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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF REVERSAL

OF COUNSEL
HAROLD E. JOHNSON
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JOHN H. FINDLEY
*Counsel of Record*
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

*Counsel for Amicus Curiae*

## QUESTIONS PRESENTED

1. May government compel a private association with an expressive purpose to accept as a leader someone who rejects the association's tenets?

2. May a court graft onto an expressive association's defining mission an ideology that the association rejects?

## TABLE OF CONTENTS





## TABLE OF CONTENTS—Continued

## TABLE OF AUTHORITIES

Page

### Cases





## TABLE OF AUTHORITIES—Continued

Page

### Miscellaneous

## IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of reversal.[1] Written permission for amicus participation in this case was granted by counsel of record for all parties and has been lodged with the Clerk of this Court.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in the United States. Founded in 1973, PLF provides a voice in the courts for individuals who believe in limited government and individual freedom. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has a tradition of litigating in support of First Amendment rights. *See, e.g., Keller v. State Bar of California*, 496 U.S. 1 (1990). PLF has also participated as a friend of the court in many other First Amendment cases this Court has heard. *See Arkansas Educational Television Commission v. Forbes*, 118 S. Ct. 1633 (1998); *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995); and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

Additionally, because PLF is a private nonprofit organization with a stated philosophical purpose, the Foundation has an institutional interest in championing freedom of association and in particular the liberty of private expressive

---

[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

organizations to define their goals without government coercion.

PLF submitted a friend of the court brief in the case at bar, in support of Petitioners' petition for certiorari; PLF now seeks to augment the arguments of Petitioners by further elucidating the grave implications for American freedom if government is allowed to dictate to private expressive associations their principles and membership policies. PLF believes its public policy perspective and litigation experience dealing with constitutional law will provide a unique viewpoint on issues in this case. PLF believes this additional viewpoint will aid this Court in the resolution of this case.

## STATEMENT OF THE CASE

The Boy Scouts of America is a nonprofit, private organization incorporated in 1910. Unlike a recreational facility open to any and all, the Scouts operate with specified membership criteria. For instance, willingness to express a belief in God is a basic and distinguishing philosophy and purpose. Participants meet regularly in small groups, often in private homes, with the aim of fostering fellowship and trust. The organization's ideals are announced in its Mission Statement:

> It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential. The values we strive to instill are based on those found in the Scout Oath and Law:



> Scout Oath
>
> On my honor I will do my best, To do my duty to God and my country to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight.

*Quoted in Dale v. Boy Scouts of America,* 308 N.J. Super. Ct. App. Div. 516, 524 (1998).

Scouting's leaders maintain that the duty to remain morally straight encompasses a view with respect to homosexuality, among other principles. This position is reflected in a 1978 memorandum by the national Scout leadership:

> "Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?
>
> A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership.
>
> Q. May an individual who openly declares himself to be a homosexual be a registered unit member?
>
> A. No. As the Boy Scouts of America is a private, membership organization, participation in the program is a privilege and not a right. We do not feel that membership of such individuals is in the best interests of Scouting."

*Quoted in Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 735 n.7 (1998).

James Dale, a veteran Boy Scout, applied for adult membership and leadership status in Scouting about the time he entered college. It was also around this time that he announced to friends and family that he was gay, and eventually he became co-president of the Rutgers University Lesbian/Gay Alliance. In July, 1990, he was interviewed by the *Newark Star-Ledger* in connection with a seminar he attended relating to gay and lesbian teenagers. The newspaper article identified him as co-president of the Rutgers Gay/Lesbian organization.

Upon learning of this information, the Monmouth Council of the Boy Scouts revoked Dale's membership. In a letter to Dale, the Council cited as grounds for this action, "[T]he standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals."

The assistant regional director of the Scouts' Northeast Region, and the Scouts' National Council, both offered similar explanations for Dale's termination. Dale declined to seek National Council review of the issue, instead bringing a lawsuit in New Jersey state court challenging the Scouts' right to exclude him.

The trial court rejected Dale's claim that New Jersey's Law Against Discrimination applied to the Boy Scouts. The court also found that the Boy Scouts' position with respect to active homosexuality was clear and the Scouts had a First Amendment right not to accept Dale as an adult leader. *Dale v. Boy Scouts of America*, No. MON-C-330-92 (Ch. Div. Nov. 3, 1995), at 71.

Appellate Division reversed and remanded for further proceedings, holding that Scouting is a "public accommodation" subject to antidiscrimination laws, and the organization could not bar Dale from being a volunteer assistant Scoutmaster solely because of his announced sexual orientation. The court also declared that the Scouts did not have a First



Amendment right to restrict membership according to sexual orientation. *Dale v. Boy Scouts of America*, 308 N.J. Super. Ct. App. Div. at 516.

The New Jersey Supreme Court upheld the Appellate Division's ruling that for the Scouts are subject to state antidiscrimination law, and that applying that law does not violate the First Amendment. *Dale v. Boy Scouts of America*, 160 N.J. 562, 624 (1999).

The Boy Scouts petitioned this Court for a Writ of Certiorari. This Court granted the writ on January 14, 2000 (No. 99-699).

## SUMMARY OF ARGUMENT

This case asks whether the Boy Scouts of America will be allowed to define their own principles and to condition membership accordingly, or whether, to the contrary, government may impose upon a private, expressive association an altered mission and reworked ideology. Because the Scouts are a voluntary organization dedicated to certain ethical propositions, the question of whether they may adhere to their own vision puts to the test the constitutional freedom of expressive association.

On this issue, the First Amendment does not equivocate. The sturdy defense that it accords freedom of expressive association was recognized by this Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), which upheld the right of a St. Patrick's Day Parade to exclude a contingent of openly gay marchers because their message was not the Parade's message. The case at bar calls for a comparable acknowledgment of constitutional principle. The Boy Scouts are every bit as much a private expressive enterprise as a parade. *Hurley* explicitly says that the parade organizers' right to restrict participation so as to control their message is similar to a private club's right to

exclude an applicant who rejects the club's principles. *Id.* at 580-81.

The New Jersey Supreme Court does not stop at forcing on the Scouts a *member* at odds with their historic policies. The court also forces on the organization a *philosophy* that jars with its organization's traditions. In pronouncing that Scouting's defining doctrines do not include opposition to homosexuality, the New Jersey Supreme Court contradicts Scout leadership. Beyond the fact that there is significant evidence contradicting the New Jersey Court's reinterpretation of Scouting principles, the court's pronouncement is audacious because it so brazenly flouts the First Amendment. Freedom of speech means that private speakers--and private expressive associations--can craft their messages free from government attempts to critique or tweak. If government were permitted to dictate doctrine and membership rules to voluntary expressive associations, the boundary between public and private sectors would be marked in disappearing ink. Expressive freedom in the private sector would be a revocable privilege rather than a bedrock right.

The liberty of expressive association that the New Jersey Court assaults plays a key role in the infrastructure of ordered liberty. It nurtures the multitudes of private organizations that promote shared causes and hone habits of cooperation and responsibility. Such private expressive associations, representing the entire range of philosophical outlooks, counterbalance centralizing trends in government and society. They are the life force of American diversity and pluralism. As alternative centers of allegiance and involvement, they ensure that there are institutions other than the state to which individuals look for philosophical kinship and tutelage. This is why Tocqueville celebrated America's profusion of private associations as not merely a force for social betterment but also as a "dike to hold back tyranny of whatever sort." Alexis de Tocqueville, *Democracy in America* 177 (J.P. Mayer and Max Lerner, eds., Harper & Row, 1966).



In the context of affirming that federal law does not require the Boy Scouts to admit atheists, the United States Court of Appeals, Seventh Circuit, has noted Scouting's status as one of those mediating institutions that serve as schools and safeguards of liberty:

> When the government, in this instance through the courts, seeks to regulate the membership of an organization like the Boy Scouts in a way that scuttles its founding principles, we run the risk of undermining one of the seedbeds of virtue that cultivate the sorts of citizens our nation so desperately needs.

*Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1278 (7th Cir. 1993).

Regardless of whether one agrees with the particular Scout policy that is challenged by Mr. Dale, upholding the Scouts' right to adhere to that policy is essential to the organization's independence, to the expressive rights of all other associations, regardless of their perspectives, and to the vitality of American pluralism and freedom.

## ARGUMENT

## I

## THE FREEDOM OF EXPRESSIVE ASSOCIATION THAT THE NEW JERSEY RULING ASSAULTS IS NOT MERELY A CONSTITUTIONAL MANDATE, IT IS ALSO A COMPELLING PRACTICAL NECESSITY FOR PRESERVATION OF PLURALISTIC DEMOCRACY

### A. Freedom of Expressive Association Is a First Amendment Mandate That Includes the Right of Private Organizations Dedicated to Expressive Purposes to Condition Their Membership Policies So as to Promote Those Purposes

The First Amendment right of a private expressive organization to align its membership with its message was unanimously affirmed by this Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557 (1995). The Court declared that Massachusetts could not compel a St. Patrick's Day Parade to admit a group aiming to "celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants." *Id.* at 569-70, 578. The Court found that the parade constituted "expressive activity"--even if it lacked any "narrow, succinctly articulable message." *Id.* at 570. Therefore, for the state, through an anti-discrimination law or any other instrument, to compel the parade to accept "an expressive contingent with its own message" would violate the organizers' First Amendment rights. *Id. at* 580-81.

> "[T]he best reading of Hurley is to establish the following canon of statutory interpretation:
>
> General antidiscrimination statutes will not be read expansively, beyond their clear application, when the broad reading would directly burden protected First Amendment rights. Such a clear statement rule not only would ameliorate clashes between nondiscrimination and free speech norms but would appropriately place the burden on the legislature to consider First Amendment values when it adopts antidiscrimination laws."



William N. Eskridge, Jr., "A Jurisprudence of 'Coming Out': Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law, 106 Yale L.J., 2411, 2462-63 (June, 1997).

The New Jersey Supreme Court flouted this message in the case at bar, insisting on exalting a statute or rather, an expansive interpretation of the statute over the Constitution's protection of free speech.

So uncompromising is the Constitution that not even the goal of promoting broad-mindedness or liberality would justify forcing on speakers a message that is not their own:

> The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.

*Hurley*, 515 U.S. at 579.

For many contemporary Americans, the Boy Scout policy at issue here is an affront to modern orthodoxy, and certainly there are many people of goodwill who disagree with it. From the standpoint of the Constitution, however, those facts are not relevant. Under the First Amendment, heresy and orthodoxy find equal shelter. Even if one believes the Scouts are wrong in their policy, their right to be wrong is shielded by the First Amendment.

**B. Boy Scouts of America Enjoys Expressive Associational Rights Just as Much as the Parade Organizers in *Hurley***

The expressive, philosophically focused mission of the Boy Scouts is self-evident from their defining formulae and their traditional membership criteria.

> Although the Scouts intentionally admit a large number of boys from diverse backgrounds, admission to membership is not without the exercise of sound discretion and judgment. This is evident from the Constitution and By-laws as well as the Boy Scouts Oath and Scout Law. The Oath reflects the commitment of each member, and has remained unchanged since the publication of the Scouts' first handbook in 1911. . . .
>
> . . . .
>
> This Oath offers a clear statement of the beliefs, principles and purpose of the Scouts, i.e., to nurture belief in God, respect for one's country and his fellow man, and being of good moral character.

*Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1276 (7th Cir. 1993).

Even the New Jersey Supreme Court acknowledges that the Scouts are an expressive organization:

> [W]e agree that Boy Scouts *expresses a belief in moral values* and uses its activities to *encourage the moral development* of its members.

*Dale v. Boy Scouts of America*, 160 N.J. 562, 613 (1999) (citations omitted; emphasis added). The Scouts are involved in "Disseminat[ing a] message. . . ." *Id.* at 612 (emphasis added).



But logic gives way to ideology as the New Jersey Supreme Court goes on to deny the Scouts the First Amendment protections accorded the *Hurley* parade, essentially on the grounds that Scouting, by some delicate judicial calculus, is *not expressive enough*. The court asserts that the Scouts cannot deny a leadership role to Mr. Dale because "Boy Scout leadership [is not] a form of 'pure speech' akin to a parade." *Id.* at 623.

The truth is, Boy Scout operations are significantly *more* expressive than a parade. This Court found a St. Patrick's Day Parade expressive enough to warrant First Amendment protection even though it lacked any "narrow, succinctly articulable message." It was enough that a "parade" generically is understood as "includ[ing] marchers who are making some sort of collective point, not just to each other but to bystanders along the way." *Hurley*, 515 U.S. at 558, 569.

In contrast to a parade without a "succinctly articulable" message, the Scouts maintain a Mission Statement, and an "oath" deemed so important that the oath-taker pledges his "honor." The organization sees its leaders who join in this Oath as communicating a message, as clearly implied in a 1978 Scout memorandum:

> "Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout Leader?
>
> A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership.

*Quoted in Curran v. Mount Diablo Council of Boy Scouts*, 17 Cal. 4th 670, 735 n.7 (1998).

According to the New Jersey Supreme Court, "Dale's status as a scout leader is not equivalent to a group marching in a parade" because "Dale does not come to Boy Scout meetings . . . to promote homosexuality, or any message inconsistent with Boy Scouts' policies." *Id.* at 623. Here, too, the court departs from the guidance of *Hurley,* which recognizes that voluntary organizations may be expressive in character without being as public as a parade. According to *Hurley*, the St. Patrick's Day Parade could condition participation "*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.*" *Hurley*, 515 U.S. at 581 (emphasis added). Mr. Dale's leadership in a campus lesbian/gay organization and his interview with a newspaper made his views "manifest" and so triggered his exclusion by the Boy Scouts. *Dale*, 160 N.J. at 577-79. Regardless of how one views the wisdom of Scout's policy, the Scouts have as much constitutional freedom to implement it as did the parade organizers in *Hurley*.

### C. Tocqueville and Other Political Theorists Have Explained How Freedom of Expressive Association Is a Guarantor of Pluralism and a Defense Against Tyranny

The freedom of expressive association that is protected by the First Amendment--the freedom that shields the Scouts' right to impose membership criteria to advance Scout principles--plays a crucial practical role in the structure of American Liberty. Indeed, having a multitude of robust, independent voluntary associations appears to be one of the preconditions for a society to enjoy stable freedom.

One of the earliest efforts to define the relationship between voluntary organizations and freedom in the political realm was advanced by the French scholar



Alexis de Tocqueville. Writing in the early 19th Century, Tocqueville

> "wanted to find out why the United States alone among the countries of his day had a successful and stable democratic political order. He pointed to the fact that as compared with Europeans of his day, 'Americans . . . constantly form associations.' "

Seymour Martin Lipset, Martin Trow, and James Coleman, *Union Democracy* 82-83 (Anchor Books, 1962) (quoting Alexis de Tocqueville: *Democracy in America*, (Alfred A. Knopf, Inc., 1945) at 376-86).

Tocqueville offered a vivid summary of Americans' associational impulse:

> There are not only commercial and industrial associations in which all take part, but others of a thousand different types--religious, moral, serious, futile, very general and very limited, immensely large and very minute. Americans combine to give fetes, found seminaries, build churches, distribute books, and send missionaries to the antipodes. Hospitals, prisons, and schools take shape in that way. Finally, *if they want to proclaim a truth or propagate some feeling by the encouragement of a great example,* they form an association. In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.

Tocqueville, *Democracy in America*, at 485 (J.P. Mayer and Max Lerner, eds., Harper & Row, 1966) (emphasis added).

Tocqueville argued that Americans' tendency to associate did more than merely contribute to social betterment. It also served as a counterforce to centralizing tendencies in

government and society, and thus tempered "omnipotence" of the majority. It acted as a "dike to hold back tyranny of whatever sort." *Id.* at 177.

Tocqueville's insight has been embraced and expanded upon by a number of 20th Century political theorists:

> Tocqueville and [twentieth century] exponents of what has come to be known as the theory of the 'mass society' have argued that a country without a multitude of organizations relatively independent of the central state power has a high dictatorial as well as revolutionary potential. Such organizations serve a number of functions: they inhibit the state or any single source of private power from dominating all political resources; they are a source of new opinions; they can be the means of communicating ideas, particularly opposition ideas, to a large section of the citizenry; they train . . . in political skills and so help to increase the level of interest and participation in politics. Although there are no reliable data on the relationship between national patterns of voluntary organization and national political systems, evidence from studies of individual behavior demonstrates that, regardless of other factors, [individuals] who belong to associations are more likely than others to give the democratic answer to questions concerning tolerance and party systems, to vote, or to participate actively in politics.

Seymour Martin Lipset, *Political Man* 67 (Doubleday & Co., Inc. 1960) (*citations omitted*).

> The central question for those concerned about maintaining the health of our republic must be, "how do individuals acquire the virtues necessary for self-government?" History provides only one answer:



> through the institutions of civil society, like the family, religious groups, and voluntary associations, which inculcate a sense of moral values in the young.

*Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1278 (7th Cir. 1993).

Some theorists see freedom threatened in modern democracies by a concerted drive to divest private associations of their uniqueness and sap them of their strength. The ultimate result would be a society deprived of those mediating institutions that serve as alternatives to the central government as focuses of people's allegiance and involvement:

> It has surely become obvious that the greatest single internal problem that liberal democracy faces is the preservation of a culture rich in diversity, in clear alternatives--*and this is a cultural problem that cannot be separated from the preservation of the social groups and associations within which all culture is nourished and developed.* . . . The State grows on what . . . it takes from competing social relationships--family, labor union, profession, local community, and church.

Robert A. Nisbet, *The Quest for Community*, at 256 (Oxford University Press, 1953) (emphasis added).

For some exponents, this analysis takes on urgency in the wake of the lessons of 20th Century totalitarianism. The totalitarian regimes have shared at least one unifying principle: *absence of truly independent voluntary associations.* Such a society is marked by

> [T]he absolute, the total, political community. As a community it is made absolute by the removal of all forms of membership and identification which might, by their existence, compete with the new

> order. It is, further, made absolute by the insistence that all thought, belief, worship, and membership be within the structure of the State."

*Id.* at 204-05.

By denying the Scouts' right to operate according to their own philosophical lights--and by imposing instead a government dictate as to who must be made a Scout leader--the New Jersey Supreme Court hints at an absolutist vision hostile to genuine independence for private associations. Not just Scouting's independence is threatened, but that of expressive associations of all philosophical stripes. The court's vision is alien to the First Amendment and poisonous to the diverse flowering of voluntary organizations that has long been America's pride and freedom's protection.

## II

## FREEDOM OF EXPRESSIVE ASSOCIATION BARS COURTS FROM EDITING OR REINTERPRETING THE MISSIONS OR IDEOLOGIES OF SUCH ASSOCIATIONS

### A. The Boy Scouts' Right to Expressive Association Includes the Freedom to Define Their Teaching for Themselves

Not content with merely commanding the Boy Scouts to admit someone whom they rejected for philosophical reasons, the New Jersey Supreme Court makes bold to foist on the Scouts the court's own interpretation--or editing--of Scout doctrine. For instance, the court declares that the "Scout Oath" pledge to be "morally straight," does not on its face, "express anything about sexuality." *Dale*, 515 U.S. at 614.

This reading of Scout doctrine confronts significant contrary evidence. For instance, in litigation in California concerning Boy Scout membership policies, the Scouts



> introduced a memorandum written in 1978 by the national Boy Scouts of America setting forth--in question and answer form--the official position of the Boy Scouts relating to homosexuality and scouting. The document states in relevant part:
>
> "Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?
>
> A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate."

*Curran*, 17 Cal. 4th at 735 n.7.

More fundamentally, the New Jersey Court's ideological correction of the Scouts violates the constitutional principle that a private expressive organization has the right to define its own creed. It is a "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573.

This First Amendment doctrine ensures the integrity and independence of private associations, protecting against a danger that Tocqueville observed in his day, on his native continent:

> In all European nations some associations cannot be formed until the state has examined their statutes and authorized their existence. In several countries efforts are made to extend this rule to all associations. One can easily see whither success in that would lead.

Tocqueville, *Democracy in America*, at 662.

The New Jersey Supreme Court has subjected Scout principles--or "statutes," to use Tocqueville's term--to a critical review and found them wanting. If allowed to stand, this judicial overreach would move the United States in the direction of those nations described by Tocqueville where private associations needed government preapproval of their message before they could formally be established.

### B. The New Jersey Court Implicitly Demands That the Scouts Adopt a Strident Tone in Order to Secure Judicial Protection for Scouting Principles

The Constitution does not require a speaker--or an expressive organization--to shout a message in order to enjoy free speech rights. "[P]rotected expression may also take the form of *quiet persuasion*, inculcation of traditional values, instruction of the young." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) (emphasis added). The New Jersey Supreme Court is deaf to this principle in its refusal to acknowledge the Scouts' First Amendment liberty. The court suggests that the absence of explicit references to homosexuality in the Scout Oath defeats Scouting's claim that it has an official position on the subject, and so justifies the court in forcing the Scouts to accept Mr. Dale as a leader. 160 N.J. at 614.

Does this mean that only if the Scouts bellow their message are they to be permitted to act on it? But what if "quiet persuasion"--an avoidance of stridency--is itself part of the Scouts' chosen form of expression? Why must the organization adopt a vociferous voice in order to be secure in its rights? In fact, any such requirement is repugnant to the Constitution. The First Amendment gives the Scouts freedom to speak in tones of their own choosing without fear that their message can be silenced for not being sufficiently shrill.



### C. The New Jersey Court's Reinterpretation of Scout Doctrine Verges on Theological Speculation, an Indulgence Prohibited to the Courts

Among the New Jersey Supreme Court's justifications for supplanting the Scouts' philosophy with its own is that Boy Scouts of America has a working relationship with various churches and there is evidence that "the Boy Scouts' religious sponsors differ in their views about homosexuality." *Dale*, 160 N.J. at 615. Invoking religious doctrine--or asserted doctrinal differences between or within religions--carries the judiciary toward forbidden terrain, because it involves judges in trying to define what particular religious groups *believe*. Such inspection of conscience and catechism has generally been regarded as beyond judicial authority. Inquiring "into the significance of words and practices to different religious faiths . . . would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Widmar v. Vincent*, 454 U.S. 263 (1981).

The fact that the Boy Scouts themselves have an avowed commitment to God makes judicial review of their mission especially ominous. The Scouts do not hold themselves out to be a church, but they do make an institutional assertion of the existence and importance of a higher power. If the New Jersey court has no qualms about inquiring into--and, indeed, aggressively challenging--"the significance of words and practices" of an organization with a religious component in its teaching, how much more vulnerable to court dictation are expressive organizations that are overtly secular? Fortunately, the First Amendment stands against such judicial forays into realms of private expression. It protects speakers, religious and secular alike, from government efforts to augment or edit their messages.

### D. To Deny the Scouts' Right to Determine Their Own Policies and Principles Would Imperil All Other Expressive Associations

In *Curran v. Mount Diablo Council of Boy Scouts*, 17 Cal. 4th 670, the California Supreme Court ruled that the Boy Scouts did not constitute a "business establishment" and so were not barred under California antidiscrimination law from excluding an admitted homosexual from leadership.

In her concurring opinion, Justice Kennard addressed federal constitutional issues. Citing *Hurley,* she observed that the First Amendment protected the Boy Scouts' right to exclude the plaintiff:

> Were we to hold that the membership decisions of the Boy Scouts of America are subject to regulation under [California civil rights law], the organization would have a compelling argument that requiring it to accept plaintiff, or anyone else who espouses views contrary to its guiding precepts, violates the First Amendment rights of expressive association and free speech enjoyed by the organization and its members.

*Curran*, 17 Cal. 4th at 725-26.

Justice Kennard noted how chilling it would be for associations of varying viewpoints if the Boy Scouts were denied expressive rights:

> Could the NAACP be compelled to accept as a member a Ku Klux Klansman? Could B'nai B'rith be required to admit an anti-semite? If the First Amendment protects the membership decision of these groups, must it not afford the same protection to the membership decisions of the Boy Scouts?

*Id.* at 729.



If the Boy Scouts are stripped of First Amendment protection, what confidence can any other association have that it might not also one day be subjected to government thought control if their doctrines fall afoul of a shift in public sentiment?

## CONCLUSION

To compel private associations to hew to a governmentally approved line of thinking would transform such associations from outposts of pluralism into agents of majoritarian uniformity. The First Amendment protects against such a coercive homogenizing of American Culture. It declares that private expressive associations can define their principles without supervision or preclearance by lawmakers or the courts, and can implement policies that conform with those principles. As a voluntary, private, expressive organization, the Boy Scouts are entitled to the full benefit of these associational freedoms. The test of the nation's commitment to freedom comes when that freedom is invoked in behalf of a controversial idea. The fact that the Scout policy challenged by Mr. Dale is controversial does not strip the Scouts of the right to embrace it. To the contrary, it makes it even more imperative that their rights be affirmed. Amicus Pacific Legal Foundation therefore urges this Court to reverse the ruling by the New Jersey Supreme Court.

DATED: February, 2000.

Respectfully submitted,

OF COUNSEL
HAROLD E. JOHNSON
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JOHN H. FINDLEY
*Counsel of Record*
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

*Counsel for Amicus Curiae*