Suffolk Journal of Trial and Appellate Advocacy

Volume 29 | Issue 1 Article 10

1-1-2024

Constitutional Law—Miss Anti-United States of America—How Courts Expanded Judicial Authority by Foregoing Constitutional Avoidance—Green v. Miss USA, LLC, 52 F.4th 773 (9th Cir. 2022)

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CONSTITUTIONAL LAW—MISS ANTI-UNITED STATES OF AMERICA: HOW COURTS EXPANDED JUDICIAL AUTHORITY BY FOREGOING CONSTITUTIONAL AVOIDANCE—*GREEN V. MISS USA, LLC*, 52 F.4TH 773 (9TH CIR. 2022).

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Article III, Section 2 of the United States Constitution bestows upon the judiciary the power to examine and make decisions on cases before it.[1] Nonetheless, this authority is not absolute, but rather is constrained by numerous doctrines that restrict the scope of judicial review.[2] For example, the constitutional avoidance doctrine, which asserts that when a law can be interpreted in two ways, one leading to significant constitutional issues, and

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[1] *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treatises made, or which shall be made, under their Authority . . . ."). The Court's authority is further delegated via the doctrine of judicial review. *See* Marbury v. Madison, 5 U.S. 137, 178 (1803) (explaining application of art. III, § 2 to cases or controversies before courts). In *Marbury*, Chief Justice Marshall articulated:

> [I]f a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that the case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id. (describing power of judicial review); *see also* James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Inquiry-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 81 (2001) (deeming *Marbury v. Madison* precedent for establishing judicial review).

[2] *See* Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U.L. REV. 671, 710 (1997) ("To properly understand the meaning of 'judicial power,' comparison should be made to its constitutional analogues, the legislative power, and the executive power."). This three-branch framework has led to the development of various justiciability doctrines aimed at preventing any single branch from attaining unchecked authority. *See* Poe v. Ullman, 367 U.S. 497, 503 (1961) (explaining restraint on hypothetical opinions to prevent judiciary from assuming legislative powers); MacNeil v. Marks, 907 F.2d 903, 904 (9th Cir. 1990) (per curiam) (rationalizing ban on advisory opinions); Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450-51 (2008) (remarking as-applied challenged subvert principles of judicial restraint and constitutional avoidance); *see generally* THE FEDERALIST NO. 48, 1, 332-24 (James Madison) (emphasizing importance of restricting governmental power).

the other avoiding such issues, the court should opt for the latter interpretation.[3] Although nearly a century old, the importance of the avoidance doctrine is equally as germane in recent Supreme Court cases.[4] Nevertheless, in 2022, the Ninth Circuit Court of Appeals departed from this doctrine in *Green v. Miss USA, LLC*,[5] holding that Miss USA's prohibition of transgender women from competing was protected by the First Amendment's compelled speech doctrine.[6] In dealing with the as-applied challenge

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[3] *See* United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909) (establishing modern constitutional avoidance doctrine); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (elucidating courts should refrain from crafting constitutional rules if facts afford statutory interpretation). "[T]he fundamental principle of judicial restraint [states] that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Wash. State Grange*, 552 U.S. at 450-51 (quoting *Ashwander*, 297 U.S. at 346-47)); *see also* Eric S. Fish, Article, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1282 (2016) (explaining different layers to constitutional avoidance and canon's evolution); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74 (1995) (elaborating on *Ashwander* decision); Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C.L. REV. 847, 857 (2005) (emphasizing importance of abiding by constitutional avoidance); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 843 (2001) (explaining important policy implications of constitutional avoidance).

[4] *See* Escambia Cnty. v. McMillan, 466 U.S. 48, 51 (1984) ("It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."). In other words, the list of cases stemming from the Supreme Court consistently urge avoidance when faced with both statutory and constitutional questions. *See* Heald v. District of Columbia, 259 U.S. 114, 123 (1922) (emphasizing deeply ingrained notion of constitutional avoidance). Despite occasional instances where constitutional avoidance is ignored, federal courts do not demonstrate a favored approach to constitutional interpretation. *See* Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 6 F.4th 1247, 1256 n.12 (11th Cir. 2021) (declining to decide statutory question because claim failed under First Amendment grounds). *But see* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1259 (2006) (remarking constitutional avoidance as "cardinal principle" of judicial statutory interpretation); Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85, 93 (1995) (noting avoidance cannon as feature of considerable importance); William McGeveran, *Four Free Speech Goals for Trademark Law*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1205, 1212 (2008) (emphasizing important concept of constitutional avoidance).

[5] 52 F.4th 773 (9th Cir. 2022).

[6] *See id.* at 773 (explaining rationale for reviewing constitutional grounds before statutory grounds).

> The panel held that the dissent proposed a radical expansion of the constitutional avoidance doctrine that would force the Pageant to continue operating under a siege of litigation irrespective of any constitutional protections. This runs directly counter to the First Amendment's right, not just to speak, but to be free of protracted speech-chilling litigation. Expanding the constitutional avoidance doctrine to force the Pageant to engage in

before determining the statue's applicability, the Ninth Circuit deviated from its intended responsibilities and encroached into the realm of legislative functions, underscoring the delicate balance between judicial interpretation and separation of powers.[7]

Anita Green publicly identified as a transgender woman at the age of 17.[8] She subsequently underwent hormone therapy and gender reassignment surgery to facilitate her transition from male to female.[9] In the past, her gender identity did not prevent her from competing in beauty pageants like Miss Montana USA and Miss Earth.[10] Nevertheless, in 2018, the Miss

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possibly years of additional, costly, and attention-diverting litigation before it can effectuate its constitutional rights would make a mockery of those rights.

Id. (arguing application of constitutional avoidance would result in suppression of free speech). *See also* Charlie Savage, *What is the Compelled Speech Doctrine?*, N.Y. TIMES (Dec. 5, 2022), [https://perma.cc/FL2Y-G94U] (explaining compelled speech doctrine "generally bars the government from compelling people to express things they do not want to say"); Am. Beverage Ass'n v. City & Cnty. of S.F., 916 F.3d 749, 764 (9th Cir. 2019) (Christen, J. & Thomas, C.J., concurring) ("Where a government-compelled message … instead 'compels the carrying of the [government's] controversial opinion[,]' it is clearly 'unconstitutionally compelled speech[.]'") (alteration in original); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1924 (U.S. 2021) (explaining expression of ideas cannot be suppressed merely because some individuals find it offensive). While verbal communication, in its strictest sense, did not take place in this instance, the court recognized expressive behavior through the Pageant's message, which it determined it could not enforce. *See* MARGOT MIFFLIN, LOOKING FOR MISS AMERICA: A PAGEANT'S 100-YEAR QUEST TO DEFINE WOMANHOOD 9 (2020) (delineating messaging behind beauty pageants); *see also* Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1060 (9th Cir. 2010) (elaborating on expressive activity via art); VIP Prods. LLC v. Jack Daniel's Props., Inc., 953 F.3d 1170, 1175 (9th Cir. 2020) (noting expression reaches beyond mere words).

[7] *See* Richard H. Fallon, Jr., *As-applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1321 (2000) (defining as-applied challenge). An as-applied challenge states that a statute should not be applied because its application would violate constitutional rights. *See id.* It is imperative to determine whether the statute applies before determining its constitutionality. *See* Catherine Gage O'Grady, *The Role of Speculation in Facial Challenges*, 53 ARIZ. L. REV. 867, 881-82 (2011) (noting individualized facts are central to as-applied challenges). If the individual facts are not utilized to first determine whether the statute applied to their case in the first place, the court is merely ruling on a hypothetical. *See Poe*, 367 U.S. at 503 ("The court can have no right to pronounce an abstract opinion on the constitutionality of a State law.").

[8] *See Green*, 52 F.4th at 778 (delineating Green's gender identity).

[9] *See id.* (describing personal and medical steps to align with Greens gender identity). Tanice Smith, the Pageant director, had no knowledge Green identified as a transgender woman until Green made her gender identity known. *See id.* (noting Smith informed Green on how to compete in Miss USA). Initially, Smith sent over the Pageant rules and suggested Green wait until 2019 to compete, since registration for 2018 had concluded. *Id.* However, Smith altered her encouragement to compete when Green wrote "[y]ou know I'm transgender, right?" *Id.* At that juncture, Smith conveyed that she was unaware Green was a transgender woman, elucidating the requirement of being a "natural born woman," and offered to find Green a pageant for which she would meet the qualifications. *See id.* (marking shift in tone and conversation to "natural born female" requirement).

[10] *See* Green v. Miss USA, LLC, 533 F. Supp. 3d 978, 982 (D. Or. 2021) (explaining Green's beauty pageant record). Previously, Green competed in Montana, Oregon, and Nevada pageants,

United States of America Pageant ("Pageant") barred her from competing in its event based on its "natural born woman" registration requirement.[11] Despite being aware of this restriction, Green applied to compete anyway, eventually leading to the Pageant's rejection of her application.[12]

In response to this denial, Green filed a lawsuit against the Pageant, alleging it violated the Oregon Public Accommodations Act ("OPAA") by discriminating on the basis of her gender identity.[13] The Pageant argued for dismissal, claiming an as-applied challenge that the OPAA violated its First

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was the titleholder of Oregon Miss Earth Elite, and competed in the 2019 National Miss Earth Elite pageant. Complaint at 27-29, Green v. Miss USA, LLC, 533 F. Supp. 3d 978 (D. Or. 2021) (No. 19 Civ. 2048). *See* Elura Nanos, *Federal Appeals Court Cites Hamilton Casting in Ruling for Oregon Beauty Pageant that Excluded Transgender Woman*, LAW AND CRIME (Nov. 4, 2022, 6:21 PM), [https://perma.cc/MA6M-JU35] (highlighting Green's previous pageant experiences**).** As a competitor, Green said the pageants "play a vital role in boosting her confidence, improving her public speaking skills, making her feel heard, giving her a public platform in which to discuss important social issues, and allowing her to be a positive and inspiring example to all women." Complaint, *supra*, at 29.

[11] *See Green*, 52 F.4th at 778 (elaborating Pageant's mission and requirements). In addition to the "natural born female" requirement, the "Miss" division required contestants be "between 18-28 years of age," have "never posed nude in film or print media," and have not given birth or been married. *Id.* The Pageant claims these requirements are essential to conveying their message of "encourage[ing] women to strive to achieve their hopes, dreams, goals of, and aspirations, while making them feel confident and beautiful inside and out." Complaint, *supra* note 10, at 15. This message is aimed to express "the ideal vision of American womanhood." *See Green*, 52 F.4th at 780 (explaining Pageant's belief competition requirements "bolster" message); *see generally* NINA BROWN, ET AL., PERSPECTIVES: AN OPEN INTRODUCTION TO CULTURAL ANTHROPOLOGY 389 (2d ed. 2020) (noting beauty pageants purpose of demonstrating feminine norms).

[12] *See Green*, 52 F.4th at 778-79 (rationalizing rejection based on Green's gender identity). At the point of application, the Pageant Director knew of Green's gender identity and how this did not align with the Pageant's requirements and message. *Id.* at 778. Although the message pertains to being "an ideal woman," Green remarked this denial made her feel "as though [she] was being invalidated . . . [and] as though the organization was saying [she is] not a woman and [she is] not woman enough." Elise Herron, *An Oregon Woman is Suing a Beauty Pageant that Excludes Transgender Contestants*, WILLAMETTE WEEK (Dec. 18, 2019, 5:33 AM), [https://perma.cc/5QVR-UR2A] (conveying Green's feelings and basis for lawsuit).

[13] *See Green*, 52 F.4th at 778-79 (restating OPAA's requirements). Under the OPAA, it is unlawful "for any person to deny full and equal accommodations, advantages, facilities, and privileges of any place of public accommodation" to an individual based on a protected status, including gender. *See* OR. REV. STAT. § 659A.403; *see also* OR. REV. STAT. § 174.100(7). Under the OPAA, an organization is considered public accommodation if it is (1) a commercial enterprise; and (2) has membership policies that "are so unselective that the organization can fairly be said to offer its services to the public." *See* Lahmann v. Grand Aerie of Fraternal Ord. of Eagles, 43 P.3d 1130, 1137 (Or. Ct. App. 2002). Ultimately, the OPAA does not cover private services or services offered to a defined segment of individuals. *See* Abraham v. Corizon Health, Inc., 511 P.3d 1083, 1093 (Or. 2022). In some circumstances, an enterprise may be considered a public accommodation even if services are offered to a defined segment but cannot subvert the OPAA by serving a subset of the public protected by the OPAA. *Id.* In this case, the Ninth Circuit did not engage in the discussion of whether the Pageant was a public accommodation under the OPAA due to the Pageant's concession. *See Green*, 52 F.4th at 794.

Amendment right against compelled expression.[14] After converting its motion to dismiss to a motion for summary judgment, the district court granted summary judgment, holding the OPAA violated the Pageant's First Amendment expressive association right.[15] In response, Green appealed to the Ninth Circuit and the Pageant renewed its as-applied challenge, with Green arguing violation of her First Amendment right.[16]

Marbury v. Madison first established federal courts' ability to rule on issues of law before them.[17] While court decisions can significantly impact public policy, constitutional constraints prevent the judiciary from becoming overly involved in the legislative process to maintain proper separation of powers.[18] Given the nature of judicial review, various constitutional

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[14] *See Green*, 533 F. Supp. 3d at 982 (describing Pageant's counterargument and as-applied challenge). "The subject of both motions is an identical as-applied challenge to the Oregon Public Accommodations Act ("OPAA") as a violation of Miss USA's rights under the First Amendment of the United States Constitution and Article I, Section 8 of the Oregon Constitution." *Id.*

[15] *See id.* (explaining court's order to alter defendant's motion). "After hearing oral argument, [the court] ordered the parties to engage in limited discovery and to submit supplemental briefing on the question of whether Miss USA is an 'expressive association' under First Amendment doctrine, thus converting the motions to a summary judgment posture." *Id.*

[16] *See Green*, 52 F.4th at 779 (describing procedural posture of case).

[17] 5 U.S. 137, 180 (1803) (establishing judicial review). Despite the Constitution not explicitly mentioning this power or granting it to the judiciary, the judicial review doctrine is firmly established in United States jurisprudence. *Id.* As a result, the judiciary can declare laws null and void should they conflict with the Constitution. *See* U.S. CONST. art. VI, § 2 (establishing Constitution as supreme Law of the Land); *see generally* 1 RALPH A. ROSSUM & G. ALAN TARR, AMERICAN CONSTITUTIONAL LAW 179, 50-51 (8th ed. 2010) (articulating despite judicial review's absence in Constitution, its practice is firmly established). *See also* U.S. CONST. art. III, § 2, cl. 1 ("[T]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."). The Judiciary Act of 1789 further established this authority, allowing courts to rule on issues of statutory law. *See* 1 STAT. 73, 1 Cong. Ch. 20 (establishing Supreme Court's original jurisdiction to issue writs of mandamus).

[18] *See* Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50, 60 (1976) (explaining Supreme Court's role as important policy maker). Nevertheless, "if . . . judicial review is justified by Article III's case-deciding dictate, it is also justified only insofar as the case-deciding function makes necessary." Kelley, *supra* note 3, at 837 (remarking court lacks power to consider unconstitutionality of law unless case or controversy permits); *see also Advisory Opinions and the Influence of the Supreme Court Over American Policymaking*, 124 HARV. L. REV. 2064, 2064 (2011) (hereinafter ADVISORY OPINIONS) (noting courts limitation on review is only for live cases or controversies); U.S. CONST. art. III, § 2, cl. 1 (extending judiciary power only to enumerated "cases" and "controversies"). The case or controversy requirement from Article III limits courts from issuing advisory opinions. *See* Flast v. Cohen, 392 U.S. 83, 95 (1968) (articulating ban on advisory opinions); *see also* Joshua S. Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power*, 68 ALA. L. REV. 493, 519 (2016) (explaining how ban on advisory opinions applies to actual controversies using hypothetical legal principles).

limitations, known as "justiciability doctrines," were developed to delineate the appropriate boundaries of judicial authority.[19]

During the early 19th century, certain Supreme Court cases alluded to the "avoidance canon," underscoring the notion that courts should presume the constitutionality of congressional actions to forestall judicial overreach and preserve the separation of powers.[20] Initially, the avoidance doctrine—although sparingly utilized—favored an interpretation of statutes that could withstand constitutional scrutiny over interpretations that might be deemed unconstitutional.[21] During the *Lochner* era, as the legal system, federal statutes, and society developed, the Supreme Court established a more active role in constitutional interpretation and subverted the rising application of this justiciability doctrine.[22] Reacting to the overreach of the *Lochner* era, judges in opposition emphasized the significance of constitutional limitations and judicial restraint—ultimately leading to an amplified development and utilization of the avoidance doctrine.[23] Initially, the avoidance canon preferred statutory readings that met constitutional scrutiny over

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[19] *See* ADVISORY OPINIONS, *supra* note 19, at 2064 (emphasizing limitations of judicial branch via justiciability doctrines). "The influence and prestige of the federal judiciary . . . is circumscribed by a number of self-imposed justiciability doctrines." *Id.*; *see also* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 87 (2007) (elaborating purpose of justiciability doctrines to aid proper judicial resolution).

[20] *See* Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804) (containing early application of avoidance canon). Here, Chief Justice Marshall remarked "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Id.*

[21] *See* Kelley, *supra* note 3, at 838 n.33 (presuming canon appeared minimally from early 1800s to 1900s due to fewer federal statutes). Although these initial cases did not expressly mention the term "constitutional avoidance," their rationale evidently invoked this canon. *See, e.g.*, United States v. Coombs, 37 U.S. 72, 75 (1838) ("A presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court . . . ."); Hooper v. California, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."); Harriman v. Interstate Com. Comm'n, 211 U.S. 407, 422 (1908) (construing statute to avoid constitutional doubts).

[22] *See* Lochner v. New York, 198 U.S. 45, 45 (1905) (marking era of courts striking down statutes based on constitutionality). In this era, the Court struck down approximately 200 social and economic statutory regulations. *See* Michael J. Phillips, *How Many Times was Lochner-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1050 (1997) (emphasizing Court struck down government action approximately five times per year for forty years). Consequently, even though the avoidance canon had been in place, the Court nevertheless disregarded such limitations—being far less tolerant of constitutional doubts and more willing to step in. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1229-36 (1986) (emphasizing Supreme Court's activity of judicial overreach during the *Lochner* era).

[23] *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 149 (1893) (articulating benefits of limited judicial review).

interpretations that would not traditionally pass muster.[24] However, this aspect of the doctrine eventually shifted through case law to a modern avoidance canon, aimed instead at avoiding the necessity of rendering advisory opinions.[25]

Following this shift, courts have frequently invoked the modern avoidance doctrine as a guiding principle in contemporary constitutional law.[26] Despite the Supreme Court's commitment to the avoidance doctrine,

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[24] *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948 n.13 (1997) (arguing inception of classical avoidance canon occurred in *Mossman v. Higginson*, 4 U.S. 12, 14 (1800)). In situations where courts invoked classical avoidance, it precluded a direct constitutional confrontation between the Court and Congress. *See* John Copeland Nagle, *Delaware & Hudson Revisited*, 72 NOTRE DAME L. REV. 1495, 1508 (1997) (stating classical avoidance "depends upon the presumption that the legislature has not actually violated the Constitution – that the members of the legislature heed their oath to uphold the Constitution, and that a coordinate branch of the government takes the Constitution seriously").

[25] *See Harriman*, 211 U.S. at 422 (altering avoidance canon subtly but significantly to avoiding interpretations that merely raise serious constitutional doubts); *see also* United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 407-08 (1909) (deeming statutory interpretation as first method of construction).

> And unless [the avoidance canon] be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to holding that such a ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave a doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.

Del. & Hudson Co., 213 U.S. at 408 (marking change from classical avoidance doctrine to modern avoidance doctrine). In other words, courts should avoid interpretations even raising serious constitutional doubts to avoid rendering de facto advisory opinions on constitutional questions. *See id.*; Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (providing most sustained judicial defense of modern avoidance). The modern avoidance doctrine states "the court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander,* 297 U.S. at 347. Thus, if a case can be decided on a statutory question, then the court should opt for that interpretation prior to reaching a constitutional conclusion. *See id.*; Rescue Army v. Mun. Court, 331 U.S. 549, 571 (1947) ("[I]f government is to function constitutionally, [courts must] keep within their power" by abiding by constitutional avoidance).

[26] *See, e.g.*, Escambia Cnty. v. McMillan, 466 U.S. 48, 51 (1984) ("It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."); Slack v. McDaniel, 529 U.S. 473, 485 (2000) (stating *Ashwander* advises courts to decide cases on non-constitutional grounds); DOC v. U.S. House of Representatives, 525 U.S. 316, 343-44 (1999) (referring to *Ashwander* when refusing to rule on constitutional grounds); Massachusetts v. Westcott, 431 U.S. 322, 323 (1977) (declining to address constitutional question per *Ashwander*). These cases ememplify the Supreme Court's dependence on *Ashwander* and the deeply rooted principle that federal courts should prioritize the adjudication of statutory ques prior to determining issues of constitutionality. *See* Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 104-05 (1944) (emphasizing constitutional avoidance's importance); Parker v. Cnty. of Los Angeles, 338 U.S. 327, 333 (1949) ("The best teaching of this Court's experience admonishes us not to entertain

it is critical to acknowledge how lower courts have applied this principle on questions of state law.[27] Notably, there is a trend in the Ninth Circuit and Oregon state courts of adhering to the avoidance doctrine, as evidenced by precedent in previous case law.[28] This commitment is specifically showcased in Oregon's cases addressing questions related to the OPAA in the context of as-applied challenges.[29]

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constitutional questions in advance of the strictest necessity."); Fox TV Stations, Inc. v. Aereokiller, LLC, 851 F.3d 1002, 1013 (9th Cir. 2017) ("We … adhere to the 'well established principle … [that] the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case . . . .'" (quoting Bond v. United States, 572 U.S. 844, 855 (2014))) (alteration in original). While there are undoubtably isolated instances where courts have not adhered to this principle, the majority of courts have invoked it as a guiding principle. *See* Healy, *supra* note 3, at 935.

[27] *See* Erie R.R. v. Thompkins, 304 U.S. 64, 71 (1938) (outlining choice of law procedures for federal courts to ensure vertical uniformity). "[T]he *Erie* doctrine would seem to require federal courts to interpret a state's law just as would the courts of that state in order to ensure consistent outcomes of federal and state courts." 1256 Hertel Ave. Assocs., LLC v. Calloway, 761 F.3d 252, 260 n.5 (2d Cir. 2014) (describing consistency requirement established by *Erie*); *see* Cooper v. Tokyo Elec. Power Co. Holdings, Inc., 960 F.3d 549, 557-59 (9th Cir. 2020) (emphasizing importance of *Erie* Doctrine in statutory interpretation questions); *see also* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1991 (2011) (articulating doctrinal canon that state methodology should be utilized for state statutes under *Erie*); Frederick Schauer, *Formalism.*, 97 YALE L.J. 509, 539-40 (1988) (alluding to importance of treating instances in same category in same way to establish predictability).

[28] *See* United States v Kaluna, 192 F.3d 1188, 1197 (9th Cir. 1999) ("Prior to reaching any constitutional questions federal courts must consider nonconstitutional grounds for decision. This is a fundamental rule of judicial restraint." (quoting Jean v. Nelson, 472 U.S. 846, 854 (1985))). The Ninth Circuit has recently reaffirmed its own adherence to constitutional avoidance, despite abiding to judicial restraint in the past. *See* Potter v. City of Lacey, 46 F.4th 787, 791 (9th Cir. 2022) ("It is well-established that [we] should avoid adjudication of federal constitutional claims when alternative state grounds are available." (quoting Cuviello v. City of Vallejo, 944 F.3d 816, 826 (9th Cir. 2019))); Mattel, Inc. v. MCA Recs., 296 F.3d 894, 905-06 (9th Cir. 2002) (utilizing legislative history to determine if statute passes constitutional muster); Mattel, Inc. v. Walking Mt. Prods., 353 F.3d 792, 808 n.14 (9th Cir. 2003) (employing narrower grounds to avoid constitutional questions). Oregon case law also strongly suggests, if not outright requires, that Oregon courts abide by constitutional avoidance. *See* State v. Alderwoods (Or.), Inc., 366 P.3d 316, 330 (Or. 2015) ("[G]enerally we will not decide constitutional issues when there is an adequate statutory basis for decision . . . ."); Vasquez v. Double Press Mfg., 437 P.3d 1107, 1110-11 (Or. 2019) (utilizing constitutional avoidance doctrine); Rico-Villalobos v. Giusto, 118 P.3d 246, 250 (Or. 2006) ("[I]f statutory sources of law provide a complete answer to the legal question that a case presents, we ordinarily decide the case on that basis, rather than turning to constitutional provisions."). This line of precedent infers that the constitutional avoidance doctrine is only foregone under a narrow exception. *See* State v. Barrett, 255 P.3d 472, 477 (Or. 2011) (deviating from constitutional avoidance because Oregon "created a clear and expedited procedural path for a victim [of stalking] to assert claims for the violation of her constitutional rights").

[29] *See* Schwenk v. Boy Scouts of Am., 551 P.2d 465, 469 n.5 (Or. 1976) (applying constitutional avoidance in context of OPAA). The significance of applying constitutional avoidance in the OPAA context arises from the prevailing dispute over whether the OPAA is applicable to a specific defendant considering the fact-sensitive nature of these determinations. *See* Lahmann v. Grand Aerie of Fraternal Ord. of Eagles, 43 P.3d 1130, 1137 (Or. Ct. App. 2002) (determining

Despite the deeply ingrained avoidance doctrine, several courts in the late 1990s and early 2000s systematically deviated from this principle, leading to unnecessary constitutional rulings.[30] This departure appeared to be indirectly connected to First Amendment challenges, with many judges expressing concerns that adhering to the avoidance doctrine could stifle free speech.[31] In these instances, a divisive question arises regarding whether courts should prioritize justiciability doctrines or if the protection of speech should take precedence over constitutional canons of construction.[32] This

whether organization is commercial enterprise under OPAA). Determining the applicability of the OPAA on a case-by-case basis is crucial due to the act's exclusive coverage of public accommodations, while it fails to extend to distinctly private services. *See, e.g.*, Abraham v. Corizon Health, Inc., 511 P.3d 1083, 1093 (Or. 2022) (explaining services covered under OPAA); Vejo v. Portland Pub. Schs., 204 F. Supp. 3d 1149, 1168 (D. Or. 2016) (holding OPAA does not apply if defendant service is sufficiently selective), *rev'd on other grounds,* 737 Fed. Appx. 309 (9th Cir. 2018); Harrington v. Airbnb, Inc., 348 F. Supp. 3d 1085, 1093 (D. Or. 2018) (examining definition of place of public accommodation and holding Airbnb falls under OPAA).

[30] *See* Healy *supra* note 3, at 935-36 (noting Rehnquist Court frequently used unnecessary constitutional rulings to restrict constitutional rights). For example, in *Siegert v. Gilley*, the Rehnquist Court suggested determining constitutional questions is necessary to "weed out" cases which fail to state a claim. *See* 500 U.S. 226, 232 (1991) (deciding constitutional issue in qualified immunity case). Nevertheless, "weeding out" cases based on constitutional questions would seem to completely abandon the deeply ingrained notions of judicial restraint. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1092-93 (2001) (describing Rehnquist Court as "an institution run dangerously amok, heedless of the sound legal standards, and determined, by hook or by crook, to impose its preferred political views upon [the] country"). Even with such variations in application, the long-term power of constitutional avoidance is well documented. *See* Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296, 309 (1993) (noting increase in Supreme Court cases invoking constitutional law as source of policy guidance); *see also* Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 809 n.132 (1997) (arguing Zeppos study "demonstrates, dramatically, the extent to which the Supreme Court relies upon constitutional criteria in interpreting statutes rather than invalidating statutes"). Even the Supreme Court has collected cases to demonstrate the long history of abiding by this canon of construction. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 133-34 (1998) (Stevens, J., concurring) (outlining precedents utilizing constitutional avoidance).

[31] *See, e.g.,* Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002) ("The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . ." (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973))); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278-79 (1964) (explaining how mere threat of litigation can lead to self-censorship); McBride v. Merrell Dow & Pharms. Inc., 717 F.2d 1460, 1467 (D.C. Cir. 1983) ("'Unless person, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors.'" (quoting Smith v. California, 361 U.S. 147, 154 (1959))). *But see* Bigelow v. Virginia, 421 U.S. 809, 816 (1975) (explaining First Amendment standing must present more than mere allegations of chilling effect).

[32] *See* Rogers v. Grimaldi, 875 F.2d 994, 998 (2d Cir. 1989) (adopting approach to protect free speech while abiding by statutory interpretation). The *Rogers* court acknowledged the tradition of constitutional avoidance; however, it chose to narrowly interpret the Lanham Act to prevent any

division amongst the courts not only stems from the practical application of constitutional avoidance, but also from how these arguments are presented to the courts—whether through an as-applied or facial challenge.[33]

Near the end of the Rehnquist Court, however, there was a shift to remedy the rise of unnecessary constitutional rulings with the disapproval of facial challenges.[34] Broadly speaking, facial challenges result in striking down an entire statute as unconstitutional.[35] As-applied challenges, however, work to limit the judiciary's overreach into legislative duties by declaring the statute unconstitutional only to the particular facts at hand.[36] Over

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conflict between the First Amendment and justiciability doctrines. *See id.* Moreover, in spite of the intention to circumvent constitutional questions at the earliest possible juncture, the Ninth Circuit employed the *Rogers* test to navigate around this doctrine. *See* Gordon v. Drape Creative, Inc., 909 F.3d 257, 264 (9th Cir. 2018) (employing First Amendment as new rule of construction to avoid constitutional and statutory conflict); Twentieth Century Fox TV v. Empire Distrib., Inc., 875 F.3d 1192, 1195 (9th Cir. 2017) (applying *Rogers* test to afford First Amendment protection). Additional circuits have similarly leaned towards a preference for First Amendment protection. *See, e.g.*, Coral Ridge Ministries Media, Inc v. Amazon.com, Inc., 6 F.4th 1247, 1256 n.12 (11th Cir. 2021) (analyzing only First Amendment issue); Boy Scouts of Am. v. D.C. Comm'n on Hum. Rts., 809 A.2d 1192, 1196 (D.C. 2002) (resolving case on First Amendment grounds before statutory grounds); Adams *ex rel.* Harris v. Boy Scouts of Am.-Chickasaw Council, 271 F.3d 769, 778 (8th Cir. 2001) (determining First Amendment issue prior to § 2000a claim); Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 639 (1980) (avoiding resolution of statutory question).

[33] *See* R. George Wright, *The Problems of Overbreadth and What to Do About Them*, 60 HOUS. L. REV. 1115, 1124 (2023) (noting conflicting outcomes amongst circuits with First Amendment as-applied challenges).

[34] *See* Gillian Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 873 (2005) (noting dichotomy of "facial" versus "as-applied" challenge debate). Near the end of the Rehnquist era, the Court began to utilize as-applied challenges in its decisions. *See* Tennessee v. Lane, 541 U.S. 509, 530-34 (2004) (determining constitutionality of statute based on specific circumstances presented within case). Despite the use of as-applied challenges, the implementation of this doctrine was less clear. *See* Luke Meier, *Facial Challenges and Separation of Powers*, 85 IND. L.J. 1557, 1562 (2010) (exploring different approaches federal courts can take when challenging constitutionality). *Compare Lane*, 541 U.S. at 530-34 (employing as-applied challenge analysis), *with* Gonzales v. Raich, 545 U.S. 1, 22-25 (2005) (utilizing facial challenge to constitutional issue).

[35] *See* Sabri v. United States, 541 U.S. 600, 609 (2004) (explaining strict nature of "facial" challenges); *see also* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984) (noting statute must significantly impact third parties' First Amendment rights to survive facial challenge); S.O.C., Inc. v. Cnty. of Clark, 152 F.3d 1136, 1142 (9th Cir. 1998) (emphasizing statute must be "'unconstitutional in every conceivable application'" to achieve facial invalidation (quoting *Taxpayers for Vincent*, 466 U.S. at 796)). Ultimately, facial challenges can run the risk of "premature interpretatio[n] of statues" and a harsh result that no application of the statute, no matter the facts at hand, can be constitutional. *See id.* (alteration in original) (quoting United States v. Raines, 362 U.S. 17, 22 (1960)).

[36] *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 236, 236 (1994) (defining as-applied challenge); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 360 (1998) (remarking as-applied challenges require interpretation of particular facts presented within case).

time, the resistance to facial challenges became deeply ingrained with the Roberts Court's increased preference towards as-applied constitutional challenges.[37] Overall, this preference towards as-applied challenges aims to afford courts with the proper authority to adjudicate constitutional matters without overreaching their grant of authority.[38] Nevertheless, uniformity in the application of as-applied challenges remains lacking, often leaving the interpretation of constitutional issues to the discretion of the court.[39]

In *Green v. Miss USA, LLC*,[40] the Ninth Circuit explored whether district and appellate courts should address constitutional questions before tackling statutory matters, focusing on the potential pitfalls of adopting a strict rule.[41] Focusing on the issue of the as-applied challenge of First Amendment violations, the court first claimed that the Pageant was afforded First Amendment protections based on its expression of its view of "womanhood."[42] This protection, the court opined, extends to the selection process

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[37] *See* Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 773 (2009) (noting frequency of preference for as-applied challenges amongst various constitutional questions); David L. Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court*, 36 HASTINGS CONST. L.Q. 689, 697 (2009) (reaffirming Roberts Court's preference for as-applied challenges).

[38] *See* Fallon, *supra* note 7, at 1328 (noting as-applied challenges avoid unnecessary or premature decisions regarding constitutionality).

[39] *See* Metzger, *supra* note 31, at 798 (alleging as-applied challenges are closely tied to individual decisions as opposed to overarching trend); Metzger, *supra* note 34, at 879-80 (highlighting justices' stances on facial versus as-applied challenges depend on result they favored). For example, two Supreme Court cases resulted in inconsistent applications of facial and as-applied challenges. *See* Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 662 (2010) (summarizing inconsistencies within constitutional interpretation). In one case, the court requires a constitutional violation to be found prior to determining the navigating the facial or as-applied challenge doctrine. *See* Ayotte v. Planned Parenthood, 546 U.S. 320, 329 (2006) (utilizing doctrines as remedy as instead of basis for suit). In another case, however, these doctrines do not pertain to remedies, rather they pertain to the circumstances which a litigant may bring suit initially. *See* Gonzales v. Carhart, 550 U.S. 124, 167 (2007) (interpreting doctrines more broadly).

[40] 52 F.4th 773 (9th Cir. 2022).

[41] *See id.* at 795 (addressing dissent's recommendation to resolve cases on statutory grounds when possible). The court also argued incorporating the long-standing tradition of constitutional avoidance in every instance would "stretch the doctrine beyond recognition." *See id.* Basing their reasoning on policy concerns and logistics of the litigation process, the Ninth Circuit reasoned:

> If every non-constitutional claim must be exhausted before reaching a constitutional issue, it is not clear how any constitutional question could ever be decided on a pre-trial motion, which happens routinely. Nor is it clear how courts could retain any level of discretion about what order to decide issues when resolving cases.

Id.

[42] *See id.* at 780 (noting First Amendment extends to other mediums of expression). The First Amendment covers entertainment, performances, and visual expression as expressive activities.

as a means to portray this expressive message.[43] The court proceeded to determine whether, based on this First Amendment protection, the OPAA passed strict scrutiny based on the compulsion of speech.[44] Under the strict scrutiny analysis, the Ninth Circuit argued there was no compelling interest due to the "high level of generality" offered as a rationale behind the OPAA.[45]

Shifting from the First Amendment analysis, the Ninth Circuit narrowed in on the avoidance doctrine—centering on the clash between the two well-established constitutional protection principles.[46] To resolve this conflict concerning the First Amendment, the court cited other circuits' non-application of the constitutional avoidance doctrine, specifically referencing *Rogers v. Grimaldi*.[47] By applying the principles of this case to the present

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See Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1060 (9th Cir. 2010) (holding process of tattooing was expressive activity). The court cites to secondary sources explaining the design of pageants are to express this message of the "ideal vision of American womanhood." *See* MARGOT MIFFLIN, *supra* note 6, at 9 (explaining purpose of beauty pageants); NINA BROWN, ET AL., *supra* note 11, at 389 (claiming pageants "provide communities with the opportunity to articulate the norms of femininity both for themselves and spectators alike").

[43] *See Anderson*, 621 F.3d at 1062 (regarding expression through medium cannot be removed from expression itself). The court strongly bases its argument off of the play *Hamilton* where Lin-Manuel Miranda explained the decision to cast a diverse set of actors was just as fundamental as the performance itself. *See Green*, 52 F.4th at 781-82 (citing Rob Weinert-Kendt, *Rapping a Revolution*, N.Y. TIMES (Feb. 5, 2015), [https://perma.cc/RLH8-GC68]) (remarking cast selection was statement itself). In placing an importance on the selection process to present a message, the court argues that the exclusion of Green was within the Pageant's First Amendment right. *See id.*

[44] *See Green,* 52 F.4th at 791 (arguing Green's inclusion in pageant is compulsive speech). Due to the court's rationale that speech may occur within the selection process itself, the Ninth Circuit claimed that mandating someone to compete is equivalent to mandating speech that would not otherwise be made. *See id.* (citing Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 795 (1988)). As a result, the compulsion of this speech is a "content-based regulation that is subject to strict scrutiny." Am. Beverage Ass'n v. City & Cnty. of S.F., 916 F.3d 749, 759 (9th Cir. 2019) (Ikuta, J., concurring).

[45] *Green*, 52 F.4th at 791 (claiming First Amendment demands precise analysis for compelling interest). Although Green argued the passage of the OPAA was to remedy discrimination that resulted in "serious mental, financial, and emotional harm on transgender individuals," the court determined this was not enough of a compelling interest to pass constitutional muster. *Id.*; *see also* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (U.S. 2021) (noting eliminating discrimination against LGBTQ+ individuals as insufficient compelling interest).

[46] *See Green*, 52 F.4th at 799 (noting dissent's mandate of constitutional avoidance results in tension). To rectify this issue, the Ninth Circuit suggested First Amendment concerns take precedent. *See id.* at 801 ("It is not clear how the dissent can reconcile this [First Amendment's] well-established doctrine with the view of constitutional avoidance it propounds here.").

[47] 875 F.2d 994, 1002 (2d Cir. 1989) (applying First Amendment issues before statutory issues only because case reached same result regardless). Many courts have misinterpreted the *Rogers* holding to find a means around the constitutional avoidance doctrine; however, the court actually stated, "[a]lthough we reach the same result as the District Court, we think the correct approach is to decide the choice of law issue first and then to determine if *Rogers* has a triable claim under the applicable substantive law, before reaching constitutional issues." *See id. But see* Coral Ridge

issue, the Ninth Circuit opined that the *Rogers* test prioritized First Amendment concerns over statutory interpretation.[48] The court justified this decision by suggesting that prioritizing statutory questions could stifle freedom of speech and expression due to concerns of prolonged litigation.[49] Moreover, even when a First Amendment issue is an as-applied challenge, or merely hypothetical, the court posited the modern overbreadth doctrine should apply.[50] This doctrine requires courts to "assume and evaluate purely

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Ministries Media, Inc v. Amazon.com, Inc., 6 F.4th 1247, 1256 n.12 (11th Cir. 2021) (remarking statutory question should not be addressed because claim failed on First Amendment grounds); Boy Scouts of Am. v. D.C. Comm'n on Hum. Rts., 809 A.2d 1192, 1196 (D.C. 2002) (resolving case on First Amendment grounds before determining whether it was place of public accommodation); Adams *ex rel.* Harris v. Boy Scouts of Am.-Chickasaw Council, 271 F.3d 769, 778 (8th Cir. 2001) ("[W]e find it unnecessary to decide whether the camp was a place of public accommodation because appellants' claim under § 2000a fails for other reasons."); Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 639 (1980) (resolving case at summary judgment without resolving statutory question).

[48] *See Green,* 52 F.4th at 801 (arguing courts apply *Rogers* test in cases with similar procedural postures as *Green*). As a result, the Ninth Circuit argues that the *Rogers* test is applicable, regardless of whether the case is a trademark case or not, when faced with a question of summary judgment. *See* Gordon v. Drape Creative, Inc., 909 F.3d 257, 267 (9th Cir. 2018) (applying *Rogers* test to use of trademark in summary judgment stage); Mattel, Inc. v. MCA Recs., 296 F.3d 894, 902 (9th Cir. 2002) (adopting *Rogers* test in Ninth Circuit during summary judgment); Mattel, Inc. v. Walking Mt. Prods., 353 F.3d 792, 807 (9th Cir. 2003) (utilizing *Rogers* test to affirm district court's grant of summary judgment); Twentieth Century Fox TV v. Empire Distrib., Inc., 875 F.3d 1192, 1198 (9th Cir. 2017) (applying *Rogers* test early in litigation process).

[49] *See Green*, 52 F.4th at 800 ("[W]e follow a well-trodden path by reaching and deciding a dispositive First Amendment issue that will avoid forcing the parties through unnecessary and protracted litigation."). *See, e.g.,* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe . . . ."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 300 (1964) (explaining chilling effect of Alabama statute on freedom of speech); Smith v. California, 361 U.S. 147, 150-51 (1959) (arguing litigation has "collateral effect of inhibiting the freedom of expression"); McBride v. Merrell Dow & Pharms., 717 F.2d 1460, 1467 (D.C. Cir. 1983) (emphasizing importance of resolving First Amendment cases at earliest possible juncture). Moreover, the court opines that even when a First Amendment issue is an as-applied challenge, or merely hypothetical, modern overbreadth doctrine should apply. *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984) (explaining overbreadth doctrine requires invalidation of any law that "seeks to prohibit [too] broad [a] range of protected conduct"); Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002) ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."). In its application, "the overbreadth doctrine requires courts to assume and evaluate *purely hypothetical* fact patterns to vindicate First Amendment interests of parties not even before the court." *Green*, 52 F.4th at 800 (arguing as-applied challenges are permissible under overbreadth doctrine). This doctrine can often override the case or controversy requirement by permitting advisory opinions because it rests primarily on hypothetical questions of law. *See* S.O.C., Inc. v. Cnty. of Clark, 152 F.3d 1136, 1142 (9th Cir. 1998) (explaining overbreadth doctrine can operate as exception to case or controversy requirements).

[50] *See Taxpayers for Vincent*, 466 U.S. at 796 (explaining modern overbreadth doctrine requires invalidation of any law that "seeks to prohibit such a broad range of protected conduct");

hypothetical fact patterns to vindicate First Amendment interests of parties not even before the court."[51] The court justified the First Amendment preference based on Oregon courts exhibiting "flexibility in resolving cases."[52] The flexibility allowed the Oregon courts to review constitutional claims without having to address statutory claims, thereby not necessitating strict adherence to constitutional avoidance.[53]

Judicial restraint and the constitutional avoidance doctrine are crucial for maintaining public trust in the judiciary's ability to impartially adjudicate matters.[54] Additionally, the separation of powers is fundamental for effective governance, preventing any single branch from exceeding its authority or implicating autocratic reign.[55] It is vital to prevent courts from resolving questions on hypothetical issues to ensure confidence in the justice system and the United States government.[56] One preventive measure is to

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Green, 52 F.4th at 800 (arguing as-applied challenges are permissible under modern overbreadth doctrine). This doctrine can often override the case or controversy requirement by permitting advisory opinions because it rests primarily on hypothetical questions of law. *See S.O.C., Inc.*, 152 F.3d at 1142 (emphasizing exception to case or controversy requirements); Bigelow v. Virginia, 421 U.S. 809, 815-16 (1975) (reinforcing overbreadth doctrine as exception); *see also* Wright, *supra* note 33, at 1124 (discussing restrictive approaches to hypothetical cases).

[51] *See Green*, 52 F.4th at 793 (determining appropriateness of constitutional avoidance in accordance with *Erie* doctrine).

[52] *See id.* (claiming Oregon has no rigid application of constitutional avoidance). The court alleged "nothing in Oregon cases indicates that a court must force parties needlessly to litigate an unraised claim in the First Amendment context just to comply with some preferred order of operations." *Id.*; *see also* State v. Barrett, 255 P.3d 472, 476 (Or. 2011) (explicitly deciding to resolve case on constitutional grounds without resolving statutory claim). Accordingly, the court in *VIP Prods. LLC v. Jack Daniel's Props., Inc.*, 953 F.3d 1170, 1175-76 (9th Cir. 2020), reversed a district court holding when they failed to "answer the predicate First Amendment issue before analyzing the statutory issue." *Green*, 52 F.4th at 801. The Ninth Circuit, finding sufficient analogs between these trademark cases and First Amendment issues, argues there is no hard-and-fast rule to apply the constitutional avoidance doctrine. *See id.*

[53] *See Green*, 52 F.4th at 794 (elucidating constitutional claims being addressed without resolution to statutory claims).

[54] *See* Velasco, *supra* note 2, at 756 (arguing "[n]o entity can be trusted with absolute power"). The reliability and trustworthiness of the judiciary has its limits, but preventing an autocratic reign with these justiciability doctrines helps support more public trust in the court system. *See id.*; Healy, *supra* note 3, at 857 ("The principle of constitutional avoidance has a long and distinguished pedigree and is grounded in the recognition that constitutional interpretation and judicial review are delicate functions.").

[55] *See* Kelley, *supra* note 3, at 841 (explaining separation of powers was crucial in Brandeis' *Ashwander* concurrence). "For Justice Brandeis, it was fundamental to the constitutional structure – to the separation of powers – that the judiciary not exercise judicial review unless all alternative grounds for decision have been exhausted." *Id.*

[56] *See* Murchison, *supra* note 4, at 93 (emphasizing avoidance's roots in preserving democratic ideals). As founding father and fourth President James Madison once stated, "[p]ower is of an encroaching nature and … ought to be effectually restrained from passing the limits assigned to it." *See* THE FEDERALIST NO. 48, *supra* note 2, at 332-34 (James Madison). If this power is not

stop courts from granting advisory opinions.[57] Courts should focus on interpreting statutes rather than empowering judges to subvert statutory interpretation.[58] Therefore, the Ninth Circuit exceeded its authority by assuming a legislative role rather than interpreting the law by addressing the First Amendment question before the alleged violation of the OPAA.[59]

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checked, it could result in a "locus of tyranny." *See* Murchison, *supra* note 4, at 159; *see also* Velasco, *supra* note 2, at 696 (emphasizing checks and balances prevents overreaching by any one branch); Siegel, *supra* note 20, at 74-75 ("[I]nsisting that the courts refrain from considering such matters unless someone with a clear stake in them objects is one of the central checks against overly broad judicial power." (quoting Editorial, *Never Mind the Pledge*, WASH. POST, June 15, 2004 at A22)).

[57] *See* Kelley, *supra* note 3, at 869 (discussing contention between policy views and justiciability). The emphasis on the prohibition of advisory opinions is grounded in the same rationale as the modern avoidance doctrine. *See* Morrison, *supra* note 4, at 1206-07 (noting ban on advisory opinions as facet of modern avoidance); *see also* Kelley, *supra* note 3, at 840 ("Because this placed the Court in the apparent position of rendering advisory opinions on constitutional questions, it shifted to the doctrine of the modern avoidance canon in *Delaware & Hudson*."); Green v. Miss USA, LLC, 52 F.4th 773, 814 (2022) (Graber, J., dissenting) (condemning majority for assuming statute is applicable and "risks issuing an unconstitutional advisory opinion"). Together, these doctrines emphasize the importance of leaving policy determinations to Congress and the political process, as opposed to the courts. *See* Kelley, *supra* note 3, at 869 ("[T]he responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones." (quoting Chevron U.S.A., Inc., v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984))).

[58] *See* Vermeule, *supra* note 25, at 1945 (articulating importance of statutory interpretation). As Chief Justice Hughes once said, "[t]he cardinal principal of statutory construction . . . is to save and not to destroy." *See id.* (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937)). Thus, constitutional avoidance encourages courts to construe statutes to avoid constitutional questions. *See* Healy, *supra* note 3, at 848 (arguing importance of statutory construction under judicial review); *Green*, 52 F.4th at 815 (Graber, J., dissenting) (alteration in original) ("[T]he Oregon Supreme Court has used the statute-first doctrine of constitutional avoidance specifically in the context of the OPAA . . . .").

[59] *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984) (examining why courts deviate from normal constitutional avoidance). There, the Court deviated by operating in absence of a case or controversy because of "the interest in preventing *an invalid statute* from inhibiting the speech of third parties who are not before the Court." *See id.* (emphasis added). Nevertheless, in the case at hand, the OPAA has been validated and applied within the state court. *See* Lahmann v. Grand Aerie of Fraternal Ord. of Eagles, 43 P.3d 1130, 1131 (Or. Ct. App. 2002) (holding fraternal organization fell within OPAA and its actions of discriminating against women violated OPAA). As a result, the issue at hand is not one of preventing an invalid statute from inhibiting speech, but rather whether the OPAA should apply to the Pageant—ultimately making the subversion of the case or controversy requirement in *Taxpayers for Vincent* irrelevant in this matter. *See Green*, 52 F.4th at 817 (Graber, J., dissenting) (noting Oregon's strong interests in knowing what activities are covered by public accommodation law). This is the sole reason why constitutional avoidance should be applied. *See Green*, 45 F.4th at 817 (Graber, J., dissenting) (alteration in original) (remarking "Oregon courts examine the meaning and application of the OPAA first, reaching as-applied constitutional claims only if it is established that the statute in fact applies").

It is imperative that the statute applies to the case itself for an as-applied challenge to properly function.[60] Although this case may be distinguished from many other OPAA challenges because the Pageant did not dispute it was a public accommodation, the court failed to further entertain the application of the OPAA.[61] Due to an as-applied challenge being only ripe for decision when the statute applies to the case, the court essentially rendered an advisory opinion on the constitutionality of the OPAA.[62] Moreover, the Ninth Circuit's failure to adhere to precedent in OPAA application ultimately expanded its ability to shape laws based on their perception of the public interest—breeding confusion and distrust in the justice system.[63]

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[60] *See* O'Grady, *supra* note 7, at 881-82 (noting individualized facts are central to as-applied challenges). The court is merely ruling on a hypothetical if the individual facts are not utilized to first determine whether the statute applied to their case in the first place. *See Poe*, 367 U.S. at 5043 ("This court can have no right to pronounce an abstract opinion on the constitutionality of a State law." (quoting Georgia v. Stanton, 73 U.S. 50, 75 (1868))).

[61] *Compare* Green, 52 F.4th at 794 (Vandyke, J., majority) (noting court refusing to analyze OPAA because Pageant did not dispute it was public accommodation), *with* Schwenk v. Boy Scouts of Am., 551 P.2d 465, 469 n.5 (Or. 1976) (applying constitutional avoidance in context of OPAA), *and Lahmann*, 43 P.3d at 1137 (determining whether commercial enterprise falls under OPAA). It is imperative, if not for the as-applied challenge but the OPAA generally, for the court determine whether the OPAA applies on a case-by-case basis. *See* Abraham v. Corizon Health, Inc., 511 P.3d 1083, 1093 (Or. 2022) (explaining nuances in OPAA that are relevant to determine whether OPAA applies); Vejo v. Portland Pub. Schs., 204 F. Supp. 3d 1149, 1168 (D. Or. 2016) (holding OPAA does not apply if defendant is sufficiently selective); Harrington v. Airbnb, Inc., 348 F. Supp. 3d 1085, 1093 (D. Or. 2018) (examining definition of place of public accommodation and holding Airbnb falls under OPAA).

[62] *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (citations omitted) ("The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."). As a result, this rule against formulating constitutional rules beyond the facts involved—the primary purpose of as-applied challenges—demonstrates the Ninth Circuit went beyond its grant of authority. *See Green*, 52 F.4th at 810 n.2 (Graber, J., dissenting) (noting case is only ripe for decision when statute applies to case's facts). Here, because the court did not undergo the analysis of whether the OPAA applies to the Pageant, they essentially issued an advisory opinion as they did not have the requisite factual basis to analyze the as-applied challenge. *See In re* MacNeil, 907 F.2d 903, 904 (9th Cir. 1990) (explaining advisory opinion "advis[es] what the law would be upon a hypothetical state of facts").

[63] *See* Stillman, *supra* note 19, at 520 (discussing relevance of judicial restraint). "Article III limitations screen out a large number of potential cases—for instance, suits by [those who] . . . only seek to vindicate the generalized public interest in seeing the law obeyed." *See id.* Ultimately, as Justice Scalia remarked in *Steel Co.*, hypothetical Article III jurisdiction "opens the door to all sorts of 'generalized grievances' that the Constitution leaves for resolution through the political process." *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 97 n.2 (1998) (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974)) (arguing judiciary should base its opinion on *stare decisis* rather than political views). *See* State *ex rel.* Dept. of Transp. v. Alderwoods (Or.), Inc., 366 P.3d 316, 330 (Or. 2015) (abiding by constitutional avoidance doctrine); Vasquez v. Double Press Mfg., 437 P.3d 1107, 1110-11 (Or. 2019) (utilizing constitutional avoidance doctrine). The dissent distinguished the cases raised by the majority which appeared to support their argument to not abide by constitutional avoidance. *See* Schwenk v. Boy Scouts of Am., 551 P.2d

Individuals expect that their cases will be decided on their merits rather than for ulterior constitutional motives.[64]

While the majority cited a few trademark cases where First Amendment issues took precedence, it failed to cite any instances within the Ninth Circuit where the avoidance doctrine had been abandoned regarding the OPAA.[65] The court also emphasized preventing the threat of litigation at the expense of potential judicial overreach.[66] In focusing on the impact of litigation on free speech, the court overlooked the issue of the judiciary infringing on the legislature's lawmaking authority, which has a direct bearing on the preservation of democracy.[67] Essentially, by issuing an advisory opinion by addressing an as-applied constitutional question before determining the OPAA's applicability, the court proffered a political stance, rather than a legal adjudication, fostering a general lack of trust and predictability in the

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465, 469 n.5 (Or. 1976) (opting not to discuss constitutional issues because the OPAA did not apply to Boy Scouts); Lahmann v. Grand Aerie of Fraternal Order of Eagles, 43 P.3d 1130, 1138 (Or. Ct. App. 2002) (declining expressly to reach constitutional issue until OPAA was certain to apply); *see also Green*, 52 F.4th at 815-16 (Graber, J., dissenting) (distinguishing majority's cases to emphasize determining OPAA application before constitutional review).

[64] *See* Schauer, *supra* note 28, at 539 (emphasizing importance of predictability of judicial decisions). Schauer asserts that "[p]redictability follows from the decision to treat all instances falling within some accessible category in the same way. It is a function of the way in which rules decide ahead of time how all cases within a class will be determined." *See id.*

[65] *See Green*, 52 F.4th at 812 (Graber, J., dissenting) ("[W]e must, if at all possible, resolve cases on statutory grounds before reaching constitutional questions." (quoting Standard Oil Co. v. Arizona, 738 F.2d 1021, 1023 (9th Cir. 1984))). Most importantly, "[t]he best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." *See id.* (quoting Parker v. Cnty. of Los Angeles, 338 U.S. 327, 333 (1949)); Fox TV Stations, Inc. v. Aereokiller, LLC, 851 F.3d 1002, 1013 (9th Cir. 2017) (adhering to constitutional avoidance).

[66] *See Green*, 52 F.4th at 799 (Vandyke, J., majority) ("Contrary to the dissent's speech-hostile version of constitutional avoidance, we . . . decid[e] a dispositive First Amendment issue that will avoid forcing the parties through unnecessary and protracted litigation."). Nevertheless, the majority's focus on protecting the speech of others, fails to account for the dangerous nature of judicial overreach in addressing constitutional questions prior to determining statutory application. *See* Leonard & Brant, *supra* note 1, at 48 (articulating sole power of one branch as threat to liberty). Overall, the avoidance doctrine protects the separation of powers by deferring to statutory questions instead of challenges to the constitutionality of laws enacted by the legislature. *See* Murchison, *supra* note 4, at 113 ("[T]he avoidance canon enabled judges to decide cases without sailing the whirling waters of the separation of powers doctrine.").

[67] *See* Fish, *supra* note 3, at 1288 (explaining classic defense of avoidance doctrine). It is ultimately argued that the avoidance doctrine limits encroachment on the legislature the courts by refraining from constitutional questions. *See id.*; Healy, *supra* note 3, at 868 (remarking Court has demonstrated diminished deference to Congress). Rather than invalidating statutes, courts utilizing the avoidance doctrine remain within its confines of interpreting the law based off precedent. *See* Vermeule, *supra* note 25, at 1962 (presenting rationale of avoidance minimizing risk of statutory invalidation).

court system.[68] By repeatedly failing to follow established law in adjudicating this case, the Ninth Circuit erred in holding that the Pageant's decision to exclude Green was protected by the First Amendment.[69]

Although upholding the constitutionality of others' actions is a vital goal, for a well-functioning democratic system, it is essential that the judiciary does not exceed its mandate. Allowing judges appointed by the executive branch to essentially issue advisory opinions, reach legal conclusions on merits not argued before them, and decide cases on different grounds than what was claimed, completely interrupts the trust and sanctity of the judicial system. Rather than deciding cases on their opinions of the legal outcome, judges should analyze the case based on its alleged claims first. As a result, *Green v. Miss USA, LLC* not only limits the protections of transgender individuals, but also subverts the proper role of the judicial system by failing to abide by the constitutional avoidance doctrine.

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[68] *See* ADVISORY OPINIONS, *supra* note 19, at 2064 (remarking that courts who issue advisory opinions assume legislative role). As a result, by having individuals not elected by the public in charge of important policy-making concerns, a general distrust in the judicial system will fester. *See id.* at 2074 ("[T]he more [the court] deviates from the nation's political mainstream by striking down democratically enacted legislation, the more it risks an unwelcome backlash that imposes reputational costs on the Court . . . .").

[69] *See* Green v. Miss USA, LLC, 52 F.4th 773, 817 (9th Cir. 2022) (Graber, J., dissenting) (remarking *Erie* doctrine applies in this instance). Here, a federal court *must* reach substantially the same result as a state court would in deciding an OPAA case, which given the history of the Oregon courts, requires abiding by the constitutional avoidance doctrine. *See id.*