No. 99-699

IN THE
Supreme Court of the United States

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL OF BOY SCOUTS OF
AMERICA, *Petitioners*

v.

JAMES DALE, *Respondent.*

BRIEF *AMICI CURIAE* OF THE AMERICAN CENTER FOR LAW AND JUSTICE, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, AND FOCUS ON THE FAMILY SUPPORTING PETITIONERS

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INTEREST OF AMICI[*]

The Ethics and Religious Liberty Commission of the Southern Baptist Convention is the ethics, moral concerns, public policy, and religious liberty agency of the Southern

* Counsel of record for the parties in this case have consented to the filing of this brief. Pursuant to Rule 37.6, amici ACLJ and Ethics and Liberty Commission disclose that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amici curiae*.

Baptist Convention, the nation's largest Protestant denomination with nearly sixteen million members in 40,000 local congregations. The Southern Baptist Convention has assigned the Ethics and Religious Liberty Commission the responsibility of addressing a wide range of moral and public policy concerns, including First Amendment issues. The Ethics and Religious Liberty Commission is profoundly concerned about the deleterious effect the New Jersey Supreme Court's decision will have on the Boy Scouts' First Amendment right to instill traditional moral values in the boys and young men who join Scouting.

Focus on the Family is a California Nonprofit Religious Corporation committed to strengthening the family in the United States and abroad. The president of Focus on the Family, James C. Dobson, Ph.D., is a child psychologist who has written extensively on child rearing and family relations. Dr. Dobson hosts and Focus on the Family distributes a daily radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada, and around the world. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month. Focus on the Family's interest in this case stems from the fact that Focus on the Family offers a ministry to those who are seeking to leave the homosexual life-style and to adopt either a heterosexual or abstinent sexual relationship. Focus on the Family conducts seminars and publishes materials addressing the dangers associated with the practice of homosexuality and the dangers posed to young children, boys in particular, by exposure to homosexual role models.

Representing the Ethics and Religious Liberty Commission and Focus on the Family, and appearing on its own behalf as well is the American Center for Law and Justice (ACLJ). The ACLJ is a non-profit, public interest law firm and educational organization dedicated to protecting First Amendment freedoms, human life, and the family. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before the United States Supreme Court and lower federal courts, and Chief Counsel Jay Sekulow has presented oral argument before this Court in the following cases: *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 855 (1997); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 224 (1990); *United States v. Kokinda*, 497 U.S. 720 (1990); and *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987). Also, the ACLJ presently has two cases pending before this Court: *Hill v. Colorado*, No. 98-1856 (argued January 19, 2000), and *Santa Fe Independent School District v. Doe*, No. 99-62 (oral argument March 29, 2000).

In this case and in other cases across the nation, the ACLJ opposes the misuse of state anti-discrimination laws to compel individuals and organizations to endorse currently fashionable sexual ethics at the expense of First Amendment rights to choose one's own message and to associate for the purpose of promulgating a message.

STATEMENT OF THE CASE

The Amici adopt the statement of the case set forth in Petitioners' Brief.

SUMMARY OF THE ARGUMENT

This case concerns whether New Jersey can use its Law Against Discrimination to coerce the Boy Scouts into presenting the state-approved message that a man's sexual morality is irrelevant to the question of his suitability as a leader in the Boy Scouts. This case is about an expressive organization's right under the First Amendment to exercise autonomy over the content of its message through its leadership selection criteria.

The First Amendment to the United States Constitution protects the unfettered expression of ideas, including those values that have fallen out of favor in some segments of society. The First Amendment also protects the right to associate with others to advance shared values. The right to associate belongs to all expressive organizations, including the Boy Scouts, whose indisputable purpose is to produce character in young boys through the inculcation of traditional morals. Long before gay rights became a politically controversial issue, the Boy Scouts determined that a Scout leader should adhere to traditional sexual mores, *i.e.*, that sexual expression is properly reserved to the marital relationship between a man and a woman. The Boy Scouts present its message to young men primarily by the role models it provides these young men.

The Boy Scouts' views are absolutely protected under the First Amendment, and James Dale's attempt to change them

through New Jersey's Law Against Discrimination should fail. This Court established five years ago that state anti-discrimination laws could not be used to coerce private organizations into endorsing homosexuality. In *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), the Court ruled that the principle of speaker autonomy must be preserved even where the speaker's message is relatively inarticulate. The state may not, even in the interest of cultural "enlightenment," force the speaker to make a statement he does not want to make. The Boy Scouts' message is and has been clear: avowed homosexuals are not suitable Scoutmasters because they are not suitable role models. The Boy Scouts' message that homosexual behavior is wrong becomes hopelessly muddled if the state compels the Boy Scouts to appoint as a leader a militantly gay man who admitted that he wants to teach the Boy Scouts how wrong their position on homosexuality is. In ordering the Boy Scouts to accept Dale as an assistant Scoutmaster, the New Jersey Supreme Court violated the principle of speaker autonomy protected by the First Amendment.

The New Jersey Supreme Court erred in ignoring *Hurley's* significance for this case. The court refused to recognize the Boy Scouts as an expressive organization whose distinct message extolling traditional sexual morality would be compromised if a homosexual advocate like Dale is exalted as a role model in the organization. Rather, substituting its own interpretation of various Scout principles and finding the Scouts' principles either disingenuous or too insignificant to be worthy of First Amendment protection, the court indulged in an unconstitutional exercise of judicial presumption. The court's decision applying New Jersey's Law Against Discrimination

tramples the Boy Scouts' First Amendment rights to free speech and expressive association.

The New Jersey Supreme Court also distorted other of this Court's expressive association cases in holding that the Boy Scouts has no right to exclude avowed homosexuals from leadership. The court read this Court's decision in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) and *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987) to mean that because the Boy Scouts was not formed primarily to promote the view that homosexual conduct was immoral, admitting Dale cannot affect the Boy Scouts' ability to carry out its mission. That the Boy Scouts' position on sexual morality is not the centerpiece of its mission does not in the least affect the First Amendment protection the Boy Scouts' position deserves. Taking the New Jersey Supreme Court's view to its logical extreme, no expressive organization can impose moral standards on its leadership unless it makes those moral standards the focus of its mission. Nothing in this Court's First Amendment jurisprudence supports the New Jersey Supreme Court's cramped view of the right to expressive association.

Contrary to the New Jersey Supreme Court's holding, the Boy Scouts' First Amendment rights of free speech and expressive association trump any conceivable state interest in this case. *Hurley* firmly establishes this point. As in *Hurley*, New Jersey's interest here is to require the Boy Scouts to modify their views and the content of their expression on the subject of homosexuality. New Jersey wants the Boy Scouts to share its belief that Dale's avowed homosexuality is irrelevant

to his suitability as a role model for young boys. Under *Hurley*, such a goal is invalid.

Finally, eliminating discrimination against homosexuals is not a compelling state interest. *Hurley* itself explicitly rejected the contention. Moreover, this Court has never held that homosexuals need the special protections given women and racial minorities in this country. Indeed, states remain free to criminalize the conduct that defines the class of homosexuals. While New Jersey may have a legitimate interest in protecting homosexuals from certain kinds of discrimination, there is no basis in federal constitutional law to hold that such an interest qualifies as a paramount interest of the highest order, subjugating even First Amendment values.

ARGUMENT

I. FORCING THE BOY SCOUTS TO APPOINT HOMOSEXUAL ADVOCATES TO LEADERSHIP POSITIONS VIOLATES ITS FIRST AMENDMENT RIGHTS OF FREE SPEECH AND EXPRESSIVE ASSOCIATION.

The New Jersey Supreme Court's decision betrays a stunted understanding of this Court's decisions establishing the interdependence of the right of free speech and the right of expressive association. This Court has long recognized the interdependence of the First Amendment right of free thought and speech with the right to associate with others who share similar views. Those rights necessarily include the right to hold and express views different from what others might consider culturally orthodox:

> Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments.
>
> . . . .
>
> At the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and conscience rather than coerced by the State. . . . *"If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism,*

> *religion, or other matters of opinion or force citizens to confess by word or act therein."*

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233-35 (1977) (emphasis added) (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). The New Jersey Supreme Court did precisely what *Abood* and *Barnette* forbid. In dictating that the Boy Scouts must subscribe to the currently fashionable view that sexual morality is irrelevant to a person's character, it "prescribed what shall be orthodox in politics and . . . matters of opinion."

Protecting expressive associational rights under the First Amendment is a paramount concern essential to "preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *see also id*. at 633 (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice"). As Justice Brennan observed in *Roberts*, "there can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." 468 U.S. at 623. That intrusion is even more constitutionally infirm when its only goal is to promote conformity in opinions on morally controversial matters. This Court has called such a goal "decidedly fatal" under the First Amendment. *Hurley v. Irish American Gay, Lesbian and Bi-Sexual Group of Boston, Inc.*, 515 U.S. 557, 579 (1995).

A. This Court's Decision in *Hurley v. Irish American Gay, Lesbian and Bi-Sexual Group of Boston, Inc.* Establishes that Private Associations Cannot Be Coerced Into Endorsing the View that Homosexuality Is a Morally Neutral Lifestyle.

New Jersey's LAD cannot be used to compel the Boy Scouts to endorse the message that an avowed homosexual is an appropriate role model for young boys. In *Hurley*, this Court unanimously held that Massachusetts' anti-discrimination law could not be applied to force the organizers of a St. Patrick's Day parade to allow a gay, lesbian, and bisexual group ("GLIB") to march. GLIB wanted to march in the parade to celebrate its members' heritage as Irish gays, lesbians, and bisexuals. *Id*. at 570. Even though the parade organizers had no specific articulable message, this Court held that requiring them to include GLIB forced them to convey a message about the acceptability of homosexuality that they did not wish to convey. *Id*. at 572-73. Massachusetts' attempted use of its public accommodation law to coerce a private organization into endorsing GLIB

> violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message. . . . [T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion or endorsement, but equally to statements of fact the speaker would rather avoid.

. . . .

> While the law is free to promote all sorts of conduct in place of harmful behavior, *it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.*

Id. at 578-79 (emphasis added).

This Court also stated that forcing parade organizers to admit GLIB would violate the parade organizer's expressive associational rights. Distinguishing *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and its progeny as cases in which "compelled access to the benefit did not trespass on the organization's message," the Court observed that GLIB "could be refused admission [to the parade] just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id*. at 581.

Hurley controls this case. The Boy Scouts is an expressive association that exists to foster the moral development of young males. Its "protected expression… take[s] the form of quiet persuasion, including the inculcation of traditional values in the young." *Roberts v. United States Jaycees*, 468 U.S. at 636 & n.* (O'Connor, J., concurring) (citing Boy Scouts as an example of an expressive organization); *see also Curran v. Mount Diablo Council of Boy Scouts*, 952 P.2d 218, 236 (Cal. 1998) (the primary function of the Boy Scouts is the inculcation of traditional moral values); *id.* at 253 (Kennard, J., concurring) (because the Boy Scouts is an organization whose activities are "overwhelmingly expressive" under *Hurley*, applying California's anti-discrimination law to the Boy Scouts would violate their First Amendment rights); *Welsh v. Boy Scouts*, 993

F.2d 1267, 1274 (7th Cir.), *cert. denied,* 510 U.S. 1012 (1993) (Boy Scouts' purpose is to train young boys to respect God, their country, and their fellow man, while developing a good moral character).

To avoid *Hurley*, the New Jersey Supreme Court trivialized the critical fact that the Boy Scouts' expressive activity consists largely of adult men acting as role models for boys. *See Dale v. Boy Scouts of America,* 734 A.2d 1196, 1229 (N.J. 1999). The 1972 Scoutmasters' Handbook highlights the Scoutmaster's duty to be a good role model:

> You are providing a good example of what a man should be like. What you do and what you are may be worth a thousand lectures and sermons. . . . *What you are speaks louder than what you say. This ranges from simple things like wearing the uniform to the matter of your behavior as an individual. Boys need a model to copy and you might be the only good example they know*. (emphasis added). Pet. A. 2652.

Thus, how a man behaves is even more important than what he says. The Boy Scouts' official policy is that homosexual behavior is not morally "straight" or "clean." Pet. A. 3241-3247, 3238-3247. Men who by word or deed condone homosexual behavior cannot, therefore, be good Scouting role models.

The Scoutmasters' Handbook also admonishes Scout leaders to "practice what you preach. . . . The most destructive influence on boys is adult inconsistency and hypocrisy." Pet. A. 2695.

Dale's views on homosexuality are clearly at odds with those of the Boy Scouts. Dale has stated openly that homosexual conduct is acceptable. Dale expressly declared that he wants to "correct" the Boy Scouts' policy against appointing avowed homosexuals to leadership positions in the Boy Scouts: "I owe it to the organization to point out to them how bad and how wrong this policy is. . . . Being proud of who I am is something the Boy Scouts taught me. They taught me to stand up for what I believe in." Pet. A. 3366-3367, 3548. Dale does not share the Boy Scouts' views on the proper male sexual identity, or the proper means of sexual expression. The Boy Scouts has long taught that a Scout leader should embody traditional sexual morality, *i.e.*, sexual expression is reserved for marriage between a man and a woman. See Pet. A. 2531-2532, 4395.

The New Jersey Supreme Court expressed the hope that Dale will "refer boys to their parents on matters of religion and sex." 734 A.2d at 1229. While Dale may well do so, that does not change the fact that Dale is an advocate for homosexual rights. According to the Scoutmasters' Handbook, Dale's identity as a homosexual advocate is more significant than what he says or does not say to individual boys. While Dale certainly has the right to be a homosexual advocate, the Boy Scouts has an equivalent right not to hold Dale out as an example for male youth.

In ignoring the essential part that role modeling plays in communicating the Boy Scouts' message, the lower court's decision also conflicts with this Court's definition of symbolic speech. Expressive conduct is entitled to First Amendment protection if the activity is intended to convey a message likely to be understood by a particular audience. *See, e.g., Texas v.*

Johnson, 491 U.S. 397, 404 (1989) (burning of American flag is protected speech); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) ("even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and desire for self-improvement"). It is undisputed that the Scout Oath, the Scout Law, and all Scouting activities are designed to convey a message about what is ideal manhood, including an ideal man's sexual identity (husband and father). Pet. A. 2531-2532, 4395. Scouting's values are to be exemplified in its adult volunteer leaders. Because Scouting's message is much more articulate than the parade's message in *Hurley* and the flag burning in *Johnson*, it is much more likely to be understood and therefore much more entitled to protection.

B. Nothing in this Court's Expressive Association Cases Supports the New Jersey Supreme Court's Holding that the First Amendment Does Not Protect an Organization's Decision to Require Certain Moral Standards as Part of its Leadership Criteria Unless those Moral Standards are the Centerpiece of its Mission.

The New Jersey Supreme Court held that because the Boy Scouts does not teach specific sexual ethics to its members, it cannot exclude from leadership a man whose sexual morality it disapproves. 734 A.2d at 1224-25. The court's holding is inconsistent with *Hurley*. That the Boy Scouts' message is communicated primarily through role modeling, and that it does not *focus* on the subject of sexuality, makes it no less worthy of First Amendment protection than the parade in *Hurley*. The parade organizers in *Hurley* had no previously articulated views

on homosexuality. Moreover, they had no written rules about who could participate in the parade, and they made *ad hoc* determinations about group participation. Observing the lack of any coherent message in the parade, this Court nonetheless held that the parade organizers could not be forced to endorse GLIB's message by allowing them to march: "A narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley*, 515 U.S. at 569. In contrast to the parade organizers in *Hurley*, the Boy Scouts have a coherent message, and the Boy Scouts' views on homosexuality have been articulated clearly. Pet. A. 3241-3247.

In addition to dismissing *Hurley*, the New Jersey Supreme Court ignored altogether *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 233 (1988), and *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981). These cases held that in the context of group expression, an association's ability to select the content of its message is inextricably woven with its freedom to select its leaders and members.

In *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981), this Court held that forcing the national Democratic party to alter its delegate selection criteria would violate the party's First Amendment right to expressive association. Specifically, the Court stated that freedom to associate to promote shared values includes "freedom to identify the people who constitute the association, and to limit the association to those people only. . . . 'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.'" *Id*. at 122 & n.22

(quoting L. Tribe, *American Constitutional Law* 791 (1st ed. 1978)).

More significantly, this Court warned lower courts against exactly the sort of presumption the New Jersey Supreme Court exercised in this case. Rejecting the argument that the national Democratic Party delegate selection procedures were ineffective or unnecessary to the goal of achieving ideological purity, the Court stated:

> [A] State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution. *And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.*

450 U.S. at 123 (emphasis added).

Similarly, in *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 233 (1988), this Court held that "a state cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure, any more than it can tell a party that its proposed communication to party members is unwise." *Id*. at 233. Again in that case, the Court chided the lower court for "impos[ing] its views about membership and leadership criteria" on the local Democratic Party. *Id*. at 233.

The New Jersey Supreme Court violated the dictates of *Eu* and *Democratic Party* by improperly substituting its own

interpretation of the Boy Scouts' views and policies. Specifically, the court declared by *ipse dixit* that the Boy Scouts' position on homosexuality is: 1) inconsistent with other Scouting values; 2) disingenuously taken up in response to litigation; and 3) insignificant because it is not "central" to Scouting's mission. *See* 734 A.2d at 1223-25. Both *Eu* and *Democratic Party* contradict the court's holding that the Boy Scouts can only exclude from its leadership those who oppose what the court considers to be the Boy Scouts' "central" mission. Those two cases establish that it is not the business of the judiciary to second-guess an expressive organization's leadership and membership criteria.

The New Jersey Supreme Court also distorted this Court's decisions in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987), and *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988) (collectively, the *Roberts* trilogy). The court relied on the *Roberts* trilogy, as it relied on *Hurley*, to support its holding that the Boy Scouts' right of expressive association was not violated because the Boy Scouts was not formed to oppose homosexuality. The court twisted language from those cases into the proposition that an expressive association can only exclude from its leadership those whose views differ on key matters, as that term is defined by the reviewing court. 734 A.2d at 1224-25.

In *Roberts* and *Rotary Club*, the Jaycees and the Rotary Club invited women to participate on some level, but excluded them from full membership privileges. In both cases, this Court recognized the organization's expressive associational rights but held that the state's compelling interest in eradicating sex discrimination outweighed the minimal burden placed on those

rights. 468 U.S. at 623; 481 U.S. at 549. *Cf. New York State Club Ass'n*, 487 U.S. at 13 (affirming constitutionality of New York City's anti-discrimination ordinance against facial challenge). In the *Roberts* trilogy, this Court also held that a limitation on an expressive association's right to select its members according to its own criteria must be unrelated to the expression of ideas. *See, e.g.*, *Roberts*, 468 U.S. at 623. Because the private associations at issue admitted women as members but denied them full privileges, this Court held that applying the anti-discrimination law "impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Roberts*, 468 U.S. at 627; *Rotary Club*, 481 U.S. at 548 (application of law did "not require the clubs to abandon or alter" any of their views); *see also New York State Club Association*, 487 U.S. at 13 (law did not prevent a "club from seek[ing] to exclude individuals who do not share the views that the club's members wish to promote.").

This case is a prototype of the sort of case anticipated in the *Roberts* trilogy. New Jersey may not violate the Boy Scouts' First Amendment rights of free speech and expressive association unless a compelling state interest so requires, *and* application of the law in question is unrelated to the expression of ideas. *See Roberts*, 468 U.S. at 623. Whatever ambiguity existed in the *Roberts* trilogy about the extent to which a private association can exclude persons with different ideologies was eliminated in *Hurley*. The ideology upon which exclusion is based need not be central to the group's mission. Indeed, it need not be about any subject the group has ever even addressed before. 515 U.S. at 581. Here, the Boy Scouts'

exclusion of Dale is based purely on ideological grounds, and it is therefore protected by the First Amendment.

The New Jersey Supreme Court's reading of the *Roberts* trilogy would virtually emasculate the right of expressive association. Reserving the freedom to exclude based on ideology only to those groups that are formed for the primary purpose of discriminating against a certain class of persons means that few associations would be protected. Many established religions teach that homosexuality is immoral, but their position on homosexuality cannot be regarded as their primary reason for being. Nobody would seriously contend that the First Amendment does not protect these organizations' right to exclude avowed practicing homosexuals from their leadership. Whatever one's views about sexual morality may be, the legitimacy *vel non* of homosexual conduct is a matter of moral philosophy and conscience. As such, an organization's views about sexual morality are "related to the expression of ideas," *see Roberts*, 468 U.S. at 623, and are therefore protected by the First Amendment from state attempts to impose a contrary view. To echo this Court's language in *Hurley*, the New Jersey Supreme Court's objective in enforcing the LAD against the Boy Scouts is nothing short of an attempt to "free" the Boy Scouts of its "biases" toward homosexuals and change its expressive conduct so that "it is at least neutral toward" homosexuals. *See* 515 U.S. at 579. The First Amendment forbids such ideological coercion. *See id*.

II. PROTECTING HOMOSEXUALS FROM DISCRIMINATION IS NOT A COMPELLING STATE INTEREST THAT TRUMPS THE BOY SCOUTS' FIRST AMENDMENT RIGHTS.

Ostensibly, relying on this Court's decisions in *Roberts* and *Rotary Club*, the New Jersey Supreme Court held that New Jersey's interest in protecting homosexuals from discrimination is compelling and outweighs the Boy Scouts' First Amendment rights. 734 A.2d at 1224. The court quoted from *Roberts* and a number of other cases to support its conclusion that discrimination against homosexuals is morally equivalent to sex or race discrimination and therefore equally deserving of government proscription. *See* 734 A.2d at 1225-1228.

The court's holding that protecting homosexuals from discrimination is a compelling state interest sufficient to trump the Boy Scouts' First Amendment rights conflicts with *Hurley*. In response to the same assertion, this Court held that eliminating discrimination against homosexuals did not trump the First Amendment right of speaker autonomy:

> [No] legitimate interest has been identified in support of applying the Massachusetts statute in this way to expressive activity like the parade.
>
> . . . .
>
> On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference. *When the law is applied to expressive activity the way it was here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further legitimate end, this object is*

> *merely to allow exactly what the general rule of speaker's autonomy forbids.*

515 U.S. at 578 (emphasis added). Thus, the Boy Scouts' right of speaker autonomy is supreme over any interest New Jersey has in protecting those who engage in homosexual conduct from discrimination.

The New Jersey Supreme Court's reliance on *Roberts* and *Rotary Club* for the proposition that protecting those who engage in homosexual conduct from discrimination is a compelling state interest is misplaced. The compelling state interest against sex discrimination identified in *Roberts* and *Rotary Club* has a substantial jurisprudential pedigree. Women comprise a quasi-suspect class under federal equal protection clause jurisprudence. *See Roberts*, 468 U.S. at 615; *Rotary Club*, 481 U.S. at 541. Sex discrimination is permissible only where an "exceedingly persuasive justification" exists. *United States v. Virginia*, 518 U.S. 515 (1996). This Court has struck down almost every sex-based classification allocating economic benefits or opportunity. *See, e.g., Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (invalidating Louisiana statute which gave a husband, as "head and master" of the family, the unilateral right to dispose of property jointly owned with his wife without her consent); *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980) (striking down statutory provision entitling women workers to fewer benefits for their family than male counterparts).

By contrast, no federal court has ever held that homosexuals share the same protected status as women or ethnic and racial minorities. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), this Court upheld the constitutionality of Georgia's statute criminalizing sodomy. If, as *Bowers* establishes, states are free to criminalize homosexual conduct, then protecting

homosexuals from discrimination cannot be a compelling state interest. "There can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

Since *Bowers*, every federal court of appeals addressing the issue has rejected the notion that homosexuals constitute a suspect or quasi-suspect class. *See Equality Foundation v. City of Cincinnati*, 128 F.3d 289, 292, (6th Cir. 1997) (homosexuals are not a suspect or quasi-suspect class); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc) ("It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause"); *High Tech Gays v. Defense Ind. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) ("Homosexuality is. . .behavioral and hence is fundamentally different from traits such as race, gender, or alienage"); *Ben Shalom v. Marsh*, 881 F.2d 454, 464 (7th cir. 1989) (same); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) (members of recognized suspect or quasi-suspect classes, *e.g.*, blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature). *Cf. Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc) (same but decided before *Bowers*); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984) (same).

Until less than 20 years ago, New Jersey criminalized homosexual conduct. N.J. Stat. Ann. § 2A: 143-1 (West 1985) (formerly N.J. Stat. Ann.§ 2:168-1), *repealed by* L. 1978 c95, § 2C: 98-2. It is absurd to suggest that homosexual conduct can go from being a crime to a compelling state interest in less than 20 years. *Cf.* Douglas Laycock & Oliver Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209,

223-24 (1994) (fornication cannot go from misdemeanor to compelling state interest in one generation). While New Jersey may choose to protect homosexuals from discrimination, nothing in federal constitutional law licenses the state to exalt that interest above every other value, including core First Amendment freedoms.

Finally, the New Jersey Supreme Court's decree that protecting homosexuals from discrimination is a compelling state interest also disregards this Court's multiple pronouncements about the rigor of strict scrutiny. "First Amendment rights are entitled to special constitutional solicitude," and this Court has "required the most exacting scrutiny" in cases where state action burdens free speech. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Strict scrutiny is not "watered . . . down but really means what it says." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 545 (1992) (quotations omitted). Given that the conduct that defines homosexuals as a class may be constitutionally criminalized and indeed was, until recently, a crime in New Jersey, to hold that the state has a compelling interest in protecting the privilege of avowed homosexuals to be Scout leaders would certainly water down strict scrutiny.

CONCLUSION

If Dale and others wish to form alternative Scouting organizations that espouse the moral neutrality or even desirability of homosexuality, they are free to do so. Moreover, the First Amendment guarantees their right to speak out against the Boy Scouts' policies. The First Amendment prevents them, however, from using the state's coercive power to remake the

Boy Scouts into what they and the state consider a proper Scouting association. Requiring the Boy Scouts to accept Dale as an assistant Scoutmaster is nothing less than an effort to change the Boy Scouts' views and message on homosexuality. As such, it is a severe intrusion on the Boy Scouts' First Amendment rights of free speech and expressive association. The New Jersey Supreme Court's decision applying New Jersey's Law Against Discrimination to the Boy Scouts should be reversed.

Respectfully submitted,

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