No. 99-699

IN THE

Supreme Court of the United States

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

v.

JAMES DALE,

Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a state law requiring the Boy Scouts, a private membership organization dedicated to fostering the development of civic and moral virtue in young boys, to appoint an avowed homosexual activist as an Assistant Scoutmaster infringes the Boy Scouts' rights of freedom of speech and association.
2. Whether such a state law infringes the rights of parents, who choose to augment the moral education of their children by participating in the Boy Scouts organization, to direct the upbringing of their own children.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED ..... **ii**

TABLE OF CONTENTS ..... **ii**

TABLE OF AUTHORITIES ..... **iv**

INTEREST OF AMICUS CURIAE **1**

SUMMARY OF ARGUMENT **2**

ARGUMENT **4**

I. FORCING THE BOY SCOUTS TO ADMIT DALE AS AN ADULT LEADER VIOLATES THE BOY SCOUTS' FREEDOM OF ASSOCIATION. 4

A. The Boy Scouts Is Not A Commercial Association 5

B. Boy Scout Troops Are Highly Intimate Private Associations 9

C. The Boy Scouts' Membership Criteria Is Directly Tied to its Moral Purpose 11

II. FORCING THE BOY SCOUTS TO ACCEPT DALE AS A SPOKESMAN/ADULT LEADER CONSTITUTES CONSTITUTIONALLY-PROHIBITED COMPELLED SPEECH. 15

III. UNDERMINING THE BOY SCOUTS' MISSION INFRINGES THE CONSTITUTIONAL RIGHT OF PARENTS TO DIRECT THE MORAL UPBRINGING OF THEIR CHILDREN 17

IV. BECAUSE THE DECISION BELOW INTERFERES WITH THE MORAL TRAINING PROVIDED BY THE BOY SCOUTS, TRAINING WHICH THE AMERICAN FOUNDERS BELIEVED TO BE ESSENTIAL IN A REPUBLICAN FORM OF GOVERNMENT, THE STATE CANNOT HAVE A COMPELLING INTEREST IN UNDERMINING THAT TRAINING 19

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Abood v. *Detroit Bd. of Ed.*, 431 U.S. 209 (1977)..... 5

Barnes v. *Glen Theatre, Inc.*, 501 U.S. 560 (1991).....24, 25

Board of Directors of Rotary Intern. v. *Rotary Club of Duarte*, 481 U.S. 537 (1987)....5, 9, 10, 11

Bowers v. *Hardwick*, 478 U.S. 186 (1986) 25

Brandenburg v. *Ohio*, 395 U.S. 444 (1966)..... 19

Cornelius v. *Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D. Conn. 1974)..... 10

Curran v. *Mount Diablo Council of the Boy Scouts of America*, 48 Cal.App.4th 670, 29 Cal.Rptr.2d 580 (Cal.App. 1994), *review granted and opinion superseded by* 874 P.2d 901, 31 Cal.Rptr.2d 126 (Cal. 1994) *aff'd*, 17 Cal.4th 670, 952 P.2d 218 (Cal. 1998)..... 9

Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670, 952 P.2d 218 (1998)... passim

Dale v. *Boy Scouts of America*, No. MON-C-330-92 (Ch. Div. Nov. 3, 1995) 13

Dale v. *Boy Scouts of America*, 308 N.J. Super. 516, 706 A.2d 270 (N.J. Super., App. Div., 1998)..... 18

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District of Columbia v. *Colts*, 282 U.S. 63 (1932)..... 24

Engel v. *Vitale*, 370 U.S. 421 (1962)..... 23

Everson v. *Board of Education*, 330 U.S. 1 (1947)..... 23

Federal Trade Commission v. R.F. Keppel & Bro., 291 U.S. 304 (1934)..... 24

Griswold v. *Connecticut*, 381 U.S. 479 (1965)..... 18

Heart of Atlanta Motel, Inc. v. *United States*,
379 U.S. 241 (1964)..... 6

Hurley v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) ..... passim

Lane v. *Cotton*, 12 Mod. 472 (1701) 6

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 23

Meyer v. *Nebraska*, 262 U.S. 390 (1923).....18, 20

N.A.A.C.P. v. *Alabama ex rel. Patterson*,
357 U.S. 449 (1958)..... 4

N.A.A.C.P. v. *Claiborne Hardware Co.*,
458 U.S. 886 (1982)..... 4

New York State Club Ass'n, Inc. v. *City of New York*,
487 U.S. 1 (1988) 5, 11, 12

Ohio v. *Whisner*, 351 N.E.2d 750 (Ohio 1976)..... 18

Parker v. *Levy*, 417 U.S. 733 (1974) 24, 26, 27

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925)..... 3, 18

Prince v. *Massachusetts*, 321 U.S. 158 (1944) 18

Randall v. *Orange County Council*,
17 Cal.4th 736, 952 P.2d 261 (1998)..... 18

Reynolds v. *United States*, 98 U.S. 145 (1878) 24

Roberts v. *United States Jaycees*,
468 U.S. 609 (1984)..... passim

Schenck v. *United States*, 249 U.S. 47 (1919)..... 19

Schwenk v. *Boy Scouts of America*,
275 Ore. 327, 551 P.2d 465 (Ore. 1976)..... 8

Seabourn v. *Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P.2d 385 (Kan. 1995)..... 26

Thomasson v. *Perry*, 80 F.3d 915 (CA4 1996) 25

Tinker v. *Des Moines Ind. Comm. School Dist.*,
393 U.S. 503 (1969)..... 17

Van Iderstine v. *National Discount Co.*,
227 U.S. 575 (1913)..... 24

Welsh v. *Boy Scouts of America*, 993 F.2d 1267
(7th Cir.), *cert. denied*, 510 U.S. 1012 (1993) 8, 22

West Virginia State Bd. of Ed. v. *Barnette*,
319 U.S. 624 (1943)..... 15

Whitney v. *California*, 274 U.S. 357 (1927) 19

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 18

Wooley v. *Maynard*, 430 U.S. 705 (1977) 15

CONSTITUTIONS AND STATUTES

An Ordinance for the Government of the Territory
of the United States Northwest of the River Ohio,
Art. 3, 1 Stat. 51 (1787) 22

Civil Rights Act of 1964, Title 2,
42 U.S.C. § 2000a.....13, 15, 17

Mass. Const. of 1780, Pt. 1, Art. 3.....21, 22

Pa. Const. of 1776, Art. II, § 45..... 21

Va. Const. of 1776, Bill of Rights, Sec.15 21

U.S. Const., Amend. I ..... passim

U.S. Const., Amend. XIV..... passim

OTHER AUTHORITIES

110 Cong. Rec. 2293 (Rep. Long) 10

2 U.S.Code Cong. & Admin.News (1964)..... 10

W. Blackstone, Commentaries on the Laws of
England (1765) 12, 13

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Charles Kesler eds., Mentor 1999). 22

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Letter from Rev. Dr. Paul H. Sherry, President of the United Church, to Jere B. Ratciffe, Chief Scouting Executive of the Boy Scouts (Sept. 18, 1998)..... 14

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INTEREST OF AMICUS CURIAE[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that the inculcation of virtue in the citizenry was

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. This brief has been authored in its entirety by undersigned counsel for *amicus curiae*. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

deemed by the Founders to be essential in a republican form of government.

The Institute pursues its mission through academic research, publications, scholarly conferences, and the selective appearance as *amicus curiae* in cases of constitutional significance. Of particular relevance here, the Institute has published extensively about the foundations of representative government and the constitutional protections of speech and association that are necessary to protect those foundations, including a monograph entitled "On the Front Lines of the Culture War: Recent Attacks on the Boy Scouts." In addition, the Claremont Institute participated as an *amicus curiae* in the courts below, filing briefs with both the intermediate appellate court and the Supreme Court of New Jersey, and filed an *amicus curiae* brief in this Court, in support of the petition for a writ of certiorari.

Recently, in order to further advance its mission, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence. The Center's purpose is to further the mission of the Claremont Institute through strategic litigation, including the filing of *amicus curiae* briefs in cases such as this that involve issues of constitutional significance going to the heart of the founding principles of this nation.

SUMMARY OF ARGUMENT

The Boy Scouts of America, as an institution, believes that homosexuality is wrong, just as it believes that adultery and pre-marital sex are wrong. It exists, in part, to foster those beliefs among the boys whose parents involve them in scouting and to teach boys respect for family as the cornerstone of civilized society. Its mission in this regard is consistent with the teachings of most major religions and in accord with the law of most civilized peoples throughout history. The Boy Scouts has been immensely successful as an organization in no small measure because it has remained true

to the moral teachings that have shaped its purpose from its beginning nearly a century ago.

The primary legal issue in this case, however, is *not* whether the Boy Scouts' position on homosexuality is right or wrong. Rather, it is whether the Boy Scouts, a private membership organization, can constitutionally be compelled by a state court to place in an adult leadership position an individual who by both word and deed conveys a message about the immorality of homosexual conduct that is contrary to the message that the Boy Scouts itself seeks to convey.

Amicus Curiae The Claremont Institute respectfully contends that under the First and Fourteenth Amendments the Boy Scouts and other private organizations cannot be compelled by government to convey a message that they choose not to convey, nor be compelled to associate with individuals who would undermine the message they do wish to convey. The order of the New Jersey Supreme Court to the contrary is in fatal conflict with the precedent of this Court protecting the freedom of speech of private associations, *see Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), the freedom of expressive association, *see, e.g.*, *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), and the right of parents to direct the moral upbringing of their children, *see, e.g.*, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

By rejecting the Boy Scouts' articulation of its own moral purpose, the New Jersey Supreme Court ventured into dangerous territory. The precious freedoms protected by the First Amendment would be rendered meaningless if governmental bodies could simply define away the expressive components of a private group's message. Respondent himself and his own *amici* have acknowledged what the New Jersey Supreme Court flatly rejected—that the executive leadership of the Boy Scouts seeks, among other things, to teach boys about their moral obligations, a teaching that

precludes the notion that there is nothing immoral about homosexuality, adultery, or pre-marital sex.

Finally, and perhaps most fundamentally, the rejection of the morality that the Boy Scouts itself claims to be fostering in favor of the moral relativism propounded by the New Jersey Supreme Court would have astounded our nation's Founders. For them, moral virtue, based on the innate nature of human beings, was a necessary prerequisite for republican government. The Boy Scouts has, for nearly a century, been a significant part of the effort to pass such virtue, and the freedom that flows from it, on to our posterity. By barring the Boy Scouts from continuing its mission, the New Jersey Supreme Court's decision strikes a blow to our republican regime.

ARGUMENT

I. Forcing the Boy Scouts to Admit Dale as an Adult Leader Violates the Boy Scouts' Freedom of Association.

This Court has long recognized that the First Amendment's protection of speech and assembly encompasses a correlative freedom of association. *See, e.g., N.A.A.C.P.* v. *Claiborne Hardware Co.*, 458 U.S. 886, 907-909 (1982); *N.A.A.C.P.* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). And there is perhaps no more fundamental tenet of the freedom of association than the right of the association itself to determine who shall be admitted to membership. During debate in the convention which gave us our Constitution, for example, Gouverneur Morris noted that "every Society from a great nation down to a club had the right of declaring the conditions on which new members should be admitted . . . ." *The Records of the Federal Convention of 1787, at* 238 (Max Farrand ed., Yale Univ. Press 1966). The sanctity of that principle continues to be recognized to this day: "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." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). "Freedom of association . . . plainly presupposes a freedom not to associate." *Id*. (citing *Abood* v. *Detroit Bd. of Ed.*, 431 U.S. 209, 234-35 (1977)).

Although not absolute, *id.*, the freedom to choose one's associates is particularly strong in the context of intimate and expressive associations, such as those fostered by the Boy Scouts at issue here. There are exceptions, as this Court's rulings in *Roberts* and two subsequent cases, *Board of Directors of Rotary Intern.* v. *Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Ass'n, Inc.* v. *City of New York*, 487 U.S. 1 (1988), make clear. But even a casual review of those cases demonstrates how clearly the Boy Scouts falls on the protection rather than the exception side of the line, for at least three reasons.

A. The Boy Scouts Is Not A Commercial Association

First, *Roberts*, *Rotary Club*, and *New York State Club Ass'n* all dealt with associations that fostered business and commercial connections. *Roberts*, 468 U.S., at 616, 626; *Rotary Club*, 481 U.S., at 549; *New York State Club Ass'n.*, 487 U.S., at 5-6. The Boy Scouts, on the other hand, is not a commercial organization. *See, e.g.*, *Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 673, 952 P.2d 218, 220 (1998) (holding that the Boy Scouts is not a "business establishment" under the California Unruh Civil Rights Act). Its purpose is not to foster commercial relationships but rather to instill in young men certain moral principles and "to prepare them to make ethical choices over their lifetime in achieving their full potential." Boy Scouts Petition, at 2 (citing A.2238, the record before the New Jersey Supreme Court).

No mere formalism, the distinction between commercial and non-commercial private associations is rooted in the historic understanding of public accommodations, and until the New Jersey court's ruling, the latter has always been understood as constitutionally protected.

In English common law, a public accommodation was a business, such as an inn or eatery, that operated along the highways and byways of the realm. William Blackstone noted that such businesses were said to have an implied contractual obligation to serve all comers by virtue of the fact that they held themselves out as serving the public.[2] Moreover, the English common law treated an innkeeper's refusal to accept a traveler without sufficient reason as more than merely a breach of an implied contract; it was also a breach of the peace. Innkeepers would be subject to a fine and even criminal indictment for thus "frustrat[ing] the end of their institution," namely, the provision of meals and lodging to travelers. W. Blackstone, 4 Commentaries, ch. 13.

Although these simple origins have been expanded upon in modern times, the Blackstonian principles remain at the root of State and federal public accommodations law and jurisprudence. When it enacted Title II of the Civil Rights Act of 1964, for example, Congress built upon the implied contractual commitment undertaken by innkeepers and applied it to other commercial enterprises such as hotels, restaurants, gas stations, theaters, and other places of entertainment.

Similarly, the California Supreme Court recently held that the Unruh Civil Rights Act, one of the most expansive state public accommodations statutes in the country, emphasizes

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[2] *See* W. Blackstone, 3 Commentaries on the Laws of England, ch. 9 ("If an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal assumpsit an action on the case will lie against him for damages, if he without good reason refused to admit a traveller"); *see also* J. Story, Bailments §§ 466a, 470, 476(2) (1846); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 284 (1964) (Douglas, J., concurring) ("[The English common law] reasoned that one who employed his private property *for purposes of commercial gain* by offering goods or services to the public must stick to his bargain" (emphasis added)); *Lane* v. *Cotton*, 12 Mod. 472 (1701), cited in *The Civil Rights Act of 1964: What it Means to Employers, Businessmen, Unions, Employees, Minority Groups* 79 (BNA, 1964).

the commercial nature of covered entities and does not extend to organizations that are not commercial in nature.[3] It is precisely the engagement in commerce that makes a private entity one which is "open to the public" and therefore within an area of traditional government concern and regulation.

The Boy Scouts as an organization does not fit within the Blackstonian or the *Curran* commercial framework for public accommodations. Unlike the innkeepers of old or their modern-day counterparts, the Boy Scouts is not engaged in a business or anything even resembling a business as far as its membership activities are concerned. *See Curran*, 17 Cal.4th, at 699-700, 952 P.2d, at 238 (noting that although the Boy Scouts "engages in business transactions with nonmembers on a regular basis," those "business transactions are distinct from the Scouts' core functions and do not demonstrate that the organization has become a commercial purveyor of the primary incidents and benefits of membership in the organization"). Furthermore, the Boy Scouts neither explicitly nor implicitly welcomes all comers. Rather, it offers membership *only* to those boys and adult leaders who are willing to subscribe to its principles. And unlike the innkeeper of old who refused a place to a weary traveler, refusing membership to one who does not subscribe to the Boy Scouts' views furthers rather than frustrates the ends for

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[3] *See Curran* v. *Mount Diablo Council of the Boy Scouts*, 17 Cal.4th 670, 697, 952 P.2d 218, 236 (Cal. 1998) ("[A]lthough past California decisions demonstrate that the [Unruh] Act clearly applies to any type of for-profit commercial enterprise, and to nonprofit entities . . . whose purpose is to serve the business or economic interests of its owners or members, no prior decision has interpreted the 'business establishments' language of the Act so expansively as to include the membership decisions of a charitable, expressive, and social organization, like the Boy Scouts, whose formation and activities are unrelated to the promotion or advancement of the economic or business interests of its members"); *see also Seabourn* v. *Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 207, 891 P.2d 385, 404 (Kan. 1995) (declining to "divorce the concept of public accommodation from the usual meaning and the common understanding of the word business").

which the institution was established.

Consistent with this historical view, numerous courts throughout the country have found that the Boy Scouts is not covered by public accommodations laws. For example, in *Welsh* v. *Boy Scouts of America*, 993 F.2d 1267 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993), the Seventh Circuit held that the "place of public accommodation" language in Title II of the Federal Civil Rights Act of 1964, 42 U.S.C. § 2000a—language identical to that in the New Jersey public accommodations law at issue here—did not cover the Boy Scouts because the Boy Scouts is neither a "place" nor a "public" accommodation.

Similarly, the California Supreme Court in *Curran* interpreted the California Unruh Civil Rights Act to exclude the Boy Scouts from the Act's strictures. The Court there held that, "given the organization's overall purpose and function, the Boy Scouts cannot reasonably be found to constitute a business establishment whose membership decisions are subject to the [Unruh] Act." 17 Cal. 4th at 697, 952 P. 2d at 236.[4]

Of course, New Jersey need not interpret its own public accommodations law in conformity with other states' laws or with Title II, but it must conform its interpretation to the mandates of the federal Constitution. The point of the

[4] Other states have reached similar results under their own public accommodation laws. *See, e.g., Seabourn*, 257 Kan., at 210, 891 P.2d, at 406 (holding that the Boy Scouts is not covered by the Kansas public accommodations statute because "the Boy Scouts has no business purpose other than maintaining the objectives and programs to which the operation of facilities is merely incidental"); *Schwenk* v. *Boy Scouts of America*, 275 Ore. 327, 334, 336, 551 P.2d 465, 468, 469 (Ore. 1976) ("[T]he primary concern and purpose of the Oregon legislature in its enactment of the Oregon Public Accommodation Act was to prohibit discrimination by Business or commercial enterprises which offer goods or services to the public. . . . [T]he term 'place of public accommodation,' as defined by [the Oregon statute], was not intended by the Oregon legislature to include the Boy Scouts of America").

commercial/non-commercial distinction is that the "public" business purpose of the former may permit certain governmental regulations that are constitutionally impermissible when applied to the latter. Quite simply, the governmental interest is much less compelling, and the infringement on private liberty much more stark, when public accommodations laws are extended beyond their common law origins, and in this case, the law has been extended beyond the constitutional breaking point.

B. Boy Scout Troops Are Highly Intimate Private Associations

Second, unlike the Jaycees or Rotary Club, the Boy Scouts' structure and purpose foster relationships second to virtually no group other than a family in their degree of intimacy. *See*, *e.g.*, *Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 48 Cal.App.4th 670, 29 Cal.Rptr.2d 580, 597-98 (Cal.App. 1994), *review granted and opinion superseded by* 874 P.2d 901, 31 Cal.Rptr.2d 126, (Cal. 1994) *aff'd*, 17 Cal.4th 670, 952 P.2d 218 (Cal. 1998). As such, the Boy Scouts has a much stronger liberty interest protected by the Due Process Clause of the Fourteenth Amendment than did the Jaycees or the Rotary Club.

The primary unit of the Cub Scouts, the organizational division of the Boy Scouts for boys between the ages of 8 and 11, is the Den, consisting of between 6 and 10 boys. These boys meet weekly, often at the home of one of the boys, for various activities. Similarly, the Boy Scouts itself is organized into Troops of about 30 boys ages 11 to 17, and further organized into Patrols of about 8 boys. *Id.*, 29 Cal.Rptr.2d, at 598 The very smallness of the groups in which the boys interact and the location in people's homes demonstrate the intimate nature of the organizational units. Because they are such intimate units, the Boy Scouts must have great control over who participates in those units.[5]

[5] That the policies each of these units follow are set by a national organization does not in any way undermine the intimately private nature

It is out of recognition that interference with such associations amounts to a severe intrusion upon liberty that most, if not all, state public accommodations laws, as well as Title II of the federal Civil Rights Act of 1964, exempt private membership clubs. These textual exemptions have historically been viewed as constitutionally compelled. When Congress enacted Title II, for example, it explicitly excluded private membership organizations because it believed that the Constitution prohibited it from doing otherwise. *See*, *e.g.*, *Cornelius* v. *Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1201 (D. Conn. 1974) ("Congress appears to have doubted the very constitutionality of legislation which *did not* exempt private clubs" (*citing* 2 U.S.Code Cong. & Admin.News (1964), at 2459-62 (Minority Report); 110 Cong. Rec. 2293 (Rep. Long)).

The reason for the private club exemptions, and for the constitutional protection afforded to private associations, is that "the formation and preservation of certain kinds of highly personal relationships" must be afforded "a substantial measure of sanctuary from unjustified interference by the State" if individual liberty is to be secured. *Roberts*, 468 U.S., at 618. Indeed, the description in *Roberts* of the right to intimate association reads almost as if it was written with groups such as the Boy Scouts in mind:

> [C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.

Id. The Boy Scouts not only fosters close relationships but, as

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of the associations. As this Court stated in *Roberts*, the relevant unit for purposes of addressing the right to intimate association is not the entire organization, but the local unit only. 468 U.S., at 621 (1984); *see also Rotary*, 481 U.S., at 546.

described below, its whole purpose is to cultivate and transmit shared ideals and beliefs; it is therefore easily entitled to the constitutional protection afforded other such intimate associations.

C. The Boy Scouts' Membership Criteria Is Directly Tied to its Moral Purpose

Finally, and perhaps most importantly, the membership criterion at issue in this case is not based on a stereotypical generalization such as was at issue in *Roberts*, where it was claimed that admitting women would force the club to alter its civic, political or business messages (apparently based on the stereotypical view that women have different positions on such matters than men). 468 U.S., at 627-28. The Boy Scouts is *not* claiming that homosexual adult leaders are less likely than heterosexual adult leaders to be trustworthy, or brave, or loyal, and thus less able to serve as role models for those aspects of the Scout Law. But the Boy Scouts *is* contending that an avowed homosexual adult leader is less able than other adult leaders to serve as a role model for the aspect of the Scout Oath that calls on boys to be "morally straight," a phrase which the Boy Scouts itself interprets as encompassing the belief that homosexual conduct is immoral. *Curran*, 17 Cal.4th, at 672, 952 P.2d, at 219.

By forcing the Boy Scouts to place in an adult leadership position someone who espouses by word and deed a position about the immorality of homosexuality inimical to that taken by the Boy Scouts, the New Jersey Supreme Court repudiated the principle articulated in *Roberts*, *Rotary Club*, and *New York State Club Ass'n* that a private association could not be forced to admit members whose views were contrary to those of the organization.

In *Roberts*, this Court upheld a decision requiring the Jaycees to admit women *only after* finding that the Minnesota public accommodations law did not require any change in the organization's creed or impose any restrictions on its "ability to exclude individuals or philosophies different from those of

its existing members." 468 U.S., at 627. In *Rotary Club*, this Court upheld a similar decision requiring the Rotary Clubs to admit women *only after* finding that the admission of women would not affect that organization's ability to carry out its purposes "in any significant way." 481 U.S., at 548-49.

And in *New York State Club Ass'n*, this Court specifically noted: "If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacles to this end." 487 U.S., at 13. Indeed, Justice O'Connor pointed out in her concurring opinion that the right to exclude individuals who do not share the organization's views exists even if the organization's purpose requires that membership be based—legitimately rather than stereotypically—on race, religion, or some other "suspect" classification. *Id*., at 19 (O'Connor, J., concurring); *see also Wallace* v. *Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) ("the question whether racial or sex-based classifications communicate an *invidious* message [is] in large part a legal question to be answered on the basis of judicial interpretation of social facts" (emphasis added)). Invidious discrimination is simply not at work when, for example, the Knights of Columbus limits membership to Catholics.

Apparently recognizing the force of this distinction, the New Jersey court simply mischaracterized the Boy Scouts' own beliefs in order to avoid the force of this Court's precedents. In an opinion that can only be called Orwellian, the New Jersey court refused to accept that the Boy Scouts actually believes that homosexual conduct is immoral and therefore incompatible with the virtues the organization seeks to foster. *See Dale* v. *Boy Scouts of America*, 160 N.J. 562, 613 n.12 (1999) (rejecting the Boy Scout's position because nor expressly adopted until after homosexuality became an issue); *id*., at 614-15 ("The words 'morally straight' and 'clean' do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral"). And it did so on its own initiative, without benefit of trial court factual findings.

In contrast, *trial* court factfinders that have considered the issue have recognized the obvious clarity and consistency of the Boy Scouts' position. As noted by the California Supreme Court in *Curran*, for example, the trial court in that case found, after a trial: "that sexual morality is addressed in the Boy Scout Oath and Law under the rubric of 'morally straight' and 'clean'"; "that the Boy Scouts of America as an organization has taken a consistent position that homosexuality is immoral and incompatible with the Boy Scout Oath and Law"; and that "this is the view that is communicated whenever the issue comes up." 17 Cal. 4th at 682. And the *trial* court in this case "found that Boy Scouts had always had a policy of excluding 'active homosexual[s].'" *Dale*, 160 N.J., at 580-81, 734 A.2d, at 1206 (citing *Dale* v. *Boy Scouts of America*, No. MON-C-330-92 (Ch. Div. Nov. 3, 1995)).

Respondent's *amici* assert that they sponsor Boy Scout troops to teach boys "values consistent with the *true* purposes of Scouting, such as loyalty, courage, kindness, cleanliness, obedience and reverence." Brief of *Amici Curiae* The General Board of Church and Society of the United Methodist Church, *et al.*, in Support of Respondent [at the petition stage], at 14 (emphasis added); *see also id.*, at 5 (defining "Scouting's *true* purposes" as including "trustworthiness, loyalty, kindness, respect for others, and bravery" (emphasis in original)). Tellingly, Respondent's *amici* never once mention the "morally straight" clause of the Scout Oath. Thus, the fact that some sponsoring organizations such as Respondent's *amici* might choose to highlight certain aspects of the Boy Scouts' purpose and not others does not alter the fact that teaching boys to be "morally straight," in all its ramifications, is an express part of Scouting's purpose.

Moreover, Respondent and his *amici* actually concede that the executive leadership of the Boy Scouts *does* have a "policy" of opposing homosexuality among scout members and adult leaders. *See, e.g.*, General Board *amici curiae* Brief in Opposition to Petition, at 11 (quoting Sept. 18, 1998 letter

from Rev. Dr. Paul H. Sherry, President of the United Church, to Jere B. Ratciffe, Chief Scouting Executive of the Boy Scouts, urging the Boy Scouts "to abandon [their] *policies* and practices" denying membership to avowed homosexuals (emphasis added)); Respondent's Brief in Opposition to Petition, at 14-16 (repeatedly referring to the Boy Scouts' exclusionary "policy"). The opposition to the Boy Scouts' "policy" by Respondent and his *amici* only serves to highlight what the *Curran* trial court explicitly found but the New Jersey Supreme Court refused to acknowledge: The Boy Scouts' purpose of fostering morality among its members includes the view that homosexuality is immoral. Forcing the Boy Scouts to admit avowed homosexuals is therefore a constitutionally impermissible restriction on the Boy Scouts' "ability to exclude individuals or philosophies different from those of its existing members." *Roberts*, 468 U.S., at 627.

The Gay and Lesbian Student Alliance, of which Respondent is a member, itself provides a striking example of the dangers inherent in intruding upon a membership organization's associational rights. Suppose, as happened not too long ago at an Ivy League college, that a student opposed to homosexuality joined the homosexual students' organization with the specific though unspoken purpose of "outing" its members or even the less nefarious purpose of trying to "cure" the homosexual students of their "disease." Surely our law must recognize the right of the organization *not* to associate with such an individual, whose very presence would undermine one of the purposes of the organization. And surely our law must so recognize even if the way in which the organization went about making that membership decision was to use religion or sexual orientation in its membership decisions.

What is prescriptive in this example as good policy is in fact constitutionally mandated. As this Court has repeatedly recognized, most recently in the case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, "the choice of a speaker not to propound a particular point of view

[by excluding proponents of that view from participation in the speaker's expressive activities] is presumed to lie beyond the government's power to control." 515 U.S. 557, 575 (1995); *see also Curran*, 17 Cal.4th, at 727, 952 P.2d, at 255-56 (Kennard, J., concurring) (recognizing that, under *Hurley*, "an organization's right of expressive association allows it to exclude applicants with 'manifest views' at odds with those of the organization").

Dale and his *amici* would hardly tolerate a court order requiring the Gay and Lesbian Alliance to accept as a leader an evangelical Christian who was committed to "curing" or converting all of the homosexual members of the organization. Yet they seek to do much the same thing here—forcing the Boy Scouts to accept into its organization a person who disagrees with one of the principles of the organization and who would seek to "cure" the organization of its supposed wrong-headedness. Neither result is constitutionally permissible.

II. Forcing the Boy Scouts to Accept Dale as a Spokesman/Adult Leader Constitutes Constitutionally-Prohibited Compelled Speech.

Closely tied to the Boy Scouts' right of expressive association is its First Amendment right to free speech and the correlative right not to be compelled to convey messages with which it disagrees. As Justice Jackson, writing for the Court, noted more than fifty years ago, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 642 (1943). The State's interest in disseminating an ideology "cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley* v. *Maynard*, 430 U.S. 705, 717 (1977).

This well-established constitutional prohibition against compelled speech was reconfirmed by this Court just five terms ago in *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). In that case, this Court unanimously held that the private sponsors of a parade could not be compelled to include within their parade a group who sought to convey a message with which the organizer did not wish to be associated. Significantly, the Court neither inquired into the views of other parade participants nor demanded that the parade have an expressive purpose that was explicitly contrary to that offered by the excluded group. It was enough that the parade organizers did not wish to convey the group's message as part of their own. *Id.*, at 574; *see also id.*, at 569 ("a narrow, succinctly articulable message is not a condition of constitutional protection"); *id.*, at 569-70 ("a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech").

The New Jersey Supreme Court's attempt to distinguish *Hurley* by asserting that this case is not about speech denigrates the speech both of the Boy Scouts and of James Dale himself. Dale has become a staunch advocate for gay rights. Indeed, his activism is what led to the news article that brought his avowed homosexuality to the Boy Scouts' attention. Pet. at 6. Moreover, by his own reported admission, Dale seeks to re-join the Boy Scouts as an adult leader in order to persuade the Boy Scouts that its position on the immorality of homosexual conduct is wrong. Pet. at 7. Dale's purpose here is therefore clearly speech, and under *Hurley*, the Boy Scouts cannot be compelled to carry his message. *Hurley*, 515 U.S. at 573. This would be true even if the Boy Scouts did not have an explicit position about the immorality of homosexuality, for *Hurley* teaches that an organization need not have a particular or uniform message as

a condition precedent to exercising its constitutional right not to be compelled to speak a message with which it disagrees.[6]

Even if Dale could credibly claim that he would support the Boy Scouts' position about the immorality of homosexuality, the very fact that a known, avowed homosexual was donning a Boy Scout uniform as an adult Scout leader would send an unmistakeable symbolic message contrary to the position taken by the Boy Scouts. This Court has rejected a formalistic view that fails to recognize the significant speech component evident in such expressive conduct. *See, e.g., Tinker* v. *Des Moines Ind. Comm. School Dist.*, 393 U.S. 503, 505-506 (1969). Thus, while the New Jersey Supreme Court may technically have been correct in its assertion that Dale does not come to Boy Scout meetings "carrying a banner," 160 N.J. at 623, Dale clearly wears his homosexuality as a badge for all to see. It takes a blind eye to fail to recognize that the appointment by the Boy Scouts of Dale as an Assistant Scoutmaster would be the height of symbolic speech, severely undermining the Boy Scouts' own speech about the immorality of homosexuality.

III. Undermining the Boy Scouts' Mission Infringes the Constitutional Right of Parents to Direct the Moral Upbringing of their Children.

The Boy Scouts is not simply another after-school playtime organization. Its purpose, as the intermediate appellate court below recognized, is "to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime." *Dale* v. *Boy Scouts of America*, 308 N.J. Super. 516, 524, 706 A.2d 270, 274 (N.J. Super.,

[6] The contention by Respondent's *amici* that some groups that sponsor Boy Scout troops disagree with the Boy Scouts' position on homosexuality is therefore beside the point. So too is the "finding" by the New Jersey Supreme Court that the Boy Scouts does not really have an expressive purpose opposing homosexuality because its position statements on the subject were not widely disseminated to its membership. Under *Hurley*, it is enough that the Boy Scouts does not wish to convey symbolically the message that homosexuality is a perfectly acceptable lifestyle alternative.

App. Div., 1998) (quoting Boy Scouts Mission Statement). Many parents choose to have their children participate in Scouting precisely because of its moral mission. *See Randall* v. *Orange County Council*, 17 Cal.4th 736, 742, 952 P.2d 261, 265 (1998) ("Parents of Cub Scouts . . . testified that they hoped certain values, including religious ones, would be instilled through the Cub Scout program, as promised by the parent handbook for new Cub Scouts")

The ruling below thus severely undermines the right of parents to direct the moral upbringing of their children, a right recognized by this Court more than three-quarters of a century ago as constitutionally protected. *See Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

Of course, this parental right, like the rights of association and speech discussed above, is not absolute. *See, e.g., Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (upholding conviction of Jehovah's Witness for violating state's child labor law). But this Court has suggested that it is a fundamental right, which would render intrusions on the right subject to strict scrutiny. *See, e.g., Wisconsin* v. *Yoder*, 406 U.S. 205, 214 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965); *id*., at 498 (Goldberg, J., concurring); *see also, e.g., Ohio* v. *Whisner*, 351 N.E.2d 750, 760 (Ohio 1976) ("it has long been recognized that the right of a parent to guide the education, including the religious education, of his or her children is indeed a 'fundamental right' guaranteed by the due process clause of the Fourteenth Amendment").

While the Boy Scouts may not provide the complete alternative to public education that was at issue in *Pierce*, there is no question that the organization fills a moral void in that education, and that, as the California Supreme Court recognized, many parents encourage their children to participate in the Boy Scouts precisely because it fills that moral void. The parents who participate in the Boy Scouts because they wish to impart certain moral views to their

children have a constitutionally protected fundamental right to do so.

IV. Because The Decision Below Interferes With The Moral Training Provided By The Boy Scouts, Training Which The American Founders Believed To Be Essential In A Republican Form Of Government, The State Cannot Have A Compelling Interest In Undermining That Training.

Recognizing that application of the New Jersey public accommodations law to the Boy Scouts infringes upon the Speech and Association rights of the Boy Scouts and upon the right of parents to direct the moral upbringing of their children does not entirely dispose of this case, of course. Even these constitutionally protected fundamental rights may in some contexts give way to a law that is narrowly tailored to further a compelling governmental interest.

In the context of the Boy Scouts' freedom of speech, however, this Court has repeatedly recognized that only the avoidance of imminent harm, amounting to a clear and present danger, is sufficiently compelling to warrant the restriction on this fundamental freedom. *See, e.g.*, *Schenck* v. *United States*, 249 U.S. 47, 52 (1919); *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1966). Otherwise, the remedy for "bad" speech—if the Boy Scouts' position can even credibly be so characterized—is more speech. *See Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). And for compelled speech such as is at issue here, the protection is near absolute.

Similarly, this Court has repeatedly recognized that governmental limitations on the expressive associational rights of private membership organizations are only permissible when the limitation is unrelated to the organization's expressive purpose. *See, e.g.*, *Roberts*, 468 U.S., at 627. The limitation imposed here by the New Jersey Supreme Court's interpretation of the New Jersey public

accommodations law, however, is directly related to the Boy Scouts' expressive purpose.

And in the parental rights context, this Court has carefully circumscribed the methods by which government may further interests that conflict with the right of parents to direct the moral upbringing of their children. In *Meyer*, for example, that State asserted that prohibiting instruction in the German language and ideals was necessary to promote civic development in American ideals. But the Court rejected that claim:

> That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. … Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

262 U.S., at 401. The same is true here. Even if it would be "highly advantageous" for all Americans to adopt New Jersey's view about homosexuality, such uniformity of opinion cannot be coerced by methods which conflict with the Constitution—and preventing parents from fostering in their children, through association with the Boy Scouts, the traditional belief that homosexuality is wrong, is just such a conflict.

Even were these strict requirements to be relaxed in this case, there is an Alice-in-Wonderland quality to the claim that the government has a compelling interest here, ostensibly because the Boy Scouts' belief in the immorality of homosexuality is itself, in the government's view, contrary to the public welfare and morals. The Boy Scouts as an organization is almost synonymous with moral virtue. Indeed, if anything, the organization is sometimes lampooned

for being *too* moral, *too* good. *See*, *e.g.*, G. Cook, "As challengers bow out, Gore comes into the crosshairs," Agence Fr.-Presse, 1999 WL 2540136 (Feb. 4, 1999) (noting that Vice President "Gore has such a boy-scout image he's often derided as boring"); B. Wattenberg, "Bush may be popular, but McCain has more of right stuff," The Topeka Capital-Journal, 1999 WL 31519897 (Oct. 30, 1999) (referring to "goody-good boy scouts").

For nearly a century, the Boy Scouts has been singularly successful in its mission of instilling in young boys a sense of their moral obligations to God, country, and family. Such moral training was thought by our nation's Founders to be essential in a republican form of government. The Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776, for example, provides "[t]hat no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, *and virtue*, and by frequent recurrence to fundamental principles." Va. Const. of 1776, Bill of Rights, Sec.15 (emphasis added). The Massachusetts Constitution of 1780 echoes the sentiment: "[T]he happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, *and morality* . . . ." Mass. Const. of 1780, Pt. 1, Art. 3 (emphasis added). And the Pennsylvania Constitution of 1776 went even further, asserting that "Laws for the encouragement *of virtue*, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution." Pa. Const. of 1776, Art. II, § 45 (emphasis added).

But perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the 55th number of The Federalist Papers: "Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are,] the inference would be that

there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another." The Federalist No. 55, at 314 (Clinton Rossiter and Charles Kesler eds., Mentor 1999). In short, the Founders viewed a virtuous citizenry as an essential pre-condition of republican self-government.

The Founders were also fully cognizant of the fact that virtue must be continually fostered in order for republican institutions, once established, to survive. *See Welsh* v. *Boy Scouts of America*, 993 F.2d 1267, 1278 (CA7), *cert. denied*, 510 U.S. 1012 (1993) ("The Founding Fathers recognized that a republic cannot endure without a virtuous citizenry"). Most of the leading Founders, therefore, turned their attentions at one time or another to education. Perhaps the best example, but by no means the only one, of this sentiment is expressed in the Northwest Ordinance, adopted by Congress for the government of the territories: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, Art. 3, 1 Stat. 51, 53 n. a; *see also, e.g.*, Mass. Const. of 1780, Ch. V, Sec. 2 ("wisdom and knowledge, as well as virtue, diffused generally among the body of the people [are] necessary for the preservation of their rights and liberties").

Because the fostering of moral excellence was, for the Founders, a task intimately tied to religion, *see, e.g.*, George Washington, *Farewell Address*, reprinted in *George Washington: A Collection* 521 (William B. Allen ed., Liberty Classics 1988) (noting that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle"), much of the moral education thought so essential by our Founders no longer can be provided in the public schools. *See, e.g., Everson* v. *Board of Education*, 330

U.S. 1, 16 (1947) (noting in *dicta* that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions"); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). As a result, the teaching of morality and virtue—so necessary to our republican form of government—is left largely to private associations, primarily churches and groups such as the Boy Scouts.

It is fortuitious, then, that the Founders did not rely on public institutions alone to foster a virtuous citizenry, but rather encouraged the development of private associations that, like the Boy Scouts, were devoted to the development of moral character. As Alexis de Tocqueville observed more than a century and a half ago, "[the intellectual and moral associations in America] are as necessary as the [political and industrial associations] to the American people, perhaps more so." Alexis de Tocqueville, *Democracy in America* 517 (J. P. Mayer ed. & George Lawrence trans., HarperPerrenial 1969) (1835).

Of course, respondent and his *amici* contest the claim made by the Boy Scouts that homosexual conduct is inherently *un*-virtuous (and therefore implicitly barred by a Scout's oath to be "morally straight"). Apparently, so does the New Jersey legislature (according to the interpretation given to its actions by the New Jersey Supreme Court). Indeed, the New Jersey Supreme Court rested its opinion in part upon the claim, grounded in moral relativism, that the Boy Scouts itself rejects the idea that there is any objective basis on which to make claims about the morality or immorality of homosexual conduct, or anything else, for that matter. *See*, *Dale*, 160 N.J., at 575, 734 A.2d, at 1203 ("Although one of BSA's stated purposes is to encourage members' ethical development, BSA does not endorse any specific set of moral beliefs. Instead, 'moral fitness' is deemed an individual choice"). The New Jersey court finds support for this astonishing conclusion in the following

passage from the Boy Scouts' Scoutmaster Handbook: "Morality … concerns the 'principles of right and wrong' in our behavior, and 'what is sanctioned by our conscience or ethical judgment.'" *Id*. (quoting Scoutmaster Handbook, at 71). The New Jersey court's reading ignores the distinction between "good conscience," on the one hand (to which the passage clearly refers), and "bad conscience" and "unconscionable" conduct, on the other. The New Jersey court's reading of the Boy Scouts' code, therefore, cannot be more wrong, nor more at odds with the idea of virtue regarded by our Founders as a necessary prerequisite of republican government.

For two centuries, the people of this nation and their courts have had little difficulty recognizing the meaning of the term "virtue," as well as its opposite—at least in non-marginal cases. Certain actions, for example, have long been held to be *malum in se*—wrongful in and of themselves. *See*, *e.g.*, *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878) (describing polygamy as an "offence against society"); *Van Iderstine* v. *National Discount Co.*, 227 U.S. 575, 581 (1913) (describing fraudulent conveyances of property beyond the reach of creditors as "*malum in se*") *District of Columbia* v. *Colts*, 282 U.S. 63, 73 (1932) (driving recklessly so as to endanger lives and property desribed as as act "*malum in se*", entitling defendant to a jury trial); *Parker* v. *Levy*, 417 U.S. 733, 762-63 (1974) (Blackmun, J., concurring) (describing "engaging in sexual acts with a chicken, or window peeping in a trailer park, or cheating while calling bingo numbers" as contrary to "[f]undamental concepts of right and wrong" and therefore punishable under the Uniform Code of Military Justice as "conduct unbecoming an officer and a gentleman") ; *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 568 (1991) ("Public nudity was considered an act *malum in se*"); *see also Federal Trade Commission v. R.F. Keppel & Bro.*, 291 U.S. 304, 312 (1934) (defining even the phrase "unfair methods of competition" in the Federal Trade Commission Act as

"practices in business that are *contra bonos mores*"). As Justice Scalia noted in *Barnes*:

> Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, "*contra bonos mores*," *i.e.*, immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy.

Id., at 575 (Scalia, J., concurring in the judgment).

Certainly homosexual conduct has for centuries been included in the list of acts generally deemed *malum in se*. *See, e.g.*, *Bowers* v. *Hardwick*, 478 U.S. 186, 192-94 (1986); *id.* at 196-97 (Burger, C.J., concurring). Indeed, the view that homosexuality is immoral is still supported by criminal prohibitions against sodomy in many States and in the Uniform Code of Military Justice. *Id.* at 193-94; Jeffrey G. Sherman, "Love Speech: The Social Utility of Pornography," 47 Stan. L. Rev. 661, 698 (April 1995) (citing state statutes and Uniform Code of Military Justice); *see also Thomasson* v. *Perry*, 80 F.3d 915 (CA4 1996) (upholding Congressional ban on homosexuals serving in the military).

Even if society wants to relax that view, it requires a sort of logical gymnastics to move from the traditional view that homosexual conduct is *malum in se* to the view, effectively propounded by the New Jersey Supreme Court, that the government now has such a compelling interest in eradicating that long-held view that it may force the Boy Scouts to proclaim symbolically its very opposite—that there is nothing immoral about homosexual conduct.

While it may be true, as Justice Blackmun once noted, that "[r]elativistic notions of right and wrong, or situation ethics, as some call it, have achieved in recent times a disturbingly high level of prominence in this country . . . as a justification of conduct that persons would normally eschew as immoral

and even illegal," *Parker* v. *Levy*, 417 U.S. 733, 765 (1974) (Blackmun, J., concurring), we have not yet reached the day when the law is allowed to silence those who think otherwise. "The truth is that the moral horizons of the American people are not footloose, or limited solely by [the positive law]. The law should . . . be flexible enough to recognize the moral dimension of man and his instincts concerning that which is honorable, decent, and right." *Id.*

The Boy Scouts has always exemplified—and to many still exemplifies—that which is "honorable, decent, and right." As the Supreme Court of Kansas recently recognized, the Boy Scouts "tends to conserve the *moral*, intellectual, and physical life of the coming generation." *Seabourn*, 257 Kan., at 180, 891 P.2d, at 388 (emphasis added) (quoting Congressional Report in Support of Act to Incorporate Boy Scouts of America). The organization seeks to instill in the coming generation a key element of what our Founders thought necessary to republican self-government, namely, the ability to govern "oneself morally [by] controlling one's own tendency to indulge the selfish and violent passions unreasonably." T. West, *Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America* 160 (Rowman & Littlefield 1997).

While the Boy Scouts position on homosexuality is not as universally accepted as it once was, it is a position that is both well grounded in our nation's laws and traditions and still regarded as correct by a large portion of the population. Almost by definition, then, the government's interest in silencing groups such as the Boy Scouts falls well short of "compelling," if that term is to retain any meaning.

To borrow again from Justice Blackmun's concurring opinion in *Parker*, for the Boy Scouts and their supporters, "what is at issue here are concepts of 'right' and 'wrong.'" 417 U.S., at 763 (Blackmun, J., concurring). These concepts are and have long been fostered by the Boy Scouts as part of the Scouts' oath to be "morally straight." The State of New

Jersey itself apparently agreed until 1979, when it repealed its law against sodomy. That New Jersey now holds a different position does not alter the fact that for the Boy Scouts and many others, "times have not changed in the area of moral precepts. Fundamental concepts of right and wrong are the same now as they [ever] were." *Id.* New Jersey may seek to persuade, but it cannot constitutionally compel, the Boy Scouts to alter its time-honored views, for in such compulsion lies intolerance, and tyranny.

CONCLUSION

The decision of the New Jersey Supreme Court should be reversed, and the grant of summary judgment entered by the New Jersey trial court in favor of the Boy Scouts should be reinstated.

Respectfully submitted,

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