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 CHRISTIAN LEGAL SOCIETY, CAMPUS CRUSADE FOR CHRIST INTERNATIONAL, INTERVARSITY CHRISTIAN FELLOWSHIP/USA, REJOYCE IN JESUS CAMPUS FELLOWSHIP, AND SOUTHERN CENTER FOR LAW & ETHICS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICI CURIAE*[1]

*Amicus curiae* **Christian Legal Society** ("CLS") is a nonprofit interdenominational association of over 4,000 Christian attorneys, law students, judges, and law professors. A key component of the ministry of the Christian Legal Society occurs through its student chapters at 165 law schools across the country, including student chapters at approximately 70 state law schools. Before becoming a member of CLS, a person must sign a statement of faith that he or she agrees with certain basic Christian tenets regarding the nature of God the Father, the Son, and the Holy Spirit, and the authority of the Bible.[2]

The purpose of *amicus curiae* **InterVarsity Christian Fellowship/USA** ("IVCF") is to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord: growing in love for God, God's Word, God's people of every ethnicity and culture and God's purposes in the world. IVCF carries out its ministry through student chapters. Officers of those chapters are required to subscribe to the purpose and doctrinal basis of IVCF and must subscribe to certain basic biblical truths of Christianity. Currently, IVCF has approximately 747 chapters on 552 campuses in the United States, including chapters at 290 public universities and colleges.

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[1] Counsel for a party did not author this brief, in whole or in part. No one, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of the brief. *See* S. Ct. Rule 37.6.

[2] The specific statements of faith for *amici's* student chapters are set forth in the Appendix with the more detailed statements of interest of the *amici curiae*.

*Amicus curiae* **ReJOYce in Jesus Campus Fellowship** ("RJCF") has student chapters at 23 universities and colleges, including student chapters at 14 state universities and colleges. Its purpose is to promote the teachings of Jesus Christ according to the Holy Bible through Bible study, campus activities and service to the campus community. While welcoming all students to attend its meetings, its voting members must subscribe to the group's Doctrinal Statement of Commitment to Historic Christianity, as well as agree to live by the group's written standards of personal conduct.

*Amicus curiae* **Campus Crusade for Christ International** ("CCC") has student chapters meeting at 731 universities and colleges across the country, including student chapters at 417 public universities and colleges. The purpose of CCC is to fulfill the Great Commission, Jesus' command to His disciples to "go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you." *Matthew* 28:19-20. Specifically, the goal of its student chapters is to reach every student at their campuses every year with the Gospel. Its leaders are to be effective witnesses of the Gospel to other students.

*Amicus curiae* **Southern Center for Law & Ethics** is a non-profit corporation involved in teaching, scholarship, and advocacy on issues relating to the interplay of ethics and law. The Center believes that the right of association implicated in this case is a significant constitutional right which enriches society with ideals drawn from religious and other significant ethical traditions.

Numerous state universities and colleges have tried to condition *amici's* student chapters' right of access to campus facilities upon their willingness to agree to accept



as officers persons who do not share their core religious values. University officials have claimed that *amici's* student chapters violate the university policies against discrimination on the basis of religion or sexual orientation, because the groups require their officers to subscribe to a statement of faith and to live according to biblical standards of conduct. If Boy Scouts must accept as a leader a person who rejects one of its core values, the ability of *amici's* student chapters to restrict their leadership to persons who share the groups' core values likely will be irreparably damaged.

Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

## SUMMARY OF ARGUMENT

Many state universities have begun to force a new orthodoxy upon student organizations: homosexual conduct, and the advocacy of such conduct, must be accepted by all student groups as a morally correct (or at least, a morally neutral) choice. State universities have sought to enforce policies prohibiting discrimination on the basis of sexual orientation against student groups whose religious principles teach that "homosexual behavior [is] a sin that disqualifies those who practice it from membership or leadership within the group." Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994). For example, the University of Illinois denied recognition to the Christian Legal Society ("CLS") chapter at the College of Law because the CLS student leaders "refused to sign a University pledge to refrain

from discrimination on the basis of sexual orientation." *Id.* at 370.

University officials have launched a separate, but related, attack against religious student groups that discriminate on the basis of religion in the selection of their officers. For example, the University of Minnesota Law School threatened to deny recognition to the CLS chapter because it required its voting members and officers to subscribe to its statement of faith. The University judged this to be "discrimination on the basis of religion" in violation of the University's Equal Opportunity Statement. Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 668-672 (1996). In 1997, the Georgia Attorney General addressed the issue when it arose at Georgia Institute of Technology and concluded that denying recognition to ReJOYce in Jesus Campus Fellowship, a religious student group that required its voting members to affirm the group's statement of faith, would violate the group's free speech rights. Ga. Op. Att'y Gen. 97-32 (1997).

Since 1993, *amici's* student chapters have encountered similar problems at campuses across the country, including public universities and colleges in Michigan, Illinois, Ohio, Minnesota, Missouri, Georgia, California, New York, Arizona, Texas, and Vermont. Although these controversies eventually have been resolved in their favor, the groups have been forced to threaten litigation in many of these instances in order to challenge the restriction on their right of access under this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995).



*Amici's* student chapters generally do not wish to exclude persons who have homosexual inclinations, or even who have engaged in homosexual conduct in the past, from serving as officers. As long as the individuals now agree that homosexual *conduct* is sinful and that they will abstain from engaging in or advocating such conduct, they may be eligible to serve as leaders. University officials, however, have generally refused to define the term "sexual orientation" to include only "orientation". Instead university officials insist that "sexual orientation" reaches far beyond "inclination" to the protection of homosexual conduct as well as advocacy of homosexual conduct. Similarly, the New Jersey Law Against Discrimination sets forth such an all-encompassing definition of "sexual orientation," defining it to include "homosexuality or bisexuality by inclination, *practice*, identity *or expression*." N.J. Stat. Ann. 10:5-5(hh) (West 1993) (Pet. App. 226a) (emphasis added).

If Boy Scouts loses the right to restrict its leadership to persons who agree with its core values, then university officials will redouble their efforts to force religious student groups to accept as leaders persons who do not share their religious viewpoints, particularly regarding sexual conduct. After this Court's restriction of exemptions for religious persons from neutral, generally applicable laws, in *Employment Division v. Smith*, 494 U.S. 872 (1990), religious persons and organizations are vulnerable to such attacks.

Fortunately, the decision below cannot be reconciled with this Court's unanimous decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In *Hurley*, this Court upheld the federal free speech right of a private organization, which had

been deemed a public accommodation under a state anti-discrimination law, to include in its parade only persons who would not impart a message the organization did not wish to convey. *Id.* at 559, 573.

In a factual and legal context parallel to this case, this Court stated:

> [T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.

*Id.* at 573. This Court rejected the notion that an organization must express an explicit message in order to exclude from its expressive activities persons who do not share its core values. Instead, the rights of expressive association and speaker autonomy protect the right of an organization to define its own values and message through the selection of its leaders. In *Hurley*, this Court rejected the idea that an association forfeits its First Amendment right to define itself, its leadership, and its message simply because the organization is large or has some interaction with the government.

Essentially, the decision below allows one individual to hijack an entire organization that transmits values that the individual wishes to challenge. If the decision below is affirmed, every organization that transmits values will be threatened by costly litigation whenever a disgruntled person is denied leadership. Courts will be overseeing the internal workings of private associations, big and small, to determine the groups' criteria for leadership or whether certain leadership positions affect a particular group's message.



The First Amendment protects the right of organizations that transmit values to determine their own criteria for selection and retention of leaders. Were that not the case, the government would have *carte blanche* to reshape private organizations to reflect the government's values and message. This Court in *Hurley* flatly rejected the exercise of such governmental power, stating:

> 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. The Speech Clause has no more certain antithesis.

515 U.S. at 579.

Part I.A., *infra*, at pp. 8-13, describes the growing problem of state university officials conditioning religious student groups' access to campus facilities upon the groups' agreement to accept as leaders persons who do not share the groups' core religious values. Part I.B., *infra*, at pp. 13-16, demonstrates that the right of Boy Scouts of America to control its leadership selection will directly affect the ability of religious student groups to select their leaders free from state coercion. Part II, *infra*, at pp. 16-30, demonstrates that this Court's analysis in *Hurley* protects the right of an organization whose purpose is the transmission of values to limit its leadership to persons who share the organization's core values, as defined by the organization.

## ARGUMENT

### I. PUBLIC UNIVERSITIES HAVE THREATENED RELIGIOUS STUDENT GROUPS WITH LOSS OF ACCESS TO CAMPUS FACILITIES IF THE GROUPS REFUSE TO AGREE TO ACCEPT AS OFFICERS PERSONS WHO DO NOT SHARE THE GROUPS' CORE RELIGIOUS VALUES, INCLUDING THEIR RELIGIOUS VIEWPOINTS REGARDING HOMOSEXUAL CONDUCT.

#### A. Denial of Equal Access to Religious Groups Because They Require Their Officers Not to Engage in or Advocate Homosexual Conduct Is an Unconstitutional Condition in Violation of This Court's Decisions in *Widmar v. Vincent* and *Rosenberger v. University of Virginia.*

The right of religious student groups to meet on public university campuses is protected by this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995). In *Widmar*, this Court prohibited public university officials from denying equal access to student groups engaging in religious speech. The university officials had not denied *all* access to religious groups but *conditioned* their access to campus facilities on their agreeing to abstain from religious worship or religious teaching at their meetings. 454 U.S. at 265, 266 n.3. This Court held that such a condition violated a religious student group's freedom of speech as well as its freedom of association. *Id.* at 269, 277. In *Rosenberger*, this Court applied its *Widmar* analysis to reject university officials' denial of equal access to student activity funds for a student publication simply because its viewpoint was religious. 515 U.S. at 834-837.

The *Widmar* equal access right is endangered, however, by university officials' attempts to obstruct access by religious student groups by conditioning their right of



access on their agreeing not to discriminate on the basis of religion or sexual orientation in the selection of their officers. Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994) (denial of recognition threatened against student religious group that refused to sign university pledge regarding discrimination on the basis of sexual orientation); Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653 (1996) (denial of recognition threatened against student religious group that required voting members and officers to agree to its statement of faith); Ga. Op. Att'y Gen. 97-32 (1997) (same).

When a state university threatens to withdraw recognition of a religious student group because its leadership decisions are based on its religious convictions, the university "engage[s] in very nearly the precise conduct that *Widmar* forbids: discrimination on the basis of a group's religious nature and membership." Paulsen, *supra*, at 675. It makes little sense to recognize a constitutional right of equal access by a religious group, but simultaneously to deny a religious group the right *to be religious* in its message and its leadership.

Religious student groups have refused for a variety of reasons to sign university pledges regarding discrimination on the basis of religion or sexual orientation. *First*, the affirmative right of religious student groups to determine the qualifications of the persons who conduct their meetings is a critical component of the equal access right. Religious student groups' leaders conduct the groups' meetings and determine the content of those meetings.

Often the leaders are responsible for leading the group in worship, prayer and Bible study.

*Second*, a potential officer's willingness to subscribe to the group's statement of faith indicates his or her commitment to the group's message and identity – a commitment that is vital to the group's maintaining its identity. Paulsen, *supra*, at 671. The active commitment of its leaders to its core values is essential to the implementation of those values through the group's meetings and other activities. Bainbridge, *supra*, at 383.

*Third*, in a very real sense, *leaders are the message*. The leaders are the visible representatives of the group to the campus community. They frequently address campus issues on behalf of the organization and serve as the liaison between university officials and the group.

*Fourth*, statements of faith in a group's constitution are often important expressions of the group's collective identity to the greater campus community. Paulsen, *supra*, at 670-671. Statements of faith represent deliberative, substantive expression of the group's shared values.

*Fifth*, and relatedly, a group may object to governmental coercion – or at best, governmental bribery – to disaffirm, in effect, their commitment to particular religious convictions. *Id.* at 671. For example, the CLS chapter at the University of Minnesota Law School "was convinced that it would be wrong in principle to let government officials tell them how religious they could or could not be as a collective entity." *Id.*

Finally, a group may fear "hostile takeovers" by persons who do not share the group's core values. Paulsen, *supra*, at 671 n.39, *citing Hsu v. Roslyn Union Free School District*, 876 F. Supp. 445, 455-456 (E.D.N.Y. 1995), *aff'd in part, rev'd in part*, 85 F.3d 839 (2d Cir. 1996). This is a particularly relevant apprehension for small, unpopular



groups whose election process might be easily hijacked by persons who oppose their message.

By their refusal to relinquish their right to determine their groups' leadership qualifications, student groups forfeit numerous benefits and incur numerous harms, including: 1) loss of access to campus facilities (Paulsen, *supra*, at 670); 2) stigmatization as a discriminatory organization (Bainbridge, *supra*, at 384); 3) denial of equal access to funds made available to student groups (*id.*; Paulsen, *supra*, at 670); 4) loss of reduced rental rates for university facilities (*id.*); 5) prohibition of on-campus fundraising activities (Bainbridge, *supra*, at 385); 6) loss of reduced advertising rates in the campus newspaper (Paulsen, *supra*, at 670); and 7) imposition of a chilling effect on "conducting publicly-visible activities on University grounds for fear that doing so would lead to the imposition of further sanctions," (Bainbridge, *supra*, at 385).

This is precisely the "danger to speech from the chilling of individual thought and expression" against which this Court eloquently warned in *Rosenberger*:

> The . . . danger . . . to speech from the chilling of individual thought and expression . . . is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . . For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

515 U.S. at 835-836 (citations omitted).

The emergent campus conformity requires student groups to trade their right to determine the criteria for their officers' conduct and viewpoints in exchange for their fundamental right of access. These attempts to coerce orthodoxy on university campuses are as constitutionally objectionable today as were the "loyalty oaths" in the 1950s or universities' denial of access to radical student groups in the 1970s. Indeed, when public university officials conditioned recognition upon a student group's abandonment of its advocacy of violence and disruption, this Court rejected a university's ability to do so on both free speech and association grounds in *Healy v. James*, 408 U.S. 169 (1972).

Quite possibly, the imposition of nondiscrimination provisions may be "a thinly-veiled attempt to circumvent *Widmar* because of disagreement with its equal-access-for-religion result." Paulsen, *supra*, at 675. Precisely such an evasion occurred at the high school level when a New York school district sought to evade compliance with the federal Equal Access Act, 20 U.S.C. §§ 4071 *et seq.* (1996), as well as this Court's decision in *Board of Education v. Mergens*, 496 U.S. 226 (1990), by denying a student religious group equal access because the group would not agree to delete from its constitution a requirement that its officers share the group's religious faith. *Hsu v. Roslyn Union Free School District No. 3*, 876 F. Supp. 445 (E.D.N.Y. 1995) (upholding school district's denial of access), *aff'd in part, rev'd in part*, 85 F.3d 839 (2d Cir. 1996) (requiring school district to grant access to student religious group and allow group to use religious criteria in selection of its president, vice president and music leader, but not in its selection of secretary and activities leader). *See also, Grace Bible Fellowship v. Maine Sch. Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991) (school district policy that justified denial



of access to community religious groups in part because school district served all races, ethnic groups, and all religious affiliations violated the religious group's speech rights).

Ironically, university officials violate their own anti-discrimination policies against discrimination on the basis of religion or creed when they penalize a religious group for selecting leaders who adhere to the group's core religious values. Paulsen, *supra*, at 674. University officials would immediately recognize the incongruity of a university policy requiring a student environmental group to have forest industry representatives as its leaders, or requiring Students Against Drunk Drivers to have a person who abuses alcohol as its leader. By prohibiting religious student groups from limiting their officers to persons who share their core ideology, university officials effectively penalize religious student groups for acting on the basis of their religious beliefs – a fundamental violation of the Free Exercise Clause. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The Free Speech Clause likewise prohibits such viewpoint-based discrimination against religious viewpoints. *Rosenberger*, 515 U.S. at 834-837; *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).

### B. The Dilution of Religious Liberty in *Employment Division v. Smith* Makes the Protection of the Freedom of Speaker Autonomy Critical to Safeguarding Religious Groups' Ability to Select Their Leadership Based on Their Standards of Conduct.

Protection of Boy Scouts' speech and associational right to limit leadership to persons who share the

organization's core values is vital to the protection of religious organizations' right to choose their leaders free from governmental intervention. For at least two reasons, the fact that *amici's* student chapters are religious is little guarantee that they would succeed in warding off governmental interference in their leadership selection.

First, because Boy Scouts' program has a strong religious component, many lower courts would be likely to interpret a ruling in this case against Boy Scouts as applicable to religious groups in general. *Cf., Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir. 1993) (parent alleged that Boy Scouts was a "public accommodation" for purposes of Title II of the Civil Rights Act of 1964 and, therefore, could not refuse to accept him and his son as members despite their refusal to comply with Boy Scouts' requirement that members and leaders affirm a belief in God). In some cases, Boy Scouts has been presumed to be religious. *See, e.g., Sherman v. Community Sch. Dist.*, 8 F.3d 1160 (7th Cir. 1993) (court presumed Boy Scouts to be religious for purposes of deciding Establishment Clause challenge to their access to public school facilities). In other cases, Boy Scouts has been the comparable group that triggers the right of equal access for a religious group. *See, e.g., Good News/Good Sports Club v. Ladue Sch. Dist.*, 28 F.3d 1501 (8th Cir. 1994) (Boy Scouts' transmission of moral values to youth triggered equal access for religious community group seeking to transmit religious and moral values to youth).

Second, as a result of *Employment Division v. Smith*, 494 U.S. 872 (1990), neutral government antidiscrimination laws arguably apply equally forcefully to both student religious organizations and nonreligious organizations. The *Smith* Court explicitly featured equal opportunity laws as examples of laws from which the



First Amendment religious liberty protection does not require exemption. *Id.* at 889. In *Smith*, however, the Court also indicated that a hybrid claim might be successful if it were "a challenge on freedom of association grounds reinforced by Free Exercise Clause concerns," *id.* at 882, *citing Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Under *Smith*, therefore, religious organizations need Boy Scouts' First Amendment rights to be protected if their own leadership decisionmaking is to be defended.

Free Exercise and Establishment Clause values should prohibit governmental interference with religious organizations' leadership selection. The First Amendment protects the institutional autonomy of religious entities from governmental intervention in the internal affairs of religious organizations. *See, e.g., Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-714 (1976), *cited with approval in Smith*, 494 U.S. at 877; *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). Federal statute protects the right of religious institutions to use religious criteria in their employment decisions. *Amos*, 483 U.S. 327 (upholding constitutionality of religious exemption in Title VII). Governmental intervention in the leadership selection and retention process of religious organizations is fraught with First Amendment peril. As Justice Brennan observed:

> Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious

> organizations often furthers individual religious freedoms as well.

*Id.* at 342 (Brennan, J., concurring).

Nevertheless, religious institutions have been sued for violation of nondiscrimination laws in the selection and retention of leaders. *See, e.g., EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996) (Catholic nun's Title VII sex discrimination suit against Catholic University after denial of tenure); *Combs v. Central Texas Annual Conf. of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (female clergy's Title VII sex and pregnancy discrimination claim against church); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (claim of sex discrimination by clergy against religious organization); *Walker v. First Presbyterian Church*, 22 Fair Empl. Prac. Cas. (BNA) 762, 23 Empl. Prac. Dec. (CCH) 31.006 (Cal. Super. 1980) (homosexual organist sued church for dismissal under city laws prohibiting sexual orientation discrimination).

Thus, in the post-*Smith* legal framework, the right of Boy Scouts to select its leadership according to its own criteria will directly affect the ability of religious student groups to select their leadership free from government coercion.

## II. THE FIRST AMENDMENT RIGHT OF SPEAKER AUTONOMY PROTECTS THE RIGHT OF AN ORGANIZATION WHOSE PURPOSE IS THE TRANSMISSION OF VALUES TO LIMIT ITS LEADERSHIP TO PERSONS WHO SHARE THE ORGANIZATION'S CORE VALUES, AS DEFINED BY THE ORGANIZATION.

The decision below cannot be reconciled with this Court's unanimous decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In *Hurley*, this Court upheld the federal free



speech right of a private organization, which had been deemed a public accommodation under a state anti-discrimination law, to include in its parade only persons who would not impart a message the organization did not wish to convey. *Id.* at 559, 573.

In a factual and legal context parallel to this case, this Court stated:

> [T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.

*Id.* at 573. Upholding the basic right of speaker autonomy, this Court concluded:

> [I]t becomes apparent that the state courts' application of the [Massachusetts public accommodation] statute had the effect of declaring the sponsors' speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in [the organization's] speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. *But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.*

*Id.* (emphasis added).

In *Hurley*, this Court considered and rejected arguments essentially identical to those marshalled by the court below to excuse its coercive interference with Boy

Scouts' selection of its leadership. None of the justifications offered by the court below satisfied this Court in *Hurley*.

### A. An Organization Dedicated to the Transmission of Values Need Not Demonstrate that It Expresses an Explicit Message in order to Exclude from Leadership a Person Who Does Not Share Its Core Values.

A fundamental error of the court below was its insistence that Boy Scouts must show that it has an explicit "anti-homosexual" message in order for it to exclude from leadership a person who engages in or advocates homosexual conduct. Pet. App. at 64a, 66a. To the contrary, forcing an organization to express a particular message in order to avoid the state's coercive interference in its leadership selection violates the First Amendment's "fundamental rule that a speaker has the autonomy to choose the content of [its] own message." *Hurley*, 515 U.S. at 573. Forcing Boy Scouts to adopt an explicit "anti-homosexual" message in order to preserve its right to refuse leaders who are "pro-homosexual" in their conduct or advocacy would force Boy Scouts to include a message that it may not want explicitly to include for a variety of reasons.

Due to the broad age span of boys belonging to its organization,[3] Boy Scouts seems to take four complementary approaches to addressing the issue of

[3] Boy Scouts' youth range from first graders, who may be as young as five years-old, through seniors in high school. Particularly at the Cub Scout level (first through fifth grades), family attendance at pack meetings and activities is encouraged. Consequently, preschool siblings are frequently exposed to the expressive content of Cub Scout meetings.



whether homosexual conduct is appropriate behavior for young men. *First*, Boy Scouts may not wish to broadcast a blanket, *explicit* "anti-homosexual conduct" message to all its members, particularly to its youngest boys. Even in this day of pervasive media, many youngsters remain oblivious to the issue of homosexuality; and many of their parents wish them to remain oblivious as long as possible. Parents who believe homosexual conduct is wrong may object nonetheless to their five year-old boys being given explicit instruction regarding homosexual conduct. Those parents might withdraw their young sons from an organization that openly discussed homosexuality, even if they agreed with the organization's "anti-homosexual conduct" message. Boy Scouts should not be required to choose between retaining its young boys as members and exercising its right to select its leadership. *See Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 15 n.11 (1986) (plurality opinion) (government cannot force a speaker to respond by requiring the speaker to include speech it does not wish to address).

*Second*, Boy Scouts may wish to present a program of positive values rather than negative commands. Human experience, particularly with teenagers, demonstrates that telling a teenager *not* to do something is often a spur to experimentation with precisely that conduct.

*Third*, Boy Scouts does express a direct positive message on sexuality to its older Scouts that presents heterosexual marriage and responsible childrearing as the appropriate expression of sexuality by adult men. In *The Boy Scout Handbook*, Boy Scouts gives an explicit message to older Scouts on sexuality: sexual activity is to occur between a man and a woman in the context of marriage when both are ready to take responsibility for each other and for any children they consequently might have. Boy

Scouts of America, *The Boy Scout Handbook* 527-528 (Tenth Edition, 1990). *See* Part II.B, *infra*, at pp. 21-22.

*Fourth*, Boy Scouts views the leaders themselves as role models, an embodiment of the values the organization wishes to convey to its young members. Most organizations whose purpose is to transmit values, particularly to youth, choose their leaders carefully, knowing that the leaders communicate the organization's message by their actions as well as their words. Certainly, if a leader were interviewed in a local newspaper regarding his current leadership of his college chapter of the National Organization for the Legalization of Marijuana ("NORML"), Boy Scouts could dismiss him from its leadership – even if he promised never to advocate marijuana use to the boys under his supervision, denied using marijuana himself, or promised not to engage in its use around the boys. The mere inconsistency between his personal advocacy of marijuana use and the organization's values undoubtedly would allow Boy Scouts to dismiss him without having to justify its decision to government officials.

Under this Court's precedent, Boy Scouts has a right both to express, and to refrain from expressing, any values it wishes. The organization's "right to tailor the speech, applies not only to expressions of *value, opinion, or endorsement*, but equally to statements of fact the speaker would rather avoid." 515 U.S. at 573 (emphasis added). Boy Scouts has a constitutional right "to decline to foster" ideological concepts, particularly those "they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 714-715 (1977). *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781 (1988); *Pacific Gas*, 475 U.S. 1; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241 (1974); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).



As this Court emphasized in *Hurley*, "a narrow, succinctly articulable message is not a condition of constitutional protection." 515 U.S. at 569. Instead, "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.' " 515 U.S. at 573, *quoting Pacific Gas*, 475 U.S. at 16.

Were this not the law, any individual effectively might hijack any organization for his or her personal expressive purposes. The First Amendment prohibits government officials from coercing values-transmission organizations to acquiesce in takeovers by leaders who do not share the organization's core values.

### B. An Organization Dedicated to the Transmission of Values – Not the Government – Has the Right to Define the Organization's Own Values and Message through Its Selection of Leaders.

Although, as discussed in the preceding section, Boy Scouts need not have an expressive message in order to exercise the right to require its leaders to share its core values, Boy Scouts in reality has explicit values that it wishes transmitted – values with which respondent's leadership would conflict. As already discussed, *supra*, at p. 19, for adolescent and teenage scouts, Boy Scouts expresses an explicit message regarding appropriate sexual conduct for men: sexual activity is to occur between a man and a woman in the context of marriage when both are ready to take responsibility for each other and for any children they consequently might have. *Handbook*, *supra*, at 527-528.

In addition to the *Handbook*, the Scout Oath and Scout Law are interpreted by Boy Scouts to preclude homosexual conduct or the advocacy of homosexual conduct. In leading the Scout Oath at meetings, the leader recites with the scouts a pledge "to keep myself morally straight." *Id.* at 5. Boy Scouts interprets its Oath to mean, among other things, abstinence from homosexual conduct. The leader also leads scouts in reciting the Scout Law at meetings. Boy Scouts has interpreted its Scout Law to preclude a scout from engaging in homosexual conduct or advocating such conduct.

Boy Scout leaders are responsible for teaching and explaining to new scouts the Scout Oath and Scout Law. One of the requirements for joining Boy Scouts is to "[u]nderstand and agree to live by the Scout Oath [and] the Scout Law." *Id.* at 4. The Scoutmaster is required to explain the joining requirements to a new scout and must sign the *Handbook* to confirm, among other things, that a new scout "[u]nderstand[s] and agree[s] to live by the Scout Oath [and] the Scout Law." *Id.* Besides ensuring that a new scout memorizes and understands the Scout Oath and Law, an adult leader's responsibilities include answering questions a scout has about their meaning.

The court below impermissibly substituted its understanding of the Scout Oath, Law, and *Handbook* for that of the Boy Scouts organization itself. The First Amendment protects the right of an organization to define its purposes without interference by the state.[4]

[4] Nor may a court interfere with an organization's internal decisionmaking simply because the organization may send individual messages that are not always uniform. In *Hurley* and *Tornillo*, respectively, the parade and the editorial page addressed myriad subjects from a variety of viewpoints, even allowing diverse messengers to espouse contradictory opinions. Nonetheless, this Court stated that "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." *Hurley*, 515 U.S. at 570.



In *Hurley*, this Court specifically discussed *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *New York State Club Association v. City of New York*, 487 U.S. 1 (1988), as cases that "recognized that the State did not prohibit exclusion of those whose views were at odds with positions espoused by general club memberships." 515 U.S. at 580, *citing Roberts*, 468 U.S. at 627, and *New York State Club Assn.*, 487 U.S. at 13. In *Roberts*, this Court deemed it "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." 468 U.S. at 622. Recognizing that "[g]overnment actions may unconstitutionally infringe upon this freedom [by] try[ing] to interfere with the internal organization or affairs of the group" (*id.* at 622-623), this Court continued:

> *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.* Such a regulation may impair the ability of the original members to express only those views that brought them together. *Freedom of association therefore plainly presupposes a freedom not to associate.*

*Id.* at 623 (emphasis added). And concurring in *Roberts*, Justice O'Connor stated:

> [A]n association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message *and the choice of its members*. . . . Protection of the association's right to define its membership derives from the recognition that *the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.*

*Id.* at 633 (O'Connor, J., concurring) (emphasis added).

The Court emphasized the commercial and business nature of the affected associations and took pains to distinguish them from genuinely political, religious, or other values-based groups, whose expressive purposes would be impaired by any governmental interference with their membership or leadership decisions. *Roberts*, 468 U.S. at 623; *id.* at 633 (O'Connor, J., concurring); *New York State Club Association*, 487 U.S. at 13. Indeed, Boy Scouts served as an example of a group whose expression would be protected, even though it might "take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service." *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring) ("Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.").

In a leading freedom of association case, *Democratic Party v. Wisconsin*, 450 U.S. 107 (1981), this Court acknowledged that:

> [T]he freedom to associate for the common advancement of political beliefs . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only. . . .



> On several occasions this Court has recognized that the inclusion of persons . . . may seriously distort [the party's] collective decisions – thus impairing the party's essential functions – and that political parties may accordingly protect themselves from intrusion by those with adverse political principles.

*Id.* at 122. *Cf., Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-714 (1976) (recognizing church autonomy to exclude leaders free from governmental intervention).

As in *Democratic Party*, Boy Scouts has chosen to "define their associational rights by limiting those who could participate" in the group's leadership. 450 U.S. at 122. As in *Democratic Party*, compelled inclusion of a leader who does not share a core value that the group holds "may seriously distort its collective decisions – thus impairing the [group's] essential functions." *Id.*

Like the impact in *Democratic Party* and *Hurley*, and *unlike* the impact on the organizations in *Roberts* and *New York State Club Association*, the impact on Boy Scouts if it is required to accept as a leader a person who actively and publicly advocates homosexual conduct will be significant. Boy Scouts has steadfastly insisted that the values it seeks to transmit to youth do not include homosexual conduct or its advocacy. Leaders are the primary means by which Boy Scouts transmits its values to its youth members, and those leaders transmit Boy Scouts' values as much by the lives they lead as by their words.

Thus, where, as here, an association seeks to maintain a distinctive identity based on core values it seeks to transmit, the First Amendment requires that the group be free to make adherence to the purposes and values of the group a condition of leadership.

### C. An Organization Dedicated to the Transmission of Values Does Not Forfeit Its Right to Select Its Leadership Simply Because It Is Successful in Attracting Members or Has Some Interaction with Government.

Like the state court in *Hurley*, the court below determined that a private group's activities constituted a public accommodation, a determination that the state court then used to justify substitution of the government's values for the organization's core values. 515 U.S. at 571-573. This Court in *Hurley*, however, ruled that designation as a public accommodation did not trump the organization's First Amendment right of speaker autonomy.

This Court ruled that the enormous size of the parade, the lack of selectivity in admitting participants to the parade, and the interaction of government with the parade organizers did not undermine the Veterans Council's First Amendment right of speaker autonomy. Specifically, the fact that the Veterans Council parade was large, including over 10,000 participants and 750,000 spectators, failed to diminish its expressive rights. *Id.* at 561. Nor did the lack of selectivity in the Council's admission of participants justify the government's override of its expressive rights. *Id.* at 563. Indeed, Boy Scouts provides far greater oversight of its leadership selection process than the Veterans Council provided in selecting its parade participants. *Id.* at 562 (noting that the Veterans Council "had no written criteria and employed no particular procedures for admission, voted on new applications in batches, [and] had occasionally admitted groups who simply showed up at the parade without having submitted an application").



In *Hurley*, the Veterans Council received substantial assistance from the City of Boston to stage its parade, which did not curtail its expressive rights. *Id.* at 560-561. The fact that the parade occurred on public property did not reduce the organization's First Amendment rights. The mere fact that a group meets on public property or receives public funding does not transform the group's speech into government speech. *See generally, Widmar v. Vincent*, 454 U.S. 263 (1981); *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995). Thus, the factors relied upon by the court below for bypassing the Boy Scouts' First Amendment rights were weighed and found wanting by this Court in *Hurley*.

### D. The Decision Below Imposes Unacceptably Costly Burdens on All Organizations Dedicated to the Transmission of Values, Chilling The Exercise of Their First Amendment Rights.

If the decision below were affirmed, state and federal courts would be mired in determining whether leadership decisions by every private organization violated myriad federal, state, and local antidiscrimination provisions. At the behest of any disgruntled office seeker, courts would be required to review the internal elections of organizations to ensure that the elections had been conducted in a nondiscriminatory manner. Even more troubling, courts would become enmeshed in determining which leadership positions were central to the core mission of an organization, and thereby exempt from nondiscrimination laws. For example, one federal court ruled that a religious student group could use religious criteria in selection of its president, vice president and music leader, because those positions were central to the group's religious identity; however, the group could not

use religious criteria to select its secretary or activities leader, because those offices were not central – at least in the court's eyes – to the group's religious identity. *See Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996).

Potential litigation will have a chilling effect on private associations as they make leadership decisions with the knowledge that each decision may be challenged in court. Small organizations may be easily bankrupted by the costly legal defense against a single meritless claim. As Justice Brennan explained in a comparable situation, "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (Brennan, J., concurring).

Indeed, the potential for guerilla warfare among ideological organizations is enormous under the decision below. Persons who do not share an organization's core values may apply for leadership positions with nothing to lose. If they are accepted into leadership, they can use their positions to change the organization's ideology; if they are rejected, they can subject the organization to burdensome litigation expenses and intrusive discovery into the organization's internal decisionmaking.

### E. Government Officials' Efforts to Recast the Values of an Organization to Fit the Prevailing Governmental Orthodoxy Are Antithetical to the First Amendment.

As in *Hurley*, the court below substituted its judicial vision of "diversity" and "inclusiveness" for the Boy Scouts' own interpretation of its core values, its Scout Oath, its Scout Law, and its *Handbook*. But this Court has



eloquently rejected as "decidedly fatal" such restructuring of an organization's purposes and values by the government, explaining:

> It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective. . . . *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. The Speech Clause has no more certain antithesis.*

515 U.S. at 579 (citations omitted) (emphasis added). *See Roberts*, 468 U.S. at 622-623; *id.* at 634 (O'Connor, J., concurring) ("A ban on specific group voices on public affairs violates the most basic guarantee of the First Amendment – that citizens, not the government, control the content of public discussion."); *Rosenberger*, 515 U.S. at 834-837.

Ironically, the court below undermines the very values of "diversity" and "inclusiveness" it professes to uphold when it uses the state's power to "re-educate" an organization that wishes to transmit a particular set of values. Five decades ago, this Court rejected the state's

attempts to coerce citizens to embrace the state's hierarchy of values – values much less controversial than those imposed by the court below – and declared:

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

*Barnette*, 319 U.S. at 641-642.

## CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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