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 14TH Circuit Court of Appeals**

**BRIEF FOR RESPONDENT**

*Counsel for Respondent*

## QUESTIONS PRESENTED FOR REVIEW

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

II. Whether, as applied to Petitioner William DeNolf, Section 4(b) of Ordinance 417 violates the First Amendment right to freely associate?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases on Record

**Supreme Court Cases**



**Lower Court Cases**

**Cases Cited Within Record**

**Supreme Court Cases**

**Constitutional Provisions**

## CONSTITUTIONAL AND STATURORY PROVISIONS

**U.S. Constitution, Amendment I:**

"Congress shall make no law… abridging the freedom of speech[.]"

**City of Knerr, Ordinance 417 Section 1(a). Definitions:**

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

**City of Knerr, Ordinance 417 Section 1(b). Definitions:**

"Commerce includes the trade, sales, trafficking, and providing of goods and services."

**City of Knerr, Ordinance 417 Section 2(a). Findings:**

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

**City of Knerr, Ordinance 417 Section 3. Public Accommodations:**

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

**City of Knerr, Ordinance 417 Section 4(b). Contracts:**

"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."

**City of Knerr, Ordinance 417 Section 5. Penalties:**

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

## STATEMENT OF THE CASE

In 2017, the City of Knerr enacted Ordinance 417 in response to a sudden rise in hate crimes. The City found that, "A positive relationship between the City of Knerr's business community and consumers is important to the economic health of the City of Knerr. Tolerance of differences is an essential component of establishing this positive relationship." R. at 13. Section 3 of the Ordinance regulates public accommodations within the city and requires that "No public place of accommodation in the City of Knerr engaged in commerce SHALL refuse to serve or provide service or sell goods or services to any person on the basis of race, color, religion, sex, sexual orientation, national origin, or residency status." R. at 14. Section 4b of the Ordinance addresses contracts that the city engages in and provides that "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." *Id*.

*Indulging Your Creativity* is a business in the City of Knerr that is owned and operated by Petitioner, William DeNolf. The business website advertises that Mr. DeNolf creates products for celebrations, particularly weddings. R. at 3. DeNolf's business motto is "If you can imagine it, we can create it!!!" R. at 2. On July 6, 2018, Ali Zee visited *Indulging Your Creativity* seeking goods and services for her upcoming wedding. Ms. Zee spoke with Mr. DeNolf about procuring a large banner, a custom frame, and party favors. R. at 3. Ms. Zee and Mr. DeNolf agreed that Zee would provide the text for the banner and party favors, while DeNolf would suggest language for the custom frame. *Id*. Mr. DeNolf guaranteed to Ms. Zee that, "We will express any message you want through our work." *Id*.

Mr. DeNolf stepped out for a moment while Ms. Zee worked with Mr. DeNolf's employee, David Moosmann, to fill out some forms. While Mr. DeNolf was gone, Ms. Zee's partner, Mandy Beau, entered the store. When Mr. DeNolf re-entered the room, Moosmann introduced Ms. Beau to his boss, and then asked if he and Mr. DeNolf could have a moment in private. When Mr. DeNolf and Moosmann returned, Mr. DeNolf told the couple that he would no longer be able to provide his services and could only sell the couple "paper products, plain frames, and empty bottles." *Id*. Ms. Beau inquired as to what caused Mr. DeNolf to change his mind and Mr. DeNolf told the couple that he objects to same sex marriage on religious grounds.

Ms. Zee and Ms. Beau left the store upset and contacted Knerr City Attorney Karina Laigo. R. at 4. Laigo handed the case to the City of Knerr Commission on Civil Rights for investigation. The Commission held a public hearing and ultimately found that Mr. DeNolf violated section 3 of the Ordinance, thus requiring him to serve the couple or pay a $5,000 fine. *Id*.

In an unrelated matter, as the City of Knerr conducted its annual review of business contracts, it identified that Mr. DeNolf made four contributions of $500 to groups designated hate groups by the Olympus Attorney General, Husoni Raymond. *Id.* While these hate groups had yet to be associated with violence, they were labeled hate groups for their refusal to sanction same sex marriage. R. at 4 n.4. Additionally, the list of hate groups was publicly available on the Olympus Justice Department's website. *Id.* Mr. DeNolf's contributions violated Section 4(b) of Ordinance 417, and Matt Murphy, mayor of the City of Knerr, informed Mr. DeNolf that his contract would be cancelled, unless Mr. DeNolf agreed to make counteracting contributions to groups deemed acceptable by the City Council, as per Section 5 of the Ordinance. *Id.* Mr. DeNolf refused, stating "I'll be damned if I will spend $2,000 to earn a contract for $7,500." *Id.*

Upon learning that his contact had been cancelled, Mr. DeNolf filed suit in the District Court for the Central District of Olympus, claiming that both Section 3 and Section 4(b) violate his First Amendment rights. *Id.* After the District Court granted summary judgment to the City, Mr. DeNolf appealed. *Id*.

## SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Fourteenth Circuit Court of Appeals because Section 3 of Ordinance 417 does not compel Mr. DeNolf to speak. In *National Institute of Family and Life Advocates v. Becerra*, this Court noted that strict scrutiny applies to content-based regulations, whereas in *Turner Broadcasting Systems v. FCC*, this Court held that content-neutral regulations are subject to intermediate scrutiny. Here, section 3 is a content-neutral regulation as it is a conduct regulation which does not "distinguish favored speech from disfavored speech", thus the correct test to apply is intermediate scrutiny. Furthermore, the state Supreme Courts of New Mexico and Arizona have split on the issue of whether public accommodations laws may apply in a content-based manner to artistic businesses. This Court should adopt the reasoning of the New Mexico Supreme Court in *Elane Photography v. Willock,* rather than the reasoning of the Arizona Supreme Court in *Brush and Nib Studio v. City of Phoenix* on this issue. Finally, this Court in *Turner* ruled that a content-neutral regulation will be sustained if it advances an important interest unrelated to the suppression of free speech and does not burden substantially more speech than necessary. Section 3 targets three interrelated important interests unrelated to the suppression of free speech: promoting tolerance, combatting discrimination, and maintaining a positive economic relationship between the surrounding community and businesses in Knerr. Section 3 does not burden substantially more speech than necessary in supporting these three interests and thus passes intermediate scrutiny. Therefore, this Court should affirm the ruling of the Fourteenth Circuit as section 3 is constitutional in its application to Mr. DeNolf.

This Court should affirm the decision of the Fourteenth Court Circuit of Appeals because Section 4(b) of Ordinance 417 does not hinder Mr. DeNolf's ability to freely associate. In *Rust v.*

*Sullivan*, this Court held that the government is authorized to condition the receipt of public money. Here, the City of Knerr did no more than avail itself of that authority in conditioning its public contracts through Section 4 of Ordinance 417. Moreover, in *Maher v. Roe*, this Court specified that the government may make value judgments, and that it may implement value judgments through the conditioning of public money. Further, under *Branti v. Finkel*, the City has the authority to terminate Mr. DeNolf's contract as it is furthering a government interest. The City of Knerr, in passing Section 4(b) of Ordinance 417, simply chose to value tolerance over hate, and implemented that judgment through contractual policy. Additionally, in *Lyng v. Automobile Workers*, this Court held that when there is no direct or substantial interference on a fundamental interest, rational basis is the correct standard to apply. Here, Mr. DeNolf's right to associate was neither directly nor substantially hindered, and as such, Section 4(b) of Ordinance 417 is subject to rational basis. Laws subject to such a standard are presumptively valid, and Section 4(b) is valid as it is rationally related to a legitimate government interest in promoting tolerance. Accordingly, this Court should affirm the Court of Appeals for the Fourteenth Circuit in its finding that Section 4(b) of Ordinance 417 is constitutional in its application to Mr. DeNolf.

## ARGUMENT

### I. THIS COURT SHOULD AFFIRM THE DECISION OF THE FOURTEENTH CIRCUIT COURT OF APPEALS BECAUSE SECTION 3 OF ORDINANCE 417 DOES NOT COMPEL SPEECH.

#### A. The Fourteenth Circuit Court Of Appeals Correctly Found That Section 3 Of The Ordinance Should Be Tested At Intermediate Scrutiny.

##### 1. Section 3 is a content-neutral regulation.

Section 3 does not violate Mr. DeNolf's First Amendment right to be free from compelled speech because it does not regulate the content of speech, rather it regulates the conduct of public accommodations within the City in a neutral manner. The First Amendment provides that "Congress shall make no law… abridging the freedom of speech[.]" U.S. Const. amend. I. This Court expounded on the breadth of the First Amendment in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) holding that individuals have the right to be free from compelled speech. This Court in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) recognized that the government may not compel speech, but can compel conduct that involves speech in a neutral manner. This Court held that, "content-neutral restrictions on speech" are "subject to intermediate First Amendment scrutiny." *Turner*, 520 U.S. at 185 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Strict scrutiny is applied to content-based regulations. *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 135 S.Ct. 2361, 2371 (2018) (quoting *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015) (holding that content-based laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). Strict scrutiny is not applied to content-neutral regulations because "Content-neutral regulations do not pose the same 'inherent dangers to free expression,' that content-based regulations do, and thus

are subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution." *Id*. at 213. (internal citation omitted).

In *Turner*, this Court considered Sections 4 and 5 of the Cable Act of 1992 which compelled that "all cable operators with more than 12 channels set aside one-third of their channel capacity for local broadcasters." *Id.* at 185. The government played no role in the choice as to which local broadcasters would be selected to fill the set aside capacity; these decisions were left up to the cable operators. *Id.* at 216. This Court found that Sections 4 and 5 of the Cable Act were content-neutral regulations. This Court reasoned that the laws at issue in *Turner* were content-neutral and not content-based because they did not "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed[.]" *Id*. at 186.

*Turner* is the most analogous case and controls this dispute. Like in *Turner*, where the regulation simply asked cable operators to dedicate a fraction of their channel space to local channels, here, section 3 simply asks places of public accommodation to treat all customers equally. R. at 14. Similarly, where the cable networks in *Turner* served as an intermediary for the message of the local networks, Mr. DeNolf serves as an intermediary for the messages of his customers. Mr. DeNolf implies in his advertising motto, "If you can imagine it, we can create it!!!" that his business takes the message of the customer and makes products commissioned by the customer with that message. R. at. 2. Additionally, Mr. DeNolf explicitly affirmed this notion by telling Ms. Zee, "We will express any message you want through our work." R. at 3. Therefore, because the regulation controls business conduct and not speech, it is content neutral.

In *NIFLA*, California's Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) placed a notice requirement on licensed and unlicensed pregnancy clinics. The FACT Act was directed at crisis pregnancy centers, which are mostly run by "pro-

life" organizations. *Id.* at 2369. Licensed clinics were required to issue a government written statement that informed women of free and low-cost health care options, including abortion services. *Id*. Some licensed clinics, such as in Los Angeles County, were required to print the pre-scripted notice in up to thirteen languages. *Id*. Unlicensed clinics were required to post the pre-scripted notice "conspicuously" and "written in no less than 48-point type." *Id*. at 2370. Unlicensed clinics were also required to post the notice on any advertising in equal or larger size font than the advertisement itself. *Id*.

*NIFLA* is distinguishable from this case. There, the FACT Act specifically targeted pregnancy centers with pro-life ideologies, whereas here, Section 3 has not specifically targeted Mr. DeNolf as it applies to all public accommodations in Knerr. Additionally, the pre-scripted message at issue in *NIFLA* was a standard example of a content-based regulation, as the message was written by the government, however, here Mr. DeNolf was not required to issue any pre-written message on behalf of Knerr. Lastly, Mr. DeNolf was not required to participate in any burdensome activities akin to *NIFLA* such as printing a conspicuous notice on his advertising. Section 3 is not a content-based law, such as the one in *NIFLA*, because Mr. DeNolf maintained his autonomy as a speaker and was not compelled to speak the government's message. This Court should apply intermediate scrutiny, not strict scrutiny, to the present case as Section 3 is content-neutral such as the law in *Turner*, not content-based such as the law in *NIFLA*.

**2. Section 3 does not apply differently to DeNolf than it does to other public accommodations.**

The Fourteenth Circuit addressed the split between state supreme courts addressing the issue of whether public accommodations laws should apply to art-related businesses. R. at 7. In *Brush and Nib Studio v. City of Phoenix*, the Arizona Supreme Court found that

public accommodations laws may apply in ways that compel speech on part of artists. 448 P. 3d 890 (Ariz. 2019). In *Elane Photography, LLC v. Willock*, the New Mexico Supreme Court found the opposite, holding that public accommodations laws may regulate business conduct, including art-related businesses. 309 P.3d 53 (N.M. 2013).

In *Brush and Nib Studio*, Petitioners made a preemptive challenge to the City of Phoenix's Human Relations Ordinance. The owners of Brush and Nib Studio argued that the law should not apply to their business and that they should be allowed to issue a statement explaining what type of art they would be objected to making. The Arizona Supreme Court sided with Brush and Nib Studio on narrow grounds, only finding that their custom wedding invitations were protected under the First Amendment, explaining that "the First Amendment does not protect all of Plaintiffs' business activities or products simply because they operate Brush & Nib as an 'art studio.'" *Id.* at 908. The Arizona Supreme Court additionally reasoned that "the Arizona Constitution provides broader protections for free speech than the First Amendment." *Id.* at 902.

This Court should not adopt the reasoning of the Arizona Supreme Court as the decision in *Brush and Nib Studio* was decided on state constitutional grounds and is based in precedent that would not apply to the immediate case. The Arizona Supreme Court relied primarily on *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) in making the argument that Brush and Nib Studio would be forced to accommodate the message of their customers, thus constituting compelled speech. However, the immediate case is distinguishable from *Hurley*. In *Hurley*, the Court found that Boston's public accommodations law would not apply to a parade. Here, Mr. DeNolf's business is unlike the parade considered in *Hurley* and falls squarely into the definition of a public accommodation as defined by section 1 of the Ordinance. R. at 13. The Court's reasoning in *Hurley* hinged on the fact that a third party was

imposing a message onto the parade organizer's message. Mr. DeNolf is in a dissimilar position. Ms. Zee and Ms. Beau were not imposing their own message onto Mr. DeNolf's message, but rather, Mr. DeNolf is a conduit for the message of Ms. Zee and Ms. Beau. *See Id*. at 577 (citing *Turner Broadcasting Systems v. FCC*, 512 U.S. 622, 655 (1994)).

In *Elane Photography*, a photography business violated the New Mexico Human Rights Act (hereinafter "NMHRA"), a public accommodations law, by refusing to photograph a lesbian couple's engagement ceremony. The owners of Elane Photography, LLC claimed that the NMHRA violated their First Amendment right to be free from compelled speech as they had a religious objection to same-sex marriage. The New Mexico Supreme Court found that the NMHRA was constitutional in its application to Elane Photography, LLC despite the business' artistic nature, reasoning that "because [Elane Photography, LLC] is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work." *Id.* at 66.

This Court should adopt the reasoning of the New Mexico Supreme Court in *Elane Photography* on this issue. The New Mexico Supreme Court rests its opinion in *Elane Photography* on this Court's decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006) which is more applicable to the immediate case. In *Rumsfeld*, this Court upheld the Solomon Act which required law schools to assist military recruiters on their campuses in ways "such as sending e-mails and distributing flyers." *Rumsfeld*, 547 U.S. at 60 (as quoted in *Elane Photography*, 309 P.3d at 65). This Court in *Rumsfeld* found that the Solomon Act did not violate the First Amendment because it "neither limit[ed] what law schools may say nor requires them to say anything." *Id*. Section 3 is analogous. Section 3 purely requires equal treatment of all protected classes included in the statute, nowhere is there any indication that

operators of public accommodations would be required to affirm any beliefs nor are any limits placed on what operators of public accommodations may say. This Court should apply the analysis of the New Mexico Supreme Court in *Elane Photography* and hold that artistic businesses should be held to the same standard as other businesses under content-neutral public accommodations laws.

### B. The Fourteenth Circuit Court Of Appeals Correctly Found That Section 3 Passes Intermediate Scrutiny.

Section 3 is constitutional because it is a content-neutral regulation that passes intermediate scrutiny. This Court held that, "A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner*, 520 U.S. at 189 (quoting *United States v. O'Brien*, 391 U.S. 367, 377). In order for a content-neutral regulation to pass constitutional muster, it is the burden of the government to prove that the regulation passes both prongs of the intermediate scrutiny test as defined by this Court in *O'Brien*.

#### 1. Section 3 has an important interest that is unrelated to the suppression of free speech.

The City of Knerr meets its burden in advancing an important governmental interest through the enactment of section 3 of the Ordinance. The government carries the burden of establishing that a content-neutral regulation furthers an important interest that is unrelated to the suppression of free speech. *Turner*, 520 U.S. at 186. Section 3 was designed to serve three interrelated interests: (1) promoting tolerance within the commercial sphere, (2) combatting

discrimination, and (3) maintaining a healthy relationship between Knerr's economy and the protected classes listed within the statute.

The Ordinance is an effort on part of the people of Knerr to promote tolerance within the City's public accommodations. Public accommodations laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley*, 515 U.S. at 572. Laws regulating public accommodations, such as the Ordinance, are put into place to create a culture of tolerance that subsequently "[re]move the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969) (cited in *Elane Photography*, 309 P. 3d at 65). DeNolf provides full services to couples that he approves of, but can only provide a discriminatory denial to Ms. Zee and Ms. Beau. Section 3 was enacted to target these very instances of inequality.

The people of Knerr's interest in promoting tolerance and combatting discrimination in places of public accommodation go hand in hand. Knerr's interest in combatting discrimination aligns with what this Court considered in *United States Jaycees v. Roberts*, 468 U.S. 609 (1984), as cited in the record in *Brush and Nib Studio v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019). In *Roberts*, this Court held that the government's "strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order." *Id*. at 624 (cited in *Brush and Nib Studio*, 448 P.3d at 914). This Court has found combatting discrimination to satisfy the first prong of the heightened strict scrutiny standard, as such, it should satisfy the first prong of the intermediate scrutiny standard.

The City of Knerr additionally has an interest in maintaining the economic benefits that flow from a culture of tolerance within public accommodations. Knerr conducted findings to support the Ordinance that indicate "A positive relationship between the City of Knerr's business community and consumers is important to the economic health of the City of Knerr. Tolerance of differences is an essential component of establishing this positive relationship." R. at 13. As applied to DeNolf, this interest is important as statistics underpinning the Ordinance reflect that the "LGBT population [in Knerr] engages in a sizable percentage of its overall commerce." R. at 5. This Court has not diminished an important interest by mere virtue of it being economically driven and has, in fact, noted the economic harm of discrimination in public accommodations. *Katzenbach v. McClung*, 379 U.S. 294 (1964) (cited in *Elane Photography*, 309 P.3d at 65). Section 3 passes the first prong of intermediate scrutiny as the City has met its burden in providing three important interests that are unrelated to the suppression of free speech.

**2. Section 3 does not burden substantially more speech than is necessary.**

Section 3 of the Ordinance passes intermediate scrutiny on both prongs. Knerr has met its burden in providing important interests, but in order to pass intermediate scrutiny, it must also prove that "the incidental restrictions [do] not 'burden substantially more speech than is necessary to further'" those important interests. *Turner*, 520 U.S. at 213 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Any burden placed on speech caused by the regulation must be "congruent to the benefits it affords." *Id.* at 215. This Court has also noted what type of speech may be involved in placing a burden that is "plainly incidental to regulation of conduct" explaining that, "it has never been deemed an abridgment of freedom of speech to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of

language, either spoken, written, or printed." *Rumsfeld v. FAIR,* 547 U.S. at 62 (as quoted in *Elane Photography*, 309 P.3d at 65).

In *Turner*, the Petitioners argued that there were "a number of alternatives in an effort to demonstrate a less restrictive means to achieve the Government's aims." This Court rejected the Petitioners' argument, stating that a regulation is not "invalidate[d] merely because some alternative solution is marginally less intrusive on a speaker's First Amendment interests." *Id*. at 217. *See Also Id*. at 218 (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 815-17 (1984) (holding that "although making exceptions 'would have had a less severe effect on expressive activity,' they were not 'constitutionally mandated'"). The dissenting opinion from the 14th Circuit makes a similar argument in proposing that, "the City could have broadened the exemption under Section 6." R. at 11. The City is not mandated to make such an exception, and any further exceptions would make the law a shadow of itself, weakening its purpose of meeting its three important objectives.

The dissenting opinion of the 14th Circuit moreover contends that the law is more broad than necessary because DeNolf violated section 3 even though he was willing to provide blank materials. R. at 11. This argument draws parallels to what this Court considered in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 130 S.Ct. 2971 (2010), as cited in the record in *Elane Photography*, 309 P. 3d at 61. In *Martinez*, the Christian Legal Society argued that they were not discriminating on the basis of sexual orientation because homosexuals were still allowed to join the society, but simply were not allowed to participate in homosexual conduct. This Court rejected that argument, noting that, "Our decisions have declined to distinguish between status and conduct in this context." *Martinez,* 130 S.Ct. at 2990, (as quoted in *Elane Photography*, 309 P.3d at 62).

Here, Mr. DeNolf's choice to sell blank goods to two lesbian women, but not provide services for their union is an attempt to distinguish between the status and conduct of the two women. If the City were to exempt Mr. DeNolf from Section 3, solely because he was willing to provide a limited menu to Ms. Zee and Ms. Beau, it would not be able to effectively meet its important interests.

Finally, the law is not more broad than necessary because it does not limit the speech of public accommodations. Knerr's purpose in enacting the Ordinance is to do everything within its constitutional bounds to promote tolerance without "prescribing what is orthodox." *Barnette*, 319 U.S. at 642. The dissenting opinion of the 14th Circuit erroneously states that, "the only way for DeNolf's rights to be protected is for DeNolf to be able to deny service to someone in instances such as these facts." R. at 11. Section 3 does not endanger DeNolf's rights, but assuming arguendo that it did, DeNolf could still issue a disclaimer stating that he does not agree with all the marriages he serves. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), as quoted in *Elane Photography*, 309 P. 3d at 69 (noting that a shopping center could disavow messages it disagreed with by posting disclaimers.) Mr. DeNolf is free to speak however he wishes, but he may not refuse services to a couple because of their protected status. As this Court held in *Norwood v. Harrison*, 413 U.S. 455, 463 (1973), "the Constitution may compel toleration of private discrimination... [this] does not mean that it requires state support for such discrimination." Knerr is not required to tolerate Mr. DeNolf's discrimination against Ms. Zee and Ms. Beau in the business context. Section 3 is constitutional and has not violated Mr. DeNolf's First Amendment rights as the regulation is not more broad than necessary, thus satisfying both prongs of intermediate scrutiny.

Petitioner alleges that section 3 compels him to speak, as he objects to serving a same-sex couple on religious grounds. In doing so, Petitioner resurrects the request made by Mr. Bessinger

in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), a request for the religious right to discriminate. Just as this Court rejected this argument as "patently frivolous" in the wake of the 1964 Civil Rights Act, this Court should reject Petitioner's arguments presently. *Id*. at 402 n.5. Section 3 is a content-neutral regulation that passes intermediate scrutiny as it has not one, but three important interests which are unrelated to the suppression of free speech and it does not burden more speech than necessary. Because the City has met its burden on both prongs of the appropriate test, this Court should affirm the decision of the Fourteenth Circuit Court of Appeals.

## II. THIS COURT SHOULD AFFIRM THE DECISION OF THE FOURTEENTH CIRCUIT COURT OF APPEALS BECAUSE SECTION 4(B) OF ORDINANCE 417 DOES NOT PROHBIT MR. DENOLF FROM FREELY ASSOCIATING.

### A. The City Has The Authority To Attach Conditions To The Contracts That It Tenders.

In order to ascertain whether Section 4(b) of Ordinance 417 is constitutional, it must first be established that the City of Knerr possesses the authority to enact such legislation; it does. In *Rust v. Sullivan*, this Court held that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." 500 U.S. 173, 194 (1991). Not only does it retain the authority to condition the receipt of public funds, but it also "can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Id.* at 193. *See Also Id.* at 192-93 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)) (finding that the government may "make a value judgment favoring childbirth over abortion, and … implement that judgment by the allocation of public funds.") Under this Court's precedent in *Rust*, the City of Knerr is authorized to condition the receipt of its public funds.

In *Rust*, this Court held that the government can condition federal funds to prevent doctors from spending money on or encouraging abortion-related activities. In doing so, the Court found that the government did not discriminate on the basis of viewpoint, but rather, it made a value judgment, choosing to fund one activity over another. *Id.* at 193. *Rust* emphasized that the funding of an activity, such as abortion, is not a protected right, and thus restricting such funds is constitutional. *See Lyng v. Automobile Workers*, 485 U.S. 360, 368 (1988) (quoting *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983)) (noting "that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.") *See also Rust*, 500 U.S. at 193 (quoting *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980)) (emphasizing that "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a `penalty' on that activity.") The government merely made a value judgment and exercised its authority to condition the receipt of public money.

**1. The City availed itself of its authority to implement value judgments by means of contractual policy.**

In passing Section 4(b) of Ordinance 417, the City availed itself of its authority to condition the receipt of public funds. Section 4 of Ordinance 417 implements a contractual policy in which the City will not do business with individuals who contribute to hate groups. R. at 14. As in *Rust*, where the government chose to condition funds in order to prevent the promotion of abortion-related activities, the City of Knerr conditioned the funds that it issues by way of contract to prevent the financial promotion of hate groups. The City of Knerr presented findings that promoting tolerance is essential to the public's interest. R. at 13. Pursuant to these findings, the City merely desires to distribute contracts and provide its funds to individuals who will not make financial contributions that undermine that essential interest. Accordingly, this Court should find that the

City of Knerr did no more than make a value judgment, choosing to promote tolerance over hate, and constitutionally conditioned its contractual policy to further tolerance.

While, at first blush, *Rust* may appear distinguishable because it deals with federal grant money rather than contracts, the overarching principle ought to reign true. When the government chooses to allocate public funds, through public programs or public contracts, it ought to be entitled to define the limits of those funds. The city offered Mr. DeNolf a choice, and Mr. DeNolf chose to accept the contract, but went on to violate the city's contractual policy. The plain language of Section 4(b), which took effect beginning July first of two-thousand seventeen, reads that "The City of Knerr will not enter into any contract or honor any existing contract with any person who … 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." R. at 14. Mr. DeNolf never claimed ignorance of this law, yet still chose to enter into a contract with the city in September of two-thousand seventeen, two months after the law took effect. R. at 1, 3. Mr. DeNolf was presented with a choice, to accept or refuse a contract with specified conditions attached through Section 4 of Ordinance 417, and he chose to both accept and violate those conditions. Just as *Rust* held that presenting such a choice involves no constitutional concern, this Court should likewise find that Section 4(b) of Ordinance 417 presents no concern, and thus does not violate Mr. DeNolf's First Amendment rights.

**2. The City has the authority to terminate Mr. DeNolf's Contract.**

Not only does the City of Knerr have the authority to attach conditions through contractual policy, but it also possesses the authority to terminate a contract when advancing a government interest. In *Branti v. Finkel*, this Court noted that the First Amendment protects government employees from termination based on private beliefs. 445 U.S. 507, 515 (1980). *Branti*, relying

on *Elrod v. Burns*, 427 U.S. 347 (1976), notes that the government can only discharge an employee if his job requires confidence or policymaking. *Branti*, 445 U.S. at 511. However, this Court also emphasized that "patronage dismissals could be justified only if they advanced a governmental, rather than a partisan, interest." *Id.* at 517 n.12. As such, the termination of a contract is permissible in the event that a governmental interest is advanced, and the City of Knerr advanced a governmental interest in promoting tolerance.

*Branti* dealt with assistant public defenders who were terminated solely for their affiliation and association with the Republican party. *Id.* at 508. The Court found that, because their job was not hindered by their association with the Republican party, their discharge solely for that association is unconstitutional. However, the interest in *Branti* was unquestionably partisan as a newly appointed Democrat public defender attempted to fire all Republicans. *Id.* at 513 n.7. As such, the dismissals were unjustified.

The City of Knerr's actions are distinguishable from *Branti* because the city advanced a governmental interest in promoting tolerance, and thus possesses the authority to terminate Mr. DeNolf's contract. The purpose of Ordinance 417 is to "promote tolerance of all persons and to establish and to protect the civil rights of all persons in the City of Knerr." R. at 13. Unlike in *Branti*, where the interest was certainly partisan as the assistant public defenders were terminated merely for their affiliation with the Republic party, the City enacted Section 4(b) in order to both promote tolerance and combat discrimination by disincentivizing individuals from making financial contributions to hate groups. To be sure, there is no political aspect to hate. The City of Knerr's interest is squarely governmental, rather than partisan, and thus its refusal to recognize and honor contracts with individuals who fund hate is constitutional.

**B. Section 4(b) Of Ordinance 417 Satisfies Rational Basis.**

While *Rust* only restricted the activities of individuals while they were on the job, this Court, in *Lyng v. Automobile Workers*, outlined that the government may also restrict one's private activities through the conditions that it attaches to food stamps. 485 U.S. 360 (1988). This Court held that public aid is not a First Amendment right, noting that the "right of association does not require the Government to furnish funds to maximize the exercise of that right." *Id.* at 368. Moreover, *Lyng*, citing *Lyng v. Castillo*, 477 U.S. 635, 638 (1986), held that rational basis review is the proper test unless the statute "directly and substantially' interfere[s] with … and thereby burden[s] a fundamental right." *Lyng*, 485 U.S. at 365. In *Lyng*, this Court upheld § 109 of the Omnibus Budget Reconciliation Act of 1981, which laid forth that if a member of a household is on strike, that household may not participate in the food stamp program. *Id.* at 363 n.2. Given that the statute neither prevented individuals from dining together nor prohibited individuals from striking, the Court found no direct or substantial burden and thus applied rational basis review. *Id.* at 365-366.

**1. Rational basis is the correct test.**

Section 4(b) of Ordinance 417 neither directly nor substantially interferes with Mr. DeNolf's First Amendment right to associate, and thus rational basis review ought to apply. Just as in *Lyng*, where individuals were still permitted to strike and associate as they please, Mr. DeNolf was likewise free to associate. Nothing in the language of Section 4(b) prohibits Mr. DeNolf from being a member of a group, advocating for a group, or even serving as the president of a group. R. at 14. In fact, Section 4(b) does not even restrict Mr. DeNolf from making financial contributions to these groups. Section 5 indicates that he may continue to do so if he makes counteracting contributions to groups approved by the City Council. *Id.* At first blush, this may appear to be a false choice, but Mr. DeNolf does not bring a challenge to the

constitutionality of Section 5, and moreover, Mr. DeNolf voluntarily entered into a contract with the city. R. at 3, 5 n.5. These two facts, coupled together, indicate that Mr. DeNolf faced no Hobson's choice. Rather, Mr. DeNolf accepted a contract with clear conditions, and those conditions had no direct or substantial impact on his right to associate, triggering rational basis review.

**2. Section 4(b) is rationally related to a legitimate government interest.**

*Lyng* notes that rational basis review is "quite deferential." 485 U.S. at 370. *See Id.* at 370 (quoting *Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307, 314 (1976)) (noting that statutes subject to rational basis are "presumed to be valid[.]") Per *Lyng*, quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973), a statute passes rational basis if it "is rationally related to a legitimate governmental interest." 485 U.S. at 370. Given that Section 4(b) of Ordinance 417 is rationally related to a compelling governmental interest, the Ordinance meets constitutional muster.

In *Lyng*, the Court recognized that the government had a legitimate interest in remaining neutral in an ongoing labor dispute, desiring not to show favoritism to either side. 485 U.S. at 371. Further, the Court found that there is "little trouble" in concluding that the statute is rationally related to furthering the governmental interest, as a refrain from subsidizing striking is surely more neutral than rewarding the activity. *Id.* Although it may appear that the statue deals with strikers more harshly than workers who outright quit, that does not render the statute irrational. *See Lyng,* 485 U.S. at 372 (quoting *Ohio Bureau of Employment Services v. Hodory*, 431 U. S. 471 (1977)) (noting that even if a statute "provides only 'rough justice,' its treatment … is far from irrational.") Thus, even though some disruption may be incurred by the statute, it is still rationally related to furthering the legitimate governmental interest of neutrality.

Section 4(b) of Ordinance 417, like § 109 of the Omnibus Budget Reconciliation Act, is rationally related to a legitimate governmental interest. Whereas in *Lyng* the interest at issue was neutrality, the interest addressed by Section 4(b) is tolerance and protecting "the civil rights of all persons in the City of Knerr." R. at 13. Not only has this Court recognized such an interest as legitimate, but has gone as far as to find it compelling. *See R. A. V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (recognizing that ensuring basic human rights is a compelling interest of the government.) As such, this Court should find that the City of Knerr has a legitimate interest in promoting tolerance and combatting discrimination.

The question then turns to whether Section 4(b) is rationally related to the interest. It is. Ordinance 417 was enacted, along with various other civil rights laws, in response to a rise in hate crimes. R. at 2. Section 4(b) took aim at this issue by refusing to contract with individuals who make financial contributions to hate groups. R. at 14. Such a stance accomplishes two objectives. First, it clarifies that the City disavows hate and seeks to promote tolerance. Second, it takes a step towards defunding hate throughout the City of Knerr. Just as, in *Lyng*, refusing to provide food stamps to workers on strike achieved the government's interest in remaining neutral, this Court should find that refusing to contract with individuals who contribute to hate groups is rationally related to the City's interest in promoting tolerance.

The dissent argues that *United States v. Robel*, which held that legislation restricting one's employment must be narrowly drawn, is controlling. 389 U.S. 258, 268 n.20 (1967). In *Robel*, § 5 (a) (1) (D) of the 1950 Subversive Activities Control Act prevented members of the Communist Party from employment in defense facilities. *Id.* at 262. Mr. Robel was indicted for knowingly maintaining employment in such a defense facility while being a member of the Communist Party.

*Id.* at 261. Given that Subversive Activities Control Act, however, did not evaluate the degree or quality of Mr. Robel's membership, the Court found it unconstitutional. *Id.* at 262.

While Section 4(b), at first blush, appears to fail the *Robel* standard, *Robel* is entirely distinguishable from the present case as membership is not involved. When dealing with membership, it is imperative to determine the quality and degree of an individual's membership; the same cannot be said of a financial contribution. For instance, an individual may be a member of a group, but take no steps to personally further any potentially dangerous aims of that group. When one makes a financial contribution, however, the aims of the group, rather than the individual making the contribution, are necessarily furthered. As such, when a financial contribution is at issue, the standing of the individual making the contribution is rendered irrelevant. Rather, the group receiving the contribution must be placed under the microscope. Here, Mr. DeNolf made four five-hundred-dollar contributions to four different organizations that had been designated hate groups. R. at 4. Regardless of Mr. DeNolf's intentions when making these contributions, he provided money to a hate groups that, in turn, may further their presence throughout the City of Knerr. As such, this Court should find *Robel* distinguishable, and thus apply rational basis rather than heightened scrutiny that requires Section 4(b) be narrowly drawn.

To find for Mr. DeNolf would be a perversion of this Court's precedent. It has long held that the City has the authority to condition the receipt of its funds, and that it may implement value judgments. In refusing to honor a contract with Mr. DeNolf, the City in no way substantially interfered with his associational rights, but rather, sought to dissuade and distance itself from hate. Doing such is rationally related to the promotion of tolerance and assurance of civil rights to all persons in the City of Knerr. Accordingly, this Court should find that Section 4(b) of Ordinance 417 is constitutional in its application to Mr. DeNolf.

## CONCLUSION

For the foregoing reasons, the People of Knerr respectfully request that this Court affirm the decision of the Fourteenth Circuit Court of Appeals and hold that:

I. Section 3 of Ordinance 417 is constitutional and does not violate Mr. DeNolf's First Amendment right to be free from compelled speech.

II. Section 4(b) of Ordinance 417 is constitutional and does not violate Mr. DeNolf's First Amendment right to freely associate.

December 14, 2020

Respectfully submitted,

*Counsel for Respondent*

**The City of Knerr**