GRANTED

No. 99-669

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 GAYS AND LESBIANS FOR INDIVIDUAL LIBERTY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Gays and Lesbians for Individual Liberty (GLIL) is a non-partisan organization founded in 1991 to advance the principles of the free market, individual responsibility, and non-interference by government in the private lives of all citizens. GLIL seeks to educate members of the gay and lesbian community about these principles, while at the same time promoting tolerance and acceptance of homosexuals among members of the wider society. GLIL is based in Washington, D.C., with members across the United States and in several foreign countries. To achieve its goals, GLIL sponsors lectures, debates, panel discussions, fundraisers for charitable organizations, and social events. GLIL also publishes a newsletter and utilizes a website to express its views, while its members contribute articles to various publications.

SUMMARY OF ARGUMENT

The New Jersey Supreme Court's decision restricting the ability of the Boy Scouts of America (BSA) to choose its own leaders and define its own membership criteria dangerously erodes the freedom of all Americans, including gay Americans, and should be reversed.

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[1] In conformity with Supreme Court Rule 37, Gays and Lesbians for Individual Liberty has obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the Clerk. GLIL also states that counsel for a party did not author this brief in whole or in part and that no persons or entities other than *amicus*, its members, and its counsel made a monetary contribution to the preparation and submission of the brief.

Freedom of association is one of the core liberties safeguarded by the Bill of Rights. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). In particular, this Court has consistently recognized that the First Amendment protects the freedom of expressive association, which it has described as the "freedom to engage in association for the advancement of beliefs and ideas." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

While a robust protection for the freedom of association is important to all Americans, it holds a special significance for gay and lesbian Americans. Throughout this nation's history, gays have suffered in a variety of contexts when freedom of association has not been respected and governments have been allowed to trample on the rights of citizens to freely gather together.

An organization's decision whether or not to associate with openly gay individuals conveys a powerful message – either one of openness and tolerance, or one of exclusion and disapproval. Either way, a message is sent. It is therefore troublesome, from a First Amendment perspective, when a well-intentioned law prohibiting discrimination is applied in a way to stifle such communication.

The BSA's ability to communicate its disapproval of homosexuality, for instance, is undoubtedly undermined when the State of New Jersey requires the organization to allow openly gay individuals to become Scoutmasters, individuals who are supposed to serve as role models to young Scouts.

The New Jersey Supreme Court's decision here is especially pernicious for it places the government in the

intolerable position of second-guessing a private organization's interpretation of its own rules and articulation of its own message. If this litigation has made one thing clear, it is that the leadership of the BSA disapproves of homosexuality and wishes to communicate this in some form to its membership and to the outside world.

An organization's freedom of expressive association cannot depend upon the degree to which it may choose to emphasize certain aspects of its message at certain times. Such a rule, in fact, works perversely to the detriment of gay Americans. Under the test adopted by the New Jersey Supreme Court, which accords protection only to forcefully stated messages, groups such as the Boy Scouts will be encouraged to stress their anti-gay views so that they may retain their freedom of expressive association.

GLIL strongly disapproves of the BSA's moral views with respect to homosexuality and wishes the organization would voluntarily end its policy of excluding gays from serving as Scoutmasters. Nevertheless, the First Amendment protects the freedom of the BSA to maintain this misguided policy if it so desires. To deny the BSA's right to express its moral views through its decisions to associate with or exclude certain people endangers the rights of all Americans, including gay Americans.

ARGUMENT

I. FREEDOM OF ASSOCIATION IS OF PARAMOUNT IMPORTANCE TO ALL AMERICANS, INCLUDING GAY AND LESBIAN AMERICANS.

This Court has long recognized that freedom of association is a vital aspect of the liberty secured by the Bill of Rights and Fourteenth Amendment. See, e.g., *NAACP v.*

Alabama ex rel. Patterson, supra. In protecting this important freedom, this Court's jurisprudence has divided associational liberty into two separate spheres.

First, it has identified what is commonly referred to as the freedom of intimate association, which "protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships." *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 544 (1987). And second, it has protected what is commonly known as the freedom of expressive association, which gives Americans the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." See *Roberts*, 468 U.S. at 622 (1984).

This Court has explained that freedom of expressive association is "indispensable" to preserving the whole host of liberties protected by the First Amendment. See *id.* at 618. "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were also not guaranteed." *Id.* at 622. And, this Court has noted that in determining the level of protection to be given to expressive association, "it is immaterial whether the beliefs sought to be advanced pertain to political, economic, religious or cultural matters." *NAACP*, 357 U.S. at 460.

While freedom of association is important to all Americans, it holds a special significance for gays and lesbians. The right to freely associate is one that has been violated repeatedly throughout American history and is still threatened with regularity even today. In particular, government has consistently targeted gays' freedom of

association, with persecution of gay organizations, nightclubs, and student groups especially prevalent. This situation has gradually improved, however, as more robust protection for everyone's right to freely associate has allowed gay organizations and institutions to grow and operate openly.

Political Organizations

Government attempts to disrupt gay organizations began as soon as those organizations started operating in the public eye. The Society for Human Rights, the first American gay organization, was formed in Chicago in 1924 with the purposes of uniting gays, creating a publication, discouraging sex with minors, and educating legislators and the public about homosexuality.[2] The founder of the Society and several of its members, however, were soon prosecuted for disorderly conduct by hostile government officials. One pleaded guilty; the founder succeeded in court but lost his job.[3] This event put an end to the Society in 1925.[4]

The federal government for many years engaged in a policy of surveillance of gay organizations. According to an investigation in 1950, the Army and Navy both kept files on thousands of alleged homosexuals.[5] The FBI also kept track of and harassed gay organizations, as well as gay individuals. It initiated a security investigation into

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[2] See Jonathan Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 385-89 (1976 ed.) [hereinafter *Gay American History*].

[3] See William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 44-45 (1999) [hereinafter *Gaylaw*].

[4] See *Gay American History* at 393.

[5] See *Gaylaw* at 74.

the Mattachine Society[6] in 1953 and began maintaining a file on the Daughters of Bilitis[7] in 1959.[8] In 1956, FBI agents visited the office of *One*, a gay journal, and threatened employees regarding statements made in the journal about the presence of homosexuals in the FBI. Agents also notified the employers of the journal's staff of their participation in a homosexual publication.[9]

At the same time as this harassment was taking place, the U.S. Supreme Court gave teeth to the freedom of association embodied in the First Amendment. First, in *Yates v. United States*, 354 U.S. 298 (1957), it indicated that Communists had the right to participate in organizations and engage in anti-American advocacy. One year later, the Court held that the State of Alabama could not require the disclosure of the NAACP's members. See *NAACP v. Alabama ex rel. Patterson, supra*.[10] Not coincidentally, gay organizations began to operate more openly in the late 1950s.[11]

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[6] The Mattachine Society was formed in 1950 as a "service and welfare organization devoted to the protection and improvement of Society's Androgynous Minority." *Gay American History* at 409. Its purposes included integrating homosexuals into society and seeking legal reform. *Id.* at 409-10.

[7] The Daughters of Bilitis was the first American lesbian organization. Its purpose was to promote the integration of lesbians into society through education and legislative reform. *Id.* at 336, 426.

[8] *Gaylaw* at 74-75.

[9] *Id.* at 75-76.

[10] See also *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark. 1968), *aff'd per curiam*, 393 U.S. 14 (1968) (no forced disclosure of Republican Party membership).

[11] See *Gaylaw* at 93.

Unfortunately, attempts at suppression of gay organizations did continue throughout the 1960s and 1970s. This Court's freedom of association decisions, however, provided the crucial framework for overturning most government efforts to interfere with gay associations. In addition to the decisions of the 1950s, this Court in 1963 provided further support for the freedom of association in *NAACP v. Button*, 371 U.S. 415 (1963). It held that the NAACP's activities were "modes of expression and association protected by the First and Fourteenth Amendments," *id.* at 428-29, and could not be prohibited by Virginia's ban on solicitation of legal clients.

The importance of the two *NAACP* decisions to gay people became apparent almost immediately. In the wake of the 1963 *NAACP v. Button* decision, Congress later that same year tried to revoke the District of Columbia charitable solicitation license of the Mattachine Society on the grounds that government should not sanction the association of gay people. The bill passed the House but failed in the Senate.[12]

States also attempted to deny incorporation to gay groups. New York courts overturned state refusals to recognize gay organizations,[13] although Ohio courts

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[12] *Gaylaw* at 114.

[13] See *In re Gay Activists Alliance v. Lomenzo*, 293 N.E.2d 255 (N.Y. 1973) (per curiam); *In re Thom*, 301 N.E.2d 542 (N.Y. 1973). See also *Aztec Motel v. State*, 251 So. 2d 849, 854 (Fla. 1971) (finding unconstitutionally vague statute that permitted the dissolution of a corporation where officers engaged in, *inter alia*, "organized homosexuality"); *Gaylaw* at 114-15 and accompanying notes.

upheld the denial of incorporation to the Greater Cincinnati Gay Society.[14] And through the late 1970s, the IRS denied tax-exempt certification to organizations that "promoted" homosexuality until a federal court held that its policy violated the First Amendment.[15]

This Court's decisions strengthening the freedom of association have also protected members of gay organizations from disclosure. In *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202 (N.D. Cal. 1983), the Coors Company sued various parties for allegedly interfering with a contract between Coors and a radio station by criticizing the company's political positions. Coors sought discovery of the identity of a gay organization's members, but the court rejected the request, relying on this Court's earlier rulings upholding freedom of association. *Wallace*, 570 F. Supp. at 207-08.

Gay people are making significant progress toward full acceptance and equality, yet they should not sacrifice freedom of association as an expedient to that goal. Loss of constitutional rights subjects all Americans, including gay people, to pure majoritarian rule. And while some states, such as New Jersey, discourage discrimination against gays, others, like Colorado, may actually encourage it.[16] This Court in *Romer v. Evans*, 517 U.S. 620 (1996), found that Colorado had impermissibly attempted, *inter alia*, to prevent gay people from seeking redress from

[14] See *State ex rel. Grant v. Brown*, 313 N.E.2d 847 (Ohio 1974) (per curiam), *cert. denied*, 420 U.S. 916 (1975).

[15] See *Big Mama Rag v. United States*, 631 F.2d 1030 (D.C. Cir. 1980); Rev. Ruling 78-305, 1978-2 C.B. 172; *Gaylaw* at 115.

[16] See "Legislating Equality," Report of National Gay Lesbian Task Force (1999) at *http://www.ngltf.org/pubs/legeq99.pdf*.

their government in the same way as other citizens. In 1992, Colorado adopted a constitutional amendment precluding all legislative, executive, or judicial action at any level of state or local government designed to protect gays, lesbians, or bisexuals. This Court found the amendment violated the Fourteenth Amendment by placing such persons on an unequal footing with all other citizens. *Id.* at 634. In its decision, the Court also alluded to the detrimental effects of the amendment on freedom of association. Because the amendment prevented gay people from pursuing reforms through local ordinances or even state statutes, gay organizations would have been restricted from all political efforts other than seeking constitutional amendments. *Id.* at 631. Gay associations at public universities and associations of gay public employees also would have been immediately affected, as the amendment reversed bars on discrimination at universities and in public employment. *Id.* at 629. Therefore, although *Romer* is not technically a First Amendment case, it nevertheless lends support to the right of gay people to form associations for political ends.

Social Organizations and Nightclubs

Police departments and other government bodies, as well as private individuals, have historically sought to prevent gays from assembling, meeting one another, and forming intimate and expressive associations. Even the presence of a gay establishment in a neighborhood can have an expressive component, indicating that the establishment, and perhaps the neighborhood, is one where gay people are welcome and treated with respect. A gay bar or other meeting place also expresses the belief of the owner and patrons that gay people should have a place to congregate. These are important, positive messages. But

they are also sufficiently controversial to engender vigorous dissent and attempts to interfere with gay association at these establishments.

Police interference with gay social events and nightclubs has a sordid and often violent history in the United States. As early as 1899, the City of New York launched a campaign to close bars at which gay people congregated.[17] In the 1930s, police harassed and raided "drag balls" (competitive singing performances of men in drag) in New York, Los Angeles, Atlantic City, and San Francisco.[18]

Many cities also raided, closed down, and revoked liquor licenses for gay bars and nightclubs on the grounds that a gathering place for homosexuals constituted a disorderly house or public nuisance.[19] Police raids often resulted in arrests for disorderly conduct and vagrancy.[20] In the 1950s, police raids of gay establishments and arrests of gay people increased dramatically.[21] Indeed, it was one such interference with gay people's right to associate (at the Stonewall bar in New York City

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[17] See *Gay American History* at 44-47.

[18] See *Gaylaw* at 45.

[19] See *id.* at 45-46, 78-80; J.F. Ghent, "Sale of Liquor to Homosexuals or Permitting Their Congregation at Licensed Premises as Ground for Suspension or Revocation of Liquor License," 27 A.L.R.3d 1254 (2000). See, e.g., *Killeen v. United States*, 224 A.2d 302 (D.C. App. 1966); *Kotterman v. Grevemberg*, 96 So. 2d 601 (La. 1957); *Paddock Bar, Inc. v. Div. of Alco. Bev. Control*, 134 A.2d 779 (N.J. App. 1957); *Lynch's Builders Restaurant v. O'Connell*, 103 N.E.2d 531 (N.Y. 1952); *In re Freedman*, 235 A.2d 624 (Pa. Super. 1967).

[20] *Gaylaw* at 44, 64 & accompanying notes; see, e.g., *Gay American History* at 45-46.

[21] See *Gaylaw* at 62-65.

in 1969) that led to large demonstrations and the political formation of the gay rights movement.[22]

Eventually, state courts began applying this Court's freedom of association jurisprudence, thus allowing gay bars to operate freely.[23] Moreover, this Court admonished against overly vague criminal statutes, like the vagrancy laws sometimes used to arrest gay people congregating in bars. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Strict enforcement of the right to freedom of association has therefore enabled gay bars and social organizations to multiply.

Even today, however, the desire to suppress gay institutions has not disappeared. Many private citizens attack gay establishments or people attending them precisely because they disagree with the message of acceptance and celebration of homosexuality that a gay establishment suggests.[24] As majority opinion often disfavors gay establishments, it is vital to preserve freedom of association so that local governments will not attempt to use their power to discourage gays from congregating. Hostile private parties may enlist government bodies using condemnation, zoning, or other legal devices to block gay

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[22] See *Gay American History* at 347.

[23] See *Gaylaw* at 112-113. See, e.g., *Vallerga v. Dept. of Alco. Bev. Control*, 347 P.2d 909 (Cal. 1959); *One Eleven Wines & Liquors, Inc. v. Div. of Alco. Bev. Control*, 235 A.2d 12 (N.J. 1967); *Kerma Restaurant Corp. v. State Liquor Authority*, 233 N.E.2d 833 (N.Y. 1967).

[24] See, e.g., "Local Police Chief Accused of Supplying Confidential Information About [Gay] Activist," *Associated Press State & Local Wire* (March 31, 1999) (gay bar subjected to repeated attacks); Ron Martz & Kathy Scruggs, "Credit for 2 Bombings Claimed," *Atlanta Journal and Constitution* (Feb. 25, 1997) at 1A (bomber claimed to target "sodomite" organizations).

establishments.[25] For instance, when Camp Sister Spirit, a lesbian retreat, opened in rural Mississippi, local residents brought an unsuccessful statutory nuisance lawsuit in an attempt to close the institution.[26] A strong right to associate protects against such incursions.

Student Groups

This Court's freedom of association jurisprudence also has been of enormous benefit to gay associations at universities and schools. University students began to form gay student groups in the 1960s. Initially, public universities denied these groups recognition and student activities' funding. Gay student organizations received a major boost, however, when this Court recognized in *Healy v. James*, 408 U.S. 169 (1972), that university students have the First Amendment right to form associations. Shortly thereafter, federal circuit courts upheld students' rights to form recognized gay associations at public universities.[27]

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[25] See, e.g., "Foes Want Last Call at Bar in Marigny," *Times-Picayune* (Nov. 5, 1999) at B1 (nuisance); David Cazares, "Gay Club at Center of Debate," *Sun-Sentinel (Ft. Lauderdale)* (Mar. 11, 1999) at 1B (zoning); Natasha Kassulke, "Filling the Void," *Wisconsin State Journal* (Feb. 19, 1998) at 3 (parking regulations); Bud Kennedy, "School Proposal Calls for Razing 21-year-old Gay Bar," *Fort Worth Star-Telegram* (Sept. 7, 1999) at B1 (condemnation).

[26] "Mississippi Feminist Camp Can Stay Open, Judge Says," *Orlando Sentinel* (July 7, 1995) at A10.

[27] See *Gay Students Organization v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Gay Student Servs. v. Texas A. & M. Univ.*, 737 F.2d 1317 (5th Cir. 1984); *Gay Lib v. Univ. of Missouri*, 558 F.2d 848 (8th Cir. 1977); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976). See also *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361

Just as *Healy v. James* improved the rights of gays to form student associations, this Court's recent decision in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), also strengthens the rights of free speech and expressive association for everyone, including gay Americans. In *Rosenberger*, this Court held that the University of Virginia's refusal to give a controversial student newspaper, expressing anti-gay and religious views, funds from the school's student activities fee constituted impermissible viewpoint discrimination.

In the first federal appellate case considering the effect of *Rosenberger* on a gay association, the Eleventh Circuit concluded that the University of South Alabama, a public university, could not deny a gay student group funding or a student association bank account. See *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997). Thus, a case upholding the entitlement to university funding of a student newspaper expressing anti-gay views ultimately is helping to vindicate the free speech and association rights of gay Americans.

Public high school student organizations appear to be the next frontier for the freedom of association. Many high school students have begun to form "gay-straight alliances," groups with both gay and non-gay members that provide a forum for open discussion and work to diminish anti-gay violence and harassment in schools. Although many public schools have permitted these groups to form, others have tried various tactics to interfere with their associational freedom. One California

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(8th Cir. 1988); *Student Coalition for Gay Rights v. Austin Peay State Univ.*, 477 F. Supp. 1267 (M.D. Tenn. 1979); *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972); *Gay Activists Alliance v. Bd. of Regents of the Univ. of Oklahoma*, 638 P.2d 1116 (Okla. 1981).

school district tried to ban a gay-straight club, but a federal district court issued a preliminary injunction allowing the club to meet during the pendency of the lawsuit.[28] In Utah, after a similar court ruling, a school board, supported by the legislature, actually went to the extreme lengths of prohibiting all extracurricular clubs.[29] Most schools, however, will not go so far, and clear application of *Healy* and *Rosenberger* can be seen in the comparatively large numbers of high schools that now allow these organizations.[30]

Banning public school gay-straight student clubs also runs afoul of the Equal Access Act of 1984. Ironically, the Act was passed primarily at the behest of religious conservatives to allow religious clubs at public schools.[31] Associational freedom, though, applies to all, and gay public high school student groups have benefited just as much as religious groups.

In sum, gays as much as any disfavored group have suffered whenever the state has abridged freedom of association. To protect their own freedom of association, gays must stand firm for the freedom of association of others, even groups that exercise that freedom by excluding gays.

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[28] See Barbara Whitaker, "To Outlaw Gay Group, District May Ban Clubs," *New York Times* (Feb. 10, 2000) at A24.

[29] See Jennifer Toomer-Cook, "S.L. District Wins Club Suit," *Deseret News* (Nov. 6, 1999) at A1; Utah Admin. Code § 277-617-4 (passed Feb. 19, 1997).

[30] The Gay, Lesbian and Straight Education Network estimates there are currently over 700 gay-straight alliances at high schools. See Harriet Barovick, "Fear of a Gay School," *Time* (Feb. 21, 2000) at 52.

[31] *Id.*

II. AS APPLIED TO THE BOY SCOUTS, NEW JERSEY'S LAW AGAINST DISCRIMINATION VIOLATES THE FIRST AMENDMENT.

The New Jersey Supreme Court's decision requiring the Boy Scouts to accept openly gay Scoutmasters imperils all Americans' freedom of expressive association. As the California Supreme Court has stated, "the Boy Scouts is an expressive social organization whose *primary function* is the inculcation of values in its youth members." *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 238 (Cal. 1998) (emphasis added). Among the values it seeks to transmit is the view that "homosexuality is immoral and incompatible with the Boy Scout Oath and Law." *Curran*, 952 P.2d at 225. In particular, the BSA maintains that homosexual conduct violates the admonitions contained in the Scout Oath and Law that Scouts should be "morally straight" and "clean."

Amicus GLIL strongly disagrees with the message the BSA seeks to convey about homosexuality as well as the organization's policy of excluding gays from serving in leadership positions. GLIL recognizes, however, that the First Amendment protects not just "free thought for those who agree with us but freedom for the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

Permitting New Jersey's Law Against Discrimination to require the BSA to accept openly gay Scoutmasters would represent a dangerous erosion of the First Amendment because it would diminish the organization's ability to effectively communicate its chosen message. The Scoutmaster Handbook states that "[b]oys learn from the example set by their adult leaders." Therefore, "[t]he Scouting program is organized around the principle that

the most effective way to teach the values of Scouting is through the leadership, counseling and example of the Scoutmaster." *Curran*, 952 P.2d at 226. Given this philosophy, it is important to ask the crucial question: what message would be sent to Scouts by the presence of openly gay Scoutmasters?

Amicus GLIL believes that the presence of openly gay Scoutmasters would send a positive message both to the boys in the organization and society as a whole. Much media attention has focused recently on the explosion of openly gay characters in movies and television programs, and those characters' role in fostering tolerance and acceptance of homosexuality.[32] The NBC sitcom *Will and Grace*, for example, features the first male homosexual lead character in any network prime time series: an openly gay attorney. While not overtly political, one commentator has noted, "There's a message to *Will and Grace* that homosexuality is just different, not better or worse,"[33] a sentiment with which GLIL concurs.[34]

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[32] See, e.g., Neal Justin, "Gays of Our Lives," *Star Tribune (Minnepolis)* (Nov. 7, 1999) at 1F; Manuel Mendoza, "More Gay Characters, Less Furor," *Dallas Morning News* (Apr. 28, 1999) at 1C.

[33] Julia Duin, "*Will & Grace* Makes Splash, But Few Waves," *Washington Times* (Oct. 16, 1998) at A2 (quoting Thomas Johnson, senior writer for the Parents TV Council).

[34] Scott Seomin, entertainment media director for the Gay & Lesbian Alliance Against Defamation, also explains, "When a gay child is struggling with his sexual identity and he sees a character like Will Truman, who is fully realized, has a good job and a nice apartment and friends who care about him, it has a real effect on how a gay kid views himself and his world." See Mendoza, *supra* note 32.

Fictional characters undoubtedly are an important means of changing societal attitudes about homosexuality. But even more effective are real life examples of openly gay individuals serving in positions at the core of our nation's civic life. When openly gay Americans occupy stations of public respect and prominence, a number of positive developments take place.

To begin with, the accomplishments and examples of openly gay individuals combat unfavorable stereotypes held by many heterosexual Americans. For instance, Matt Foreman, executive director of the Empire State Pride Agenda, explains that in the political arena, "There is something uniquely important about electing openly lesbian and gay people to office. . . . *It dispels stereotypes very quickly.*"[35] (emphasis added).

It is difficult to overstate the impact that openly gay Americans participating in public life have on societal attitudes about homosexuality. By encountering openly gay individuals on a day-to-day basis, straight Americans come to understand that gays deserve to be treated with tolerance and respect. As President Clinton's liaison to the gay community Elizabeth Julien Potter has put it, "What we've learned is that the only way for people to change hearts and minds is by coming out."[36] Similarly, openly gay actor Ian McKellen recently noted after receiving an Academy Award nomination, "This just

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[35] Somini Sengupta, "By The Way, A Mayor-Elect Is Gay," *New York Times* (Nov. 6, 1999) at B5.

[36] Michael Mello, "Gay and Lesbian Officials Still Crowded in Closet," *Associated Press State & Local Wire* (Nov. 19, 1999).

shows the importance of people in public life being honest and open about their sexuality because it encourages people to see there is nothing wrong with it."[37]

Apart from the powerful effect on the attitudes of society as a whole, the presence of openly gay Americans in civic life has a particularly significant effect on gay youth. Successful gay adults serve as role models for gay youth, encouraging them to embrace who they are and to be honest with their friends and families. Whether they are athletes,[38] teachers,[39] journalists,[40] community activists,[41] or government officials,[42] gay role models play a

[37] Susan Wloszczyna, "Between Love and War Shakespeare Nets 13," *USA Today* (Feb. 10, 1999) at 1D.

[38] Chris Jones, "Ex-Boxer Leduc Still Battles to Help Young Gay Athletes," *London Free Press* (June 23, 1999) at B6 (telling story of openly gay Olympic silver medallist in boxing); Bill Kaufman, "Tewksbury Faces Snubs," *Calgary Sun* (Dec. 21, 1998) at 15 (recounting controversy surrounding openly gay Olympic gold medallist in swimming who now gives motivational speeches).

[39] Valerie Schremp, "Gay Students, Teachers Look for Network of Support," *St. Louis Post-Dispatch*, (Feb. 10, 1999) at B1 (openly gay teacher Rodney Wilson notes, "Well-adjusted gay adults are invaluable role models for gay youth").

[40] Simon Houston, "I Came Out So Kids Would Have A Better Gay Role Model Than Dale Winton," *Daily Record* (Oct. 4, 1999) at 9 (reporting that BBC anchorman revealed his homosexuality to "offer himself as role model for gay teenagers").

[41] Stephen Magagnini, "Slain Couple Were 'Soul of Redding'," *Sacramento Bee* (July 15, 1999) at A1 (noting that slain community leaders "served as role models for young people grappling with their own homosexuality").

[42] John L. Mitchell, "At 15, West Hollywood's Going Strong," *Los Angeles Times* (Nov. 13, 1999) at B1 (West Hollywood City Councilman Mayor Heilman explains that it is important for young people "to realize that there are professional gays and lesbians in positions of power, whether in the City Council or administrative positions. There weren't that many role models 20 years ago").

crucial role in easing the loneliness and despair felt by most gay teenagers[43] and helping them to see themselves as part of a larger community.

Many courts have already recognized the expressive component of identifying oneself as gay.[44] See, e.g., *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 610-11 (Cal. 1979) (holding that "com[ing] out of the closet" is "political activity" under Calfornia law); *Fricke v. Lynch*, 491 F. Supp. 381, 384-85 (D.R.I. 1980) (holding that attending high school prom as same-sex couple constitutes "political statement" worthy of First Amendment

[43] See, e.g., Martha Knox, "Schools Should Help Homosexuals Early," *University Wire* (Sept. 24, 1999) (reporting that 80% of gay teenagers experience feelings of strong social isolation). Merri Rosenberg, "A Center Offers a Haven for Gay Teenagers," *New York Times* (Aug. 29, 1999) at § 14WC, pg. 7 (noting that gay teenagers are two to three times more likely than their heterosexual counterparts to attempt suicide and are at increased risk of dropping out of school, becoming homeless, or being a victim of violence).

[44] Respondent Dale denies the expressive nature of identifying oneself as gay. See Brief In Opposition to Petition for Writ of Certiorari at 26. But while such an argument may serve his interests in this particular case, it would work to the detriment of gay and lesbian Americans in other cases, such as those involving First Amendment protection for openly gay government employees. See, e.g., *Weaver v. Nebo School Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998) (holding that removal of public high school volleyball teacher for acknowledging her homosexuality violated the First Amendment).

protection). This Court, in fact, specifically noted in *Hurley v. Irish American Gay Group of Boston*, 515 U.S. 557, 574 (1995), that the presence of openly gay marchers in a parade "would suggest [the] view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals." Justice Brennan also pointed out that acknowledging one's homosexuality "necessarily and ineluctably" involves one in the ongoing debate about the rights of gay Americans and is therefore deserving of constitutional protection. *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1012 (1985) (Brennan, J., dissenting from denial of certiorari).

Moreover, the expressive message communicated by identifying oneself as gay has been noted by legal scholars sympathetic to gay rights. Professor William Eskridge, for example, states that "coming out of the closet as a gay person is also an explicitly political act." 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, 2443 (1997). See also Evan Wolfson & Robert S. Mower, When the Police Are in Our Bedrooms, Shouldn't the Courts Go in After Them?: An Update On the Fight Against "Sodomy" Laws, 21 *Fordham Urb. L.J.* 997, 1025 n.100 (1994); Jose Gomez, The Public Expression of Lesbian/Gay Personhood as Protected Speech, 1 *Law & Ineq. J.* 121 (1983).

In short, GLIL believes that the participation of openly gay Americans in all aspects of this nation's public and civic life is important because it sends a positive

message of tolerance and acceptance to society.[45] Similarly, the service of openly gay individuals, like James Dale, as Scoutmasters would signal to young Scouts that homosexuality at the very least should be tolerated and that openly gay individuals can be good role models.

Consistent with the First Amendment, however, this message must be sent through private choice and must not be communicated due to government coercion. In *Roberts v. United States Jaycees*, this Court made it clear that "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. It therefore explained:

> 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.

Id. Consequently, infringements on an expressive organization's right to define its own membership and select its own leaders must pass strict scrutiny. See *id.*

In *Roberts*, this Court upheld the Minnesota Human Rights Act's requirement that the Jaycees allow female members. It determined that the Act advanced the State of Minnesota's compelling interest in eradicating sex discrimination through the least restrictive means because the "Jaycees . . . failed to demonstrate that the Act

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[45] Just as the statement, "I am gay," has profound expressive impact, so does membership in a gay organization. Many organizations make expressive statements simply by their names, e.g., Human Rights Campaign, Parents and Friends of Lesbians and Gays.

impose[d] any serious burdens on male members' freedom of expressive association." *Id.* at 626. The Court concluded that "[t]here is . . . no basis in the record for concluding that admission of women as full voting members will impede the organization's ability . . . to disseminate its preferred views." *Id.* at 627.[46]

This case, however, is easily distinguishable from *Roberts*. There, the Jaycees made no claim that the organization wished to exclude women in order to convey a specific message about the female gender, such as that women are inferior to men and shouldn't participate in civic life, or barred women to maintain a male-only environment. Indeed, such contentions would have been absurd as the Jaycees had already invited women to take part in most of the group's activities. See *Roberts*, 468 U.S. at 627. Rather, the Jaycees merely hypothesized that women may have different views than men on some issues so their inclusion as voting members might affect the organization's position on certain public policy issues. See *id.* at 627-28.

By contrast, the BSA here correctly contends that requiring the organization to accept openly gay Scoutmasters would *directly undermine* its ability to communicate its disapproval of homosexuality to young Scouts. As

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[46] See also *Rotary Club*, 481 U.S. at 548 (upholding California's Unruh Act requirement that Rotary Club admit women as members because "evidence fail[ed] to demonstrate that admitting women to Rotary Clubs [would] affect in any significant way the existing members' ability to carry out their various purposes"); *New York State Club Ass'n v. New York City*, 487 U.S. 1, 13 (1988) (rejecting facial attack on application of New York City's Human Rights Law to private eating clubs because the Law did "not affect 'in any significant way' the ability of individuals to form associations that will advocate public or private viewpoints").

previously explained, the presence of openly gay Americans in civic life sends precisely the opposite message of that which the Boy Scouts seek to convey: gays should be accepted for who they are and can serve as admirable role models. Cf. *Hurley*, 515 U.S. at 574.

It is simply untenable to maintain, as did the New Jersey Supreme Court, that the presence of openly gay Scoutmasters would not "compel [the] Boy Scouts to express any message." *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1229 (N.J. 1999). Pursuant to Boy Scout philosophy, "[b]oys learn from the example set by their adult leaders." And from the example set by openly gay Scoutmasters, Scouts would learn that people shouldn't be ashamed of who they are and that differences in sexual orientation should be tolerated. While these are admirable sentiments, they are unfortunately not the values the BSA wishes to relay to its young members.

Any attempt by the BSA to communicate its disapproval of homosexuality to young Scouts would inevitably be hampered by the presence of openly gay Scoutmasters within the organization. As the Scoutmaster Handbook advises, Scoutmasters are expected to "practice what [they] preach" as "[t]he most destructive influence on boys is adult inconsistency and hypocrisy." If Scoutmasters, who are supposed to serve as role models for young Scouts, are openly gay, how will the BSA be able to convince young Scouts of its view that homosexuality is wrong? To say the least, the organization's message will be muddled.

The New Jersey Supreme Court attempted to avoid this First Amendment quagmire by reinterpreting the BSA's rules. According to the Court, the plain meaning of the Scout Oath and Law does not forbid homosexual

conduct, and the organization produced insufficient evidence that it wished to communicate its disapproval of homosexuality to Scouts. See *Dale*, 734 A.2d at 1223-25.

While amicus GLIL agrees with the New Jersey Supreme Court that gays can be "morally straight" and "clean," the BSA evidently does not concur, and it is patently offensive to First Amendment values for the government to reject an organization's interpretation of its own moral code.[47]

III. IF AFFIRMED, THE NEW JERSEY SUPREME COURT'S DECISION WOULD HARM GAY AND LESBIAN AMERICANS.

Respondent Dale and a number of *amici* gay advocacy groups argue that a loss for the Boy Scouts here would be a victory for gay Americans. But diminution in the scope of freedom of association is not something that gay people should hail. If the BSA loses, private organizations and institutions will have substantially diminished control over the composition of their membership and leadership. For the large number of gay organizations that seek to remain exclusively gay or gay-controlled, this decision could sound a death knell.

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[47] It is also irrelevant that religious organizations sponsoring Boy Scout troops do not share a common perspective on homosexuality. See *Dale*, 734 A.2d at 1224-25. A national organization does not lose its right to expressive association merely because a minority of its local affiliates may disagree with one of its policies. In fact, the ongoing dispute within the BSA regarding its policy toward openly gay individuals only serves to underscore the expressive message the policy communicates. See Jennifer Levitz, "Boy Scouts' Top Officials Launch Study of Homosexuality," *Providence Journal-Bulletin* (Aug. 14, 1999) at 1A.

Gay organizations often seek exclusively gay environments. There are exclusively gay social and activity clubs,[48] web sites,[49] retreats,[50] vacations,[51] and alumni and professional organizations.[52] Lesbian organizations and institutions, in particular, often seek to limit membership and participation. Many lesbian bars and clubs bar all men, straight men, or unaccompanied men, and many women's music festivals exclude men.[53] Sometimes organizations have no explicit policy excluding straight people, but their names indicate that they are meant to be gay organizations, e.g. Federal Gay Lesbian or Bisexual

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[48] See, e.g., Family Pride Coalition Website at *http://www.familypride.org/parentinggroups.html* (gay parenting and family groups); Golden Threads Website at *http://members.aol.com/goldentred* (older lesbians); GALA Choruses Website at *http://www.galachoruses.org* (gay and lesbian singing groups); SAGA North Website at *http://saganorth.com* (gay and lesbian winter sports club).

[49] See, e.g., Lesbian.org Website at *http://www.lesbian.org*; Gay.com Website at *http://www.gay.com*.

[50] See, e.g., Celebrate! Website at *http://www.celebrate.cwc.net/celebratemain.html* (annual retreat for lesbians and gay men); Triangle Recreation Camp Website at *http://www.camptrc.org* (camp site).

[51] See, e.g., Gay Travel Plus Website at *http://www.gaytravelplus.com/* (many gay and lesbian travel options); Gay Cruise Vacations Website at *www.gaycruisevacations.com* (gay cruises).

[52] See, e.g., Harvard Gay and Lesbian Caucus Website at *http://www.hglc.org/hglc*; Massachusetts Lesbian & Gay Bar Association Website at *http://www.mlgba.org*.

[53] See, e.g., Michigan Womyn's Music Festival Website at *http://www.michfest.com/General/general.htm*; North East Women's Musical Retreat Website at *http://members.aol.com/NEWMR99/page6.html*

Employees.[54] Finally, while many organizations do not insist on an exclusively gay membership, there would be resistance to leadership by heterosexuals. For instance, gay people certainly would not wish to force a group like Parents and Friends of Lesbians and Gays[55] to accept as a volunteer leader someone who was also active in Parents and Friends of Ex-Gays,[56] a group that counsels that gay people should try to become heterosexual.

Such threats are far from theoretical; at least one anti-gay group has already sued a gay parade for the right to participate and protest.[57] A state court ruled against the group on grounds similar to this Court's decision in *Hurley, supra*,[58] once again showing that gay Americans need the right to control their message as much, if not more, than other Americans. For gay organizations that wish to keep consistent the ideological perspective of their leaders, and for lesbians and gay men who want to preserve spaces that are exclusively lesbian or gay, a decision in favor of the Boy Scouts will protect their ability to maintain and control their expressive associations.

Moreover, the New Jersey Supreme Court's ruling if upheld would also work perversely to the detriment of gay individuals in a less obvious manner. Associations,

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[54] See Federal GLOBE Website at *http://www.fedglobe.org*.

[55] See Parents, Families, and Friends of Lesbians and Gays Website at *http://www.pflag.org*.

[56] See Parents & Friends of Ex-Gays Website at *http://www.pfox.org*.

[57] See Pat Flynn, "Hedgecock, Others Sue Over Gay Parade," *San Diego Union-Tribune* (July 13, 1994) at B2.

[58] See Pat Flynn, "Anti-Gay Protesters Barred From Today's Parade," *San Diego Union-Tribune* (July 16, 1994) at B3.

such as the Boy Scouts, seeking to preserve their freedom to express their disapproval of homosexuality would no longer be able to do so in a quiet manner. Instead, they would have to explicitly emphasize their anti-gay message in order to preserve their right to select their own leaders and define their own membership. Needless to say, such an outcome would hardly be to the benefit of gay Americans.

The New Jersey Supreme Court's decision will affect the shape of organizations' messages in subtle but meaningful ways. For example, if one examines the history of the Scouting movement, it is not surprising that there exists no explicit prohibition of homosexual conduct in Scout Law. This is because Scout Law is a collection of positive exhortations and not one of negative commands.

While the father of the Scouting philosophy, Lord Baden-Powell, most certainly wished to discourage immoral behavior among boys, he did not believe that a list of prohibitions was the best means of accomplishing this end. He wrote, " 'Don't,' of course is the distinguishing feature and motto of the old-fashioned system of repression; and is a red rag to a boy. It is a challenge to him to do wrong."[59] This is why Scout Law contains no prohibition against theft or murder even though this is conduct that respondent Dale would surely admit the BSA seeks to discourage.

The BSA's subtler manner of articulating its message, however, could not survive under the New Jersey Supreme Court's reasoning if the organization wished to retain its freedom of expressive association. Rather than utilizing a list of positive prescriptions combined with a reliance on the examples provided by role models, the

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[59] E.E. Reynolds, *Baden-Powell* 158 (1943).

BSA instead would have to try to influence conduct by communicating a list of clear and specific rules forbidding various behaviors in order to be able to exclude certain individuals from serving in a leadership capacity. Additionally, other organizations seeking to exclude gays would similarly have to amplify anti-gay sentiment so as to be assured of retaining their freedom of expressive organization. As a result, the shape and perhaps even the effectiveness of organizations' messages will be altered, and the volume of anti-gay rhetoric will artificially increase due to government intervention in the marketplace of ideas.

Indeed, this case illustrates the wisdom of Justice O'Connor's opinion in *Roberts v. United States Jaycees*. In her concurrence, Justice O'Connor forecast the difficulties that would flow from requiring an organization to prove that "the admission of unwelcome members 'will change the message communicated by the group's speech.' " *Roberts*, 468 U.S. at 632. She objected that "[w]hether an association is or is not constitutionally protected in the selection of its membership should not depend on what the association says or why its members say it." *Id.* at 633.

Instead, Justice O'Connor argued that associations predominantly engaged in protected expression should enjoy complete First Amendment freedom to define their own membership and select their own leaders. *Id.* at 637. Such an approach has the advantage of avoiding many of the thorny disputes present in this case. Will the presence of openly gay Scoutmasters undermine the BSA's chosen message? Does the BSA really wish to communicate a message to Scouts that homosexuality is immoral? And if so, in what form should it do this?

Justice O'Connor's approach has the virtue of recognizing that the answers to these questions are best left to

private organizations to figure out for themselves, and should not be second-guessed by courts. As such, her suggested rule of law would provide the best protection for both straight Americans' and gay Americans' freedom of expressive association and should be adopted by this Court.

If the Court were to apply Justice O'Connor's test in this case, there is little doubt that the Boy Scouts would qualify as an organization primarily engaged in protected expression rather than a commercial organization. As Justice O'Connor herself noted, "protected expression may . . . take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service." *Roberts*, 468 U.S. at 636. She also explained that "[e]ven 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." *Id.* (citing, among other sources, *The Official Boy Scout Handbook*).

CONCLUSION

Freedom of association plays a vital role in safeguarding all of the liberties protected by the First Amendment. While a creeping infringement of this freedom would harm all Americans, it would particularly threaten the welfare of gay and lesbian Americans, who have historically suffered when government has not respected citizens' right to gather together free from government harassment. Therefore, to paraphrase Voltaire, while amicus GLIL may disagree with what the Boy Scouts are associating to say, they will fight to the death to defend the Boy Scouts' right to associate with the people of their

choosing to say it. Accordingly, the judgment of the New Jersey Supreme Court should be reversed.

Respectfully submitted,

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