R.A.V.*. There, St. Paul's ordinance restricted fighting words that related to certain protected classes including "race, color, creed, religion, or gender." *R.A.V.*, 505 U.S. at 380. The Court found that "[i]n its practical operation,. . . the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination" because, for example, "one could hold up a sign saying. . . that all 'anti-Catholic bigots are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.'" *Id.* at 391-392.

When applied to expression like DeNolf's, Section 3 has a similar discriminate effect on different ideological stances. Indeed, it does not seem that Section 3 would extend to requiring a gay artist to produce art condemning same-sex marriage as immoral. Such a compulsion would be severe governmental overreach, after all. So too, here. The City's use of Section 3 cannot be "justified without reference to the content" or viewpoint of the "regulated speech" and so it is in every respect a content-based regulation that demands strict scrutiny. *Ward v. Rock Against Racism*, 491 U. S. 781 (1989), as cited by *R.A.V.* (internal quotations omitted).

C. Requiring DeNolf to produce speech contrary to his deeply-held beliefs clearly fails strict scrutiny.

Content-based regulations of speech are "presumptively unconstitutional" barring a significant showing of proof that such a law is narrowly tailored to serve a compelling governmental interest. *NIFLA*, 138 S. Ct. at 2371 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155 (2015)). Barring that showing and a showing that the regulation is the "least restrictive means of furthering [the]

compelling governmental interest," strict scrutiny demands that that the regulation be struck down. *Brush & Nib Studio*, 448 P.3d at 918-919. DeNolf does not dispute the City's compelling interest in protecting the civil rights of its citizens. But whatever the City's interest, its actions are vastly more restrictive on speech than necessary, and content-neutral alternatives to the same ends are available.

1. The City's application of Section 3 is not the least restrictive means to achieve any governmental interest it may have.

To satisfy strict scrutiny's "least restrictive means" requirement, the City must show, as the Arizona Supreme Court characterized it, that "proposed alternatives are ineffective or impractical." *Id.* at 923 (internal citations and quotations omitted). As the *R.A.V.* court explained, "[t]he existence of adequate content-neutral alternatives. . . undercuts significantly any defense of [a content-based statute]." *R.A.V.*, 505 U.S. at 395. Here, effective, content-neutral alternatives exist, and so the City has fallen short of its burden.

For example, the City could adjust its regulatory scheme such that artists like DeNolf are free to choose the messages they express, but not the customers. By way of example, a baker could lawfully refuse to create a cake for a same-sex wedding, but not a birthday cake for a same-sex individual assuming the baker would provide a birthday cake for a heterosexual individual. In the first instance, the baker would be asked to express an entirely different message — support for same sex marriage, a politically and religiously fraught issue — but in the second instance, the baker would only have to treat the customer the same as all other customers, regardless of their protected class. Therein lies the crucial distinction of this case too. DeNolf offered to sell Ms. Zee and Ms. Beau any raw materials or other products in his store they may want, he only did not want to express himself in support of a practice that contravened his religious beliefs.

The *Obergefell v. Hodges*, 576 U.S. 644 (2015) court, as cited by *Brush & Nib*, put it best:

> [Organizations and persons may] continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

It is this fundamental value of pluralism that is at stake in this case. However noble the City's interest in protecting LGBT citizens, it must do so without trampling over others' free speech rights with reckless disregard. *See generally Burwell v. Hobby Lobby*, 573 U.S. 682 (2014), as cited by *Brush & Nib* ("[e]ven a compelling interest may be outweighed in some circumstances by another even weightier consideration"). It has not done so in the instant case, and so this Court should invalidate its restrictions as applied to William DeNolf.

II The City of Knerr violated DeNolf's First Amendment right of association by imposing an unconstitutional condition upon the terms of his contract.

The City's application of Ordinance 417 conditioned the receipt of monetary benefits upon DeNolf's exercise of First Amendment rights. Under the unconstitutional conditions doctrine articulated by this Court, requiring individuals to waive the exercise of constitutional rights in order to receive a benefit in effect inhibits and penalizes those rights. The Fourteenth Circuit erred by appealing to the government's established authority over the scope of public funding. Because the City seeks to control DeNolf's actions as a private citizen, rather than his use of public funds, the lower court's application of the conclusion in *Rust*, 500 U.S. 173 is mistaken. Because the City's actions impose an unconstitutional condition on DeNolf's contract, infringing upon his First Amendment rights without meeting the appropriate standard of strict scrutiny, Petitioner respectfully asks this Court to hold that DeNolf's First Amendment right of association was violated by the City's actions.

A. The City's imposition of an unconstitutional condition penalizes and inhibits constitutionally protected rights.

The unconstitutional conditions doctrine states that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry*, 408 U.S. at 597–598, as cited in *Rust*, 500 U.S. at 196 and *Branti*, 445 U.S. at 515. The doctrine was developed in order to protect constitutional rights from more subtle attacks; for if such conditions were permitted, the "exercise of those freedoms would in effect be penalized and inhibited." *Id.* If the City has in fact imposed an unconstitutional condition by: (1) denying a benefit; (2) on a basis which infringes upon constitutionally protected interests; and (3) outside of the scope of recognized government authority, then the city has, in effect, infringed upon DeNolf's constitutionally protected interests.

1. For the purposes of the unconstitutional conditions doctrine, the City's application of Section 4(b) denies a benefit.

The City canceled DeNolf's contract with the City, causing him to lose $7,500 of payment from the City. *Record* at 4. An analysis of this Court's applications of the unconstitutional conditions doctrine shows that, for the purposes of the doctrine, this payment is unquestionably a benefit. This Court has applied the unconstitutional conditions doctrine to the conditioning of grants, public employment, and employment contracts. There is no fundamental difference between any of these kinds of monetary benefits and the payment that the City was to make to DeNolf. In addition, conditioning public contracts has the same potential to penalize and inhibit speech as conditioning any other kind of monetary benefit; therefore, the unconstitutional conditions doctrine should be applied in order to protect the exercise of constitutional freedoms.

This Court has applied the unconstitutional conditions doctrine to a wide variety of financial relationships, without reference to the specific nature of any monetary benefit. In *Branti*, this court applied the doctrine to the loss of public employment and its accompanying salary. *Branti*, 445 U.S. at 515. There is nothing special about employment, or a right to employment — even non-renewal of an employment contract (something which one has no right to) — has fallen under the scope of the unconstitutional conditions doctrine, as the threat of non-renewal may also impermissibly inhibit constitutionally protected interests. *Shelton v. Tucker*, 364 U.S. 479 (1960), as cited in *Branti*, 445 U.S. at 515. This, again, is not on the basis of the loss of livelihood, or any other such protection. In *Rust*, this Court applied the unconstitutional conditions doctrine to grants of federal funds to reproductive health facilities, a monetary benefit which is independent of employment, livelihood, or any other specific consideration of the effects of monetary payment. *Rust*, 500 U.S. at 196

It is obviously true that conditioning some payment upon the waiver of a constitutional right penalizes those that choose to exercise that right; and this is true regardless of what that payment is for. This Court has clearly recognized this truth, as demonstrated by their application of the unconstitutional conditions doctrine to a wide variety of payments and monetary benefits, without reference to the specific nature of any benefit. Because conditioning a contract has the same potential to inhibit the exercise of constitutional rights as conditioning any other kind of monetary benefit, the city's cancellation of DeNolf's contract does fall under the unconstitutional conditions doctrine.

2. The City's penalty was imposed because of DeNolf's exercise of First Amendment rights, thus infringing upon constitutionally protected interests.

The City canceled DeNolf's contract because he made financial contributions to groups designated as "hate groups" by the Attorney General of State of Olympus. *Record* at 4. In articulating the unconstitutional conditions doctrine, this Court has equated conditions which infringe upon constitutionally protected interests to those that "deny a benefit to a person because of his constitutionally protected speech or associations." *Branti*, 445 U.S. at 515. The City has undisputedly canceled DeNolf's contract because of his political contributions. This Court has recognized political contributions as an exercise of First Amendment rights when they are instrumental to the exercise of the freedom of association or the expression of political beliefs, as they are in this case. Therefore, the City's condition does infringe upon constitutionally protected interests.

In *Elrod v. Burns*, 427 U.S. 347 (1976) as cited in *Branti*, 445 U.S. at 513–514, this Court found that requiring employees to make financial contributions (or other political actions) in order to keep their jobs violated their First Amendment rights for two reasons. First, citing *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court found that the employee's financial assistance could be used "to the detriment of his party's views and ultimately, his own beliefs," something that the Court considered

to be "tantamount to coerced belief." *Elrod*, 427 U.S. at 19, as cited in *Branti*, 445 U.S. at 513. Second, because "the average political employee is hardly in the financial position to support his party and another," the employee's ability to "associate with others of his political persuasion is constrained, and support for his party is diminished." *Elrod*, 427 U.S. at 355–356, as cited in *Branti*, 445 U.S. at 515.

The present case is an inversion of the situation in *Elrod* — rather than conditioning benefits upon a requirement to contribute, the City conditions benefits upon a prohibition from contributing. Though the means of coercion are different, the results are the same. DeNolf's ability to associate with others of his ideological persuasion is constrained. Even the majority below recognizes that there is a "modicum of truth" to the idea that the city has "punished DeNolf for his thoughts, beliefs, and associations." *Record* at 9.

Where the Fourteenth Circuit errs, however, in its application of *Lyng*, suggesting that causing associations "to abandon or alter any of their activities or basic goals" is necessary in order to violate associational rights. *Lyng v. Automobile Workers*, 485 U.S. 360, 367 (1988); *Record* at 9. This is not the case; the Court explicitly (and strongly) hedges the statement that the majority relies on, noting that "[associational] rights can be abridged even by government actions that do not directly restrict individuals' ability to associate freely." *Lyng*, 485 U.S. at 367. Indeed, the Court in *Lyng* explicitly states that the threat of economic reprisals, among other harms, could be a "substantial restraint" on the "right to freedom of association." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) as cited in *Lyng*, 485 U.S. at 367.

3. The City's actions do not fall within the scope of recognized government authority.

The doctrine of unconstitutional conditions is tempered by the scope of recognized government authority. To function effectively, the government must be able to act on its own behalf — not every cent of government spending or every government publication implicates the First Amendment or the unconstitutional conditions doctrine. *See Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200, 205 (2015). To this end, this Court has previously recognized the government's ability to speak and to disburse money to promote specific viewpoints or values: in *Rust*, this Court initially applied the unconstitutional conditions doctrine, but concluded that the government permissibly restricted the scope of the activities that it chose to fund; and in *Walker*, the Court established that the government "does not have to endorse speech that it rejects." *Rust*, 500 U.S. at 196; *Record* at 9; *Walker*, 576 U.S. at 214.

However, the majority in the Fourteenth Circuit is mistaken in their reliance on *Rust* and *Walker*; in each of these cases, the Court pointed to specific facts to show that the government was acting permissibly on its own behalf. Because DeNolf's private contributions are not within the pale of the City's funding (as in *Rust*) and cannot be identified as the government's contributions or government speech (as in *Rust*) the City of Knerr's actions do not fall within the scope of recognized government authority; therefore, it remains a proper subject of First Amendment analysis and the unconstitutional conditions doctrine.

The Court in *Rust* does acknowledge a strong presumption that the government is able to control the scope of the activities that they pay for. If the government chooses to subsidize specific activities or values, then it may permissibly condition the receipt of public funds upon the performance of those activities; in other words, it can control how its money is spent, and how

it must not be spent. *See Rust*, 500 U.S. at 198. However, the Court explicitly states that these conditions can only be attached to the spending of government money for a specific program:

> In contrast, our "unconstitutional conditions" cases involve situations in which the Government has placed a condition upon the *recipient* of the subsidy rather than a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program. *Id.* at 197.

Unlike the Secretary's legitimate government actions in *Rust*, the City of Knerr follows DeNolf home. The City does not seek to control the expenditure of directed government funds, granted to achieve some purpose — rather, the City seeks to penalize DeNolf for any dollar he spends, no matter how far removed from the City's legitimate purview, effectively prohibiting him from fully engaging in the protected right of association.

Like *Rust*, *Walker* also recognizes the government's authority to act on its own behalf. Speech which is "best viewed as a form of government speech" is not "subject to scrutiny under the Free Speech Clause." *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) as cited in *Walker*, 576 U.S. at 7. Speech which is "best viewed as a form of government speech" is not "subject to scrutiny under the Free Speech Clause." *Id*, citing *Summum*, 555 U.S. at 464. In *Walker*, this Court applied the government speech standard established in *Id*; asking whether expression is "meant to convey [a government message]" and "has the effect of conveying a government message." *Id.* at 472 as cited in *Walker*, 576 U.S. at 12. This is plainly untrue in the present case. DeNolf's private, personal contributions are neither meant to convey a government message; nor could his private contributions be understood as conveying a government message. There is no evidence on the Record which suggests that DeNolf claimed or appeared to be acting on behalf of the government; nor does Section 4(b) limit itself to such instances.

The City of Knerr's actions under Section 4(b) in the present case are neither within the well-defined scope of government funding authority nor within the well-defined boundaries of government speech. The Fourteenth Circuit errs by applying narrow rulings in *Rust* and *Walker* to the present case. Without the benefit of this misapplication, the City's actions remain reviewable under First Amendment analysis and the unconstitutional conditions doctrine.

B. The City of Knerr's actions fail to meet the appropriate standard of strict scrutiny.

The City's imposition of an unconstitutional condition unquestionably infringes upon DeNolf's freedom of association. Because this infringement is content-based, the appropriate standard of review for this infringement is the strict scrutiny standard. The City fails to meet this standard because it has not shown that its actions are *necessary* to serve a compelling government interest, which is required by the strict scrutiny standard.

1. Strict scrutiny is required because the City has inhibited DeNolf's right of association on the basis of the viewpoints he chose to endorse.

When such infringements are content based, this Court has subjected them to the strictest standard of scrutiny. *See Eichman*, 496 U.S. at 318. It is content discrimination that "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *R.A.V.*, 505 U.S. at 387.

The City's actions are dependent upon the viewpoints that DeNolf chooses to support; thus, they are content-based, and merit the strictest review. Section 4(b) states that the City of Knerr will not honor contracts with those that contribute to groups that the Attorney General of the State of Olympus has designated as a hate group. *Record* at 14. The groups that DeNolf contributed to were designated as hate groups "because of their refusal to sanction same-sex marriage." *Id.* at 4. The

City of Knerr's actions, and the purpose behind those actions, cannot be "justified without reference to the content" of the contributions in question — that is, the ideologies or viewpoints that DeNolf chose to contribute to. *Eichman*, 496 U.S. at 318. The City would not have canceled DeNolf's contract if he had donated to an organization with some other viewpoints or organizations which supported same-sex marriage — in order to properly apply the ordinance, the City had to reference both DeNolf's protected actions *and* the viewpoints that his actions endorsed.

The majority below is correct in asserting that hate speech, as a subset of fighting speech, can be proscribed. *Record* at 9. However, they are gravely mistaken in equivocating what the Court views as "hate speech" and what the Attorney General of the State of Olympus might consider to be a hate group. As the Court explains in *R.A.V.*, the Government can proscribe certain "modes of speech" such as content, or obscenity, or fighting words, but "may not regulate use based on hostility — or favoritism — towards the underlying message expressed." *R.A.V.*, 505 U.S. at 386. The record clearly states that that the groups DeNolf endorsed were classified as hate groups only "because of their refusal to sanction same-sex marriage," a categorization made solely on the basis of "the underlying message expressed." *Record* at 4; *R.A.V.*, 505 U.S. at 386. If the Attorney General were to have made these designations on the basis of violent action, or some other viewpoint-neutral standard, then the Fourteenth Circuit's appeal to *R.A.V.* might be appropriate; but in the case presently before the Court, the Fourteenth Circuit is mistaken in applying *R.A.V.*.

2. The City of Knerr's actions neither narrowly drawn nor necessary to serve a compelling state interest.

The strict scrutiny standard asks whether state actions are "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) as cited in *R.A.V.*, 505 U.S. 377 (White, J. concurring).

Petitioner does not doubt that the abstract interest asserted by the City in Ordinance 417 — "to promote tolerance of all persons and to establish and to protect the civil rights of all persons in the City of Knerr — is a compelling one, and one that appears to be promoted by the Ordinance. *Record* at 13. However, the City has not shown that Section 4(b) is necessary to further this end; in addition, Section 4(b) is not narrowly tailored to meet this end.

There are two possible mechanisms by which we can understand the City's actions under Section 4(b) to further their stated purpose. First, Section 4(b) could be understood as limiting those groups that the city affiliates (or seems to affiliate) with; second, Section 4(b) could be understood as discouraging or limiting overall contributions to Attorney-General designated hate groups.

The second is plainly and clearly unconstitutional under *Eichman*; for "if there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Eichman*, 496 U.S. at 319. If the Government acts with the intention of suppressing particular ideas for the very sake of suppressing those ideas, its actions are unquestionably unconstitutional; even if its ends are compelling, it must use other means to achieve then.

The first purpose, however — avoiding the appearance of city affiliation with hate groups — could be a permissible purpose. However, the City's actions under Section 4(b) are neither necessary nor narrowly tailored to achieve its ultimate goals. In order to appeal to and assert the purpose of avoiding hate affiliation, the government would have to show that it is a compelling one (which it is not) or that it is necessary to promote tolerance or protect civil rights, which it certainly is not. Even if the Court chose to accept this end as compelling, the government's statute is not narrowly tailored to avoiding hate affiliation, as required by strict scrutiny.

The City could construct a more narrowly tailored statute by establishing a requirement of financial separation, rather than penalizing all financial contributions. For example, the City could require its contractors to maintain separate financial accounting of city-provided funds, and show that city funds were not used for contributions to Attorney General designated hate groups. Such a policy would meet the City's aims while permitting contractors such as DeNolf to exercise their First Amendment rights.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully Submitted,

Counsel for Petitioner