GRANTED

No. 99-699

In The

Supreme Court of the United States

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

Petitioners,

v.

JAMES DALE

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION

in support of the *Petitioner*

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INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae, The National Legal Foundation, is a 501c(3) organization that is dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. As such, the organization has a direct interest in seeing that groups such as the Boy Scouts of America be allowed to associate freely and freely communicate the traditional moral values to which they subscribe.

SUMMARY OF THE ARGUMENT

The New Jersey Supreme Court's application of New Jersey's Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to –49, to the Boy Scouts of America is incompatible with the First Amendment of the United States Constitution. The Boy Scouts have rights of expressive association and of free speech which the New Jersey court did not honor. One way to view what is at stake in this case is by analogizing this lawsuit to the heckler's veto line of cases. When this is done, one can see that neither Respondent, James Dale, nor the New Jersey courts should be allowed to "veto" the Boy Scouts' message that homosexuality is immoral.

[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel.

ARGUMENT

I. INTRODUCTION

The New Jersey Supreme Court's application of New Jersey's Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to –49, has placed the LAD on a collision course with the First Amendment of the United States Constitution. The problem may very well be that the New Jersey Supreme Court has misconstrued its own state's statute. That is, the court may have forced a square peg into a round hole by being wrong on two fronts—the Boy Scouts are simply not a place of public accommodation at all and they are clearly a private organization. *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1213-18 (1999). Or the problem may be that the New Jersey Supreme Court has misapplied this Court's tests designed to safeguard the rights of intimate association, expressive association, and free speech under *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). Or as amicus believes, both problems may exist.

Although amicus is cognizant that this Court has before it only the question of whether the New Jersey LAD, as applied, deprives the Boy Scouts of America of its First Amendment rights, amicus also believes that the case at bar is similar to cases such as *Edwards v. South Carolina*, 372 U.S. 229 (1963), and *Cox v. Louisiana*, 379 U.S. 536 (1965) in which:

> Because a claim of a constitutionally protected right is involved, it remains [the duty of the Supreme Court] in a case such as this to make an independent examination of the whole record. . . . In the area of First Amendment freedoms as well as other constitutionally protected rights, [the Supreme Court] cannot avoid [its] responsibilities by permitting [itself] to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding.

Cox, 379 U.S. at 545, n.8 (citations omitted) (internal quotation marks omitted). Thus, whatever the underlying problem with the New Jersey Supreme Court's opinion, this Court cannot be hamstrung in its efforts to set the matter right.

However, it is not the purpose of this brief to merely repeat the argument of the Boy Scouts and others that the New Jersey Supreme Court's intimate association, expressive association, and free speech analysis is flawed in the manner suggested above. Rather, amicus wishes to bring to this Court's attention a common sense analogy that, in the past, has helped this Court and other courts decide related issues. When viewed through this lens of common sense, it is clear that the New Jersey court's decision must be rejected and reversed. The analogy amicus offers is that of the heckler's veto.

II. HECKLER'S VETO

A. ORIGIN OF THE HECKLER'S VETO DOCTINE

The heckler's veto doctrine started as a description of just what it sounds like—literal hecklers shouting down literal speakers. While the early cases that are now generally recognized as heckler's veto cases (or at least close prototypes) are open to multiple interpretations, it is at least arguably true that courts actually allowed hecklers to shut down speakers.[2]

For example, in *Terminiello v. Chicago*, 337 U.S. 1 (1949), the Illinois courts, including the Illinois Supreme Court, had upheld a criminal conviction that was based upon the arrest of Arthur Terminiello when he refused to stop speaking in the face of sever heckling.

However, the courts, especially this Court, began a jurisprudential journey toward ever more protection of the speakers' First Amendment rights and away from judicial support for the hecklers. One stop on that journey was the trilogy of cases decided on January 15, 1951—*Niemotko v. Maryland*, 340 U.S. 268 (1951), *Kunz v. New York*, 340 U.S. 290 (1951), and *Feiner v. New York*, 340 U.S. 315 (1951). In *Feiner*, Chief Justice Vinson wrote that "the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and [we] are also mindful of the

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[2] See, generally, Jerome A. Brown & C. Thomas Dienes, *Handbook of Free Speech and Free Press* 81-93 (1979); Harry Kalven, Jr., *The Negro and the First Amendment* 123-160 (1965) discussions of the origins of the doctrine, and interpretations of various lines of cases that came together to form the doctrine, including a discussion of individual Justices' approaches.

possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings." *Id.* at 320.

Although this Court upheld Feiner's convictions because of a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order." *Id.* (internal quotation omitted), Justices Black, Douglas, and Minton would not have allowed a heckler's veto, even in the charged environment described by Chief Justice Vinson. At least from this point forward, the steady trend has been to protect speech against even potentially violent heckling.[3]

B. THE EXPANSION OF THE DOCTRINE

Even as the heckler's veto theory began to solidify as a pro-speaker, anti-heckler doctrine, its application also expanded. Specifically, courts began to apply the doctrine to activities other than actual speeches and to persons and things other than literal hecklers.

This Court (and various justices thereof) have applied the heckler's veto doctrine via (implicit) analogy to the activities such as civil rights sit-ins, *Brown v. Louisiana*, 383 U.S. 131, 133, n.1 (1966). (citing Kalven, *supra*, 140-160); a parade, *Forsythe Co. v. Nationalist Movement*, 505 U.S. 123, 140 (1992) (four justices dissenting); internet fora, *Reno v. ACLU*, 117 S.Ct. 2329, 2349 (1997); and job assignments, *Faragher v. Boca Raton*, 118 S.Ct. 2275, 2288-89 (1998). This

[3] See footnote 2 and sources cited there.

Court has applied the doctrine to persons and things beyond a literal heckler as well, including a breach of peace statute, *Brown* 383 U.S. at 133, n.1; a parade fee, *Forsythe Co.*, 505 U.S. at 140 (four justices dissenting); a minor's parent invoking a provision of the Communications Decency Act of 1996, *Reno* ;and a job supervisor, *Faragher*. Without using the term "heckler's veto," this Court has also applied the principle to various laws, ordinances, and governmental orders that were used to stop street protests, demonstrations, parades, and worship services. *See, eg.*, *Edwards v. South Carolina*, 372 U.S. 229 (1963), and *Cox v. Louisiana*, 379 U.S. 536 (1965); *Gregory v. Chicago*, 394 U.S. 111 (1969); and *Kunz v. New York*, 340 U.S. 290 (1951).

Other courts have followed suit.[4] In *ACLU v. Johnson*, ___ F.3d ___, ___ (10th Cir. 1999), the Tenth Circuit applied the analogy to a minor's parent invoking a provision of the Communications Decency Act of 1996. In *Chicago Acorn v. Metropolitan Pier and Exposition Authority,* 150 F.3d 695, 701 (7th Cir. 1998), the Seventh Circuit applied the analogy to governmental discrimination in facility access based on user popularity. The District Court for the District of Columbia applied the analogy to the refusal of the District of Columbia to issue a parade permit in *Christian Knights of the Ku Klux Klan v. District of Columbia,* 751 F.Supp. 212, 215 (D.D.C. 1990). In *Diamond Walnut Growers, Inc v. National Labor*

[4] Several of the cases cited in the following discussion have subsequent history which will not be indicated. In some cases, the history is long and complex. Amicus has not cited these cases for their final result, but rather to point out that the heckler's veto doctrine/analogy was the most common sense based approach to the original issues before these courts.

Relations Board, 113 F.3d 1259, 1266 (D.C. Cir. 1997) (*en banc*), the District of Columbia Court of Appeals applied the analogy to safety issues during a labor strike. The Sixth Circuit applied it to a governmental refusal to grant a permit for a private religious display in a public forum. *Pinette v. Capitol Square Review and Advisory Board*, 30 F.3d 675, 679 (6th Cir. 1994). The Sixth Circuit also applied it to an injunction which forbade such displays, *American United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (*en banc*), as did one judge from the Seventh Circuit, *Doe v. Small*, 964 F.2d 611, 630 (7th Cir. 1992) (*en banc*) (Easterbrook, concurring). The Fifth Circuit applied the analogy to a city disorderly conduct ordinance. *Hunter v. Allen*, 422 F.2d 1158, 1163 (5th Cir. 1970). The Seventh Circuit applied it to the removal of a painting by public officials from private property. *Nelson v. Streeter*, 16 F.3d 145, 150 (7th Cir. 1994).

III. APPLICATION TO THE PRESENT CASE

In light of the foregoing discussion, it is obvious that the heckler's veto analogy has been applied to a wide variety of speech and associational activities. In many of these cases, the heckler's veto—either actual or by analogy—has been invoked as a shorthand, common sense way of stating a fundamental truth: Neither an individual, nor the government, nor an individual seeking to harness governmental compulsion via an injunction, can silence the speech or associational rights of another. Otherwise those rights would have no meaning.

The heckler's veto analogy is equally applicable in the present case. As seen above, the analogy has been applied to injunctions like the one in this case that seeks to make the Boy Scouts' First Amendment rights subject to James Dale's veto.

As widely as the analogy has profitably been applied, the Court could undoubtedly apply it to all three First Amendment rights that the New Jersey court analyzed. However, applying the analogy to the Boy Scouts' right to expressive association and to free speech keeps the analogy closer to its roots.

One additional point is worth noting before applying the analogy to the case at hand. Just as this Court ultimately set the heckler's veto jurisprudence right—even after some courts had initially allowed hecklers to prevail—so too in this case, this Court should correct the error of the New Jersey Supreme Court.

A. HECKLER'S VETO ANALOGY APPLIED TO THE BOY SCOUTS' RIGHT OF EXPRESSIVE ASSOCIATION

The Boy Scouts of America constitutes a constitutionally protected expressive organization with expressive associational rights. At the core of its very existence is the communication of a moral message to boys and young men. The Boy Scouts of America's self-proclaimed mission "is to instill the values of the Scout Oath and Law in young people and to prepare them to make ethical choices over their lifetime in achieving their full potential." *Petition for Writ of Certiorari*, at 2 (internal quotation marks omitted).

However, this Court need not merely accept the Boy Scouts' self-characterization. In their *Petition for Writ of Certiorari,* the Boy Scouts pointed out support for this assertion from two judicial sources. *Id.* at 14. First, the California Supreme Court acknowledged in *Curran v. Mount Diablo Council of the Boy Scouts of America*, the Boy Scouts of America is a "charitable, expressive, and social organization" whose "primary function is the inculcation of a specific set of values in its youth members, and whose recreational facilities and activities are complementary to the organization's primary purpose." 952 P.2d 218, 236 (1998). Second, Justice O'Connor recognized as much in *Roberts v. United States Jaycees*, 468 U.S. 609, 638, n.* (1984) (O'Connor, J., concurring) (citations omitted), citing as examples of expressive associations, both the Boy Scouts and the Girl Scouts and stating 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."

It is apparent that the Boy Scouts of America's mission is the communication of its message to its young audience. And its message is one of character and morality. That message includes its views on homosexuality. It does not matter how or how often the Boy Scouts engage in expressive activity in support of that message. Its expressive associational activities must not be held hostage to James Dale's veto nor to the veto of the New Jersey courts.

The New Jersey Supreme Court's own statements about expressive association show the applicability of the heckler's veto analogy:

> 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 not also guaranteed. Thus, the right to engage in activities protected by the First Amendment carries with it a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. The freedom to come together in furtherance of a collective purpose provides protection for minority views, thereby fostering political and cultural diversity.
>
> When the government attempts to interfere with the internal organization or affairs of the group, the members' freedom of expressive association may be curtailed. In this regard, the Supreme Court has said that "[t]here 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."

Dale, 734 A.2d at 1222 (internal quotations and citations omitted).

The New Jersey court went on the explain that the *Roberts* Court had noted that the right of association is not absolute. *Id.* That goes without saying.

However, the present case is one in which utilizing the heckler's veto analogy would point in the right direction.

The New Jersey court's analysis would have been better informed by comparing the present case to the heckler's veto cases than to the facts of *Roberts*. Surely, the Boy Scouts have a set of beliefs and a range of expressive activities as well defined as the individuals and groups subjected to the heckler's veto in each of the cases discussed above. And surely, New Jersey's LAD serves as a heckler's veto as much as the breach of peace laws involved in the early (and some recent) heckler's veto cases. Furthermore, here, as in many of the cases discussed above, one party seeks to regulate the expressive association of another. The Boy Scouts of America, in its message of traditional morality, in its choice of proponents of traditional morality as leaders, as well as in its decision to exclude avowed homosexuals from its leadership, expresses the idea that homosexuality is immoral. Dale, an avowed homosexual and gay rights activist, *Petition for Writ of Certiorari*, at 6, seeks not merely the acceptance of the Boy Scouts of America but rather to alter the association's message.

Furthermore, there is in effect another heckler's veto lurking just below the surface of this case. Dale, following the lead of interest groups that have sought to change the Boy Scouts of America's moral and religious messages by filing suit under public accommodations laws in California, Illinois, Florida, Oregon, Connecticut, Minnesota, Pennsylvania, Kansas and Washington D.C., brings this suit under the same type of statute in New Jersey. *See Brief of Boy Scouts of America as Amicus Curiae in Support of Reversal, Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston,* at 2. It is the sheer number of cases

and the exorbitant costs of defending them that serve as the heckler's *tour de force* in the attempt to change the Boy Scouts of America's message. This court should declare once and for all that the "litigator's veto" will prevail no more than the heckler's veto.

B. HECKLER'S VETO ANALOGY APPLIED TO THE BOY SCOUTS' RIGHT OF FREE SPEECH

The heckler's veto analogy is even more at home with the Boy Scouts' free speech rights. Just as the Boy Scouts disseminate its message through expressive activities, so too does it disseminates its message through pure speech. As this Court pointed out in *Roberts*, the two rights are closely connected. *Id.* at 622 ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in a wide variety of political, social, economic, educational, religious, and cultural ends.")

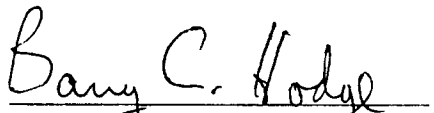
However, an additional point may be added here. The right to speak subsumes the right not to speak (just as the right to associate subsumes the right not to associate). *Id.* at 623, *Hurley*, 515 U.S. at 573. Yet, Dale seeks the right to force a message upon the Boy Scouts. Thus, Dale not only seeks to change the Boy Scouts' message with his presence; he also seek to change their message with his words. Dale states publicly that he disagrees with the moral position taken by Boy Scouts of America regarding homosexual conduct, and he "owe[s] it to the organization to point out to them how bad and wrong this policy is." *Petition for a Writ of Certiorari*, at 15.

Not only does Dale seek to impose a heckler's veto upon the Boy Scouts, he seeks nothing less than to entirely eradicate the Boy Scouts' current message about homosexuality and to force the Scouts to be a vehicle for his own message. This Court should not allow this to happen.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the New Jersey Supreme Court.

Respectfully submitted
this 26th day of February, 2000



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