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.

BRIEF *AMICUS CURIAE* OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENT

Filed March 29, 2000

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INTEREST OF THE *AMICUS*

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, religious and economic rights of American Jewish Congress. It has over the years urged an expansive view of both the right of expressive association and the right to be free of invidious discrimination in places of public accommodation. In this brief, we attempt to maximize the scope of each of these rights as they collide.

The brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

1. The freedom of association includes a right (in certain circumstances) to exclude persons from an association, even where the exclusion is based on status, not an absence of shared ideological commitment. The determination of who is a member of the group defines a group, its purpose, ethics, strategies and goals. Membership boundaries, like definitions of citizenship, define the polity, and communicate to others the group's ideology.

2. This right of exclusion should be available not only to religious groups but political, ideological or other groups. Frequently, however, there will be no need to countenance rules that discriminate on the basis of a person's status, as ideological commitment to an agency's purpose will be an adequate substitute. However, there will be cases (and this is one) where a status-based exclusion is freighted with ideological meaning.

3. An unfettered right not to associate would have devastating consequences for the public accommodation laws. Those laws have often been invoked to override claims of expressive association, even when made by not-for-profit groups.

4. Not-for-profit groups have accumulated important social capital, which to ensure equality, must be generally available to all groups in the society.

5. In assessing a claim of associational freedom, it is not relevant that a reviewing court believes the exclusion archaic or stereotypical. Nor is it determinative that a group's membership does not unanimously support an exclusionary policy. The Court below erred in invoking these grounds, which reflect an official orthodoxy inconsistent with fundamental First Amendment values.

6. A court may not – as the Court below seems to have done – reject a freedom of association claim because it judges the exclusionary rule not central to an organization's purpose, just as a court cannot evaluate whether a religious claim is central to a person's belief system.

7. The decision below nevertheless should be affirmed because the *sina qua non* of an expressive association claim is the intent to come together to communicate an idea. As this Court has repeatedly held, for conduct to be protected by the First Amendment, there must be both an intent to communicate and an action which is reasonably understood as communicating an idea.

8. Because the Boy Scouts have never expressly communicated any view about sexual orientation, it cannot be said that Scouts joined together to express any idea about sexual orientation and scouting. By contrast, they have clearly expressed views about male only scouting and belief in God.

ARGUMENT

I. The Public Accommodation Laws Must Be Balanced Against the Right Not To Associate[1]

A. THE RIGHT TO ASSOCIATE INCLUDES THE RIGHT NOT TO ASSOCIATE

We recognize, at the outset, that the right to associate embodies a right, in certain circumstances, not to associate. *Roberts v. United States Jaycees* 468 U.S. 609, 623 (1995). The right not to associate reflects a strong national commitment to diversity.

The American Jewish Congress and other Jewish organizations, even ones that are not pervasively sectarian, are, and should be, free to decide who is part of their community. They are free to decide that non-Jews should not be admitted to their counsels. They are, and should be, equally be free to decide to open their membership to all.

Jewish institutions are, and should be, free to decide that so-called messianic Jews are not Jews, and that, notwithstanding public accommodation laws banning religious discrimination, such persons are unwelcome. *cf. Cohn-Frankel v. United Synagogue of Conservative Judaism*, 246 A.D. 2d 322, 667 N.Y.S. 2d 360 (App. Div.1998) (messianic Jew expelled from synagogue sponsored tour).

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

Exclusions by private bodies on the basis of religion are undoubtedly discriminatory. Of equal certainty, these exclusions enjoy constitutional protection, as subsequent to the decision on review here, the New Jersey courts have acknowledged. *Wazeerud-Din v. The Goodwill Home and Missions, Inc.*, 325 N.J. Super. 3, 737 A.2d 683 (1999) (drug rehabilitation program operated by a religious group may exclude addicts not sharing its religious beliefs.)

Accordingly, this Court should not shrink from declaring some forms of discrimination by private not-for-profit agencies constitutionally protected. The determination of who shall be a member of the group is an aspect of the associational right protected by the Constitution. That is, eligibility rules for membership in the group define the group, its purposes, ethics, strategies and goals. Such rules do not simply mark off in a technical sense who can be a member. They are akin to the question of who can be a citizen of a country. Whether citizenship is defined by birth, see XIV Amendment, §1, loyalty, or some other criteria, is not a technical question, but goes to the very nature of the polity.

Rules on membership, whether exclusionary or inclusionary, reflect, and communicate an attitude toward others, either welcoming or rejecting, and a stance toward the world, either open or closed. Such membership rules are, for a wide range of groups, ideological decisions, and are, therefore, properly protected by the First Amendment's freedom of association.

To allow government to insist on its own, monochromatic, non-exclusionary vision is to allow

government to control, dictate and limit the terms of all private association, and to end all discussion about any groups defined by the 'status' of its members. *Hurley v. Irish-American Gay Group*, 515 U.S. 557, 579 (1995). That is an Orwellian vision, incompatible with freedom and the existence of real ideological competition with official (and unofficial) orthodoxies.

B. The Right Not To Associate Extends Beyond Religious Groups

This principle that the right to associate includes the right to exclude ought not to be limited to religious groups,[2] notwithstanding the special protection and solicitude religious practice and political associations enjoy under the Constitution. *Norwood v. Harrison,* 413 U.S. 455 (1973). *But see, Employment Division v. Smith,* 494 U.S. 872 (1990).

Amicus believes that the same principle applies to political associations. Neither the NAACP nor the Klan (much as we hesitate to mention the two in the same grammatical clause) could constitutionally be compelled to accept members of a different race, as the Klan has chosen not to do, but the NAACP has.

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[2] We do not mean to suggest religious groups have unlimited and unconstrained authority to exclude. This Court has held they do not, at least with regard to racial discrimination and educational institutions. *Bob Jones University v. United States,* 461 U.S. 574 (1983); *Runyon v. McCrary,* 427 U.S. 160 (1976).

To be sure, as this Court recognized in *Roberts, supra*, 468 U.S. at 628, exclusions cast in terms of identity or status are, at bottom, stereotypes. Still, should the NAACP have made, or choose in the future to make a racially exclusionary decision, even though the decision reflected stereotypical assumptions about racial attitudes, the organization should be permitted to make that decision. This would be so although it could substitute less stereotypical measures of adherence to common ideological purpose.

The same is true of moral decisions. Groups often define themselves around a moral principle - abolition, temperance, equal rights and the like. Although such groups are usually content with constitutionally protected ideological membership criteria, *Hurley, supra*, some groups organized around moral principles will enforce status-based membership criteria.

Status-based criteria rest on immutable characteristics fixed at birth (religion being regarded as immutable, though not so fixed). Under this test, the ban on homosexual scoutmasters may well be status-based. Further evidence of the status-based nature of the ban is the fact that scouts may advocate non-discrimination on the basis of sexual orientation. Sexual orientation is likely status-based for constitutional purposes, when government draws lines based on sexual orientation. *cf. Romer v. Evans*, 517 U.S. 620 (1996). [3] However, given the continuing debate whether sexual orientation is (to over simplify) an immutable characteristic or a volitional one

[3] Amicus takes no position on same sex marriage.

freighted with moral consequences, we believe those actors with associational freedom claims should not be barred at the threshold from making "status" based decisions about sexual orientation.

Moral rules by their very nature draw lines. Moral judgements are inevitably exclusionary and judgmental. Much as many regard moral judgments about others, particularly about the private sexual activity of others, as intrusive and dangerous, the ability to join together to express, teach and *live* out one's moral views is an inescapable privilege, and risk, of freedom. *Hurley, supra.*

If not securely cabined, however, the exclusionary principle — the right of freedom of expressive association guaranteed by the First Amendment — would expand to the point where it would call into question the application of public accommodation laws to the broad spectrum of non-commercial activities.[4]

This Court has frequently *rejected* freedom of expressive association claims as a defense to the charge that an exclusionary rule violated a non-discrimination law, *New York*

[4] Petitioners wisely do not contend that commercial entities can claim the protection of the First Amendment to justify discrimination. By and large, claims by private employers that their religion required them to discriminate fail. *See Brief Amicus Curiae of the Beckett Fund.*

Although it is too broad a statement to assert that commercial employers can never invoke the First Amendment to defend a civil rights claim - corporations should be able to announce opposition to civil rights laws without being guilty of creating a hostile work environment - it certainly will be the unusual case where such a claim would justify a refusal to hire, the closest analogy to the Boy Scout's refusal to "hire" Dale as a scout leader.

State Clubs v. City of New York, 487 U.S. 1 (1988); *Roberts v. United States Jaycees, supra; Rotary International v. Board of Directors*, 481 U.S. 537 (1987). It has refused to recognize such claims in other contexts as well. *Runyon v. McCray*, 427 U.S. 160 (1976) (religious school: racial discrimination). Even in the case of political parties, this Court has been unwilling to tolerate practices with a disparate impact on minority groups. *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (filing fee for party convention delegates subject to the Voting Rights Act, not withstanding freedom of expressive association claim).

Petitioners would draw a bright line around non-for-profit activity and suggest that all not-for-profits are entitled to exclude whom they will.[5] Though there is a surface appeal to this claim, it does not survive closer scrutiny.

Equal access to most not-for-profits conveys no message contradictory to the organization's beliefs about sexual orientation, gender, faith, race or national origin, such that application of the non-discrimination rule of public accommodation law would impinge upon the organization's freedom of expressive association. A chamber of commerce ordinarily has no expressive association defense, *Roberts v. United States Jaycees, supra, Rotary International v. Board of*

[5] Petitioners do not contest the power of government to insist on non-discrimination as a condition of government funding, even from ideologically motivated not-for-profit organizations. *Amicus* believes that not only may government insist on such a condition, but that in many cases it is obligated to do so. See Title VI of the 1964 Civil Rights Act, 42 U.S.C. 2000d, *et seq.* See *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974); *Evans v. Newton*, 382 U.S. 296 (1966).

Directors, supra. Neither would a not-for-profit humane society have its expressive association rights violated by requiring it to accept members regardless of race, creed, gender, national origin, or sexual orientation. Nothing in the day-to-day functioning of art, science and history museums, theaters, and sports leagues would justify a refusal to accept blacks, Catholics or gays on equal terms with whites, Protestants, or heterosexuals.

Because the mediating institutions of the private sector play such an important and defining role in the life of the community, full and equal access to these institutions is crucial to every person's ability fully to exploit the opportunities available to all and to full and equal citizenship. Petitioner's proposed rule leaves too much room for needless discrimination.

Blanket tolerance of private discrimination in the not-for-profit sector would come at a very high price, and involve costs not randomly distributed across society. Those who have over the years built powerful and socially important organizations, such as the Boy Scouts, whose members enjoy valuable contacts and opportunities for 'networking', are likely to be defenders of the status quo, whether it be ideological, political, racial, ethical, social, religious or, as here, moral and sexual.

Those, like Dale, excluded from those organizations are most likely to be members of marginalized groups which are excluded from the main stream of society. The very persons and groups public accommodation laws are designed to protect and integrate into the social mainstream would be denied access

to these crucial social institutions and the opportunities they present. The sense of fraternity, commonality and community which accrues from membership in nominally private organizations like the Boy Scouts, is an integral part of society's social capital. That capital is placed off limits to distinct and disadvantaged groups only at a high cost to the whole community.

But even if the burden was equally distributed, society is harmed by the creation of exclusive, walled-off communities, established along immutable group lines. These parochial communities are destructive of the sense of community essential to society's health. Public accommodation laws are premised on the notion that real equality means more than merely equality in treatment by government. It requires equal access to important social institutions.

These ideas are not unique to the public accommodation laws. They run like a thread through the applications of civil rights law to private activity. Thus, in the debates leading to the enactment of Title VII of the 1964 Civil Rights Act guaranteeing equal employment opportunity in the private sector, sponsors spoke of the futility of insuring equal protection of the laws if blacks had not the economic wherewithal to exercise effectively the rights of citizenship.

II. Balancing the Interests

This Court then, is confronted with a social paradox. It is a measure of society's health that people can voluntarily join together to form groups to advance ideas, even unpopular and disputed ones. These same groups, if powerful, exclusionary, insular and parochial, may undermine the health of that society.

The New Jersey Supreme Court offered several explanations of why in this case, the right to equal treatment ought to trump the right to expressive association. Although several of those reasons do not withstand scrutiny, its conclusion is nevertheless sound.

A. Intimate Association

Amicus agrees with the Court below that the Boy Scouts cannot assert right of intimate association. Its membership is too large, too publicly recruited, without any genuine limiting criteria, to be comparable to the small, intimate units in which such a right has been recognized. *See Roberts, supra.*

B. Expressive Associational Freedoms

In our view, this case turns on the right of associational freedom recognized in cases such as *Hurley*, *Roberts*, *and Runyon*. In deciding that the Boy Scouts had not made out such a claim, the Court below committed several errors.

First, it rejected the Scouts' own interpretation of its oath. The Scouts contended below, and they contend here, that

the reference in the well-known Boy Scout Oath to Scouts to being "morally clean" rejects homosexuality as acceptable sexual practice. The Court below disagreed, noting that this was an "archaic and stereotypical view," and therefore could not be what "morally clean" meant.

That Court reasoned as well that not all groups sponsoring scout troops shared the view about homosexuality asserted by the Scouts and hence that Petitioners were not properly interpreting their own oath. *Amicus* believes that the interpretation of an organizations's moral views is for the organization, not the courts.

Those who disagree with the Boy Scouts' morality are free to challenge it or establish competing organizations. Churches which believe that homosexuals are entitled to equal treatment with heterosexuals are free to challenge the Scouts, refuse to sponsor scout troops or form their own organizations. But it does not follow that their opposition sheds light on the Scouts' beliefs.

It certainly does not follow that states are free to reinterpret private moral codes to meet contemporary standards of political correctness or orthodoxy. Labeling the Scouts' views "stereotypical or archaic", as the New Jersey Supreme Court did, does not advance the argument. The state may not insist that private organizations act only in keeping with the latest 'progressive' morality, or that only non-stereotypical views prevail. *Hurley, supra,* 515 U.S. at 579.

The New Jersey Supreme Court's reference to the archaic nature of the Boy Scouts views belies that Court's insistence that the suppression of the Boy Scouts' rule against

gay scoutmasters is unrelated to the suppression of ideas, or that the statute was being applied without regard to an organization's viewpoint. On the contrary. It appears that suppressing "archaic views" is precisely what that court thought it was about.

It also cannot be that the right of expressive association depends on the affirmative assent of all of an association's members. Only in the most narrowly focused single issue groups is the membership agreed on policy. Real world organizations do not work this way. The right to expressive association ought not to be constricted in ways that make it illusory. The Court has recognized with regard to its claim of associational standing that it is enough if *some* members of the association are adversely affected, a recognition that unanimity is not a fact of organizational life. *Warth v. Selden*, 422 U.S. 490, 509 (1975).

People join organizations notwithstanding disagreement on particular issues. They may regard a disputed issue as relatively unimportant, or outweighed by other policies by the group. People may join the ACLU because of its crucial contributions to freedom of speech and religion, even as they disagree about its positions on abortion, affirmative action or aliens.

The American Jewish Congress limits membership to Jews or members of their households. It has members who believe that it should open its membership roles to all who share its ideological message, regardless of faith. The constitutional protection the American Jewish Congress enjoys

to limit its membership on religious lines does not and should not turn on the absence of internal dissent and disagreement.

This Court said as much in *Hurley*. There, groups seeking to intrude forcibly on a parade asserted that the parade could not assert a right of associational freedom because people of many views marched in the parade. The Court rejected that submission, for "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..." 515 U.S. at 569-70.

The opinion of the Court below could also be read to allow a claim of expressive association only where discriminatory criteria are central to the purposes of the association. Thus, the Court below described the Scouts as being concerned with outdoor activities, group activities and the like, not with making a statement on disputed moral questions. This, too, is not a secure basis for denying the right of expressive association.

Whether the Boy Scouts is a group dedicated to introducing boys to the outdoors that also has a peripheral interest in moral issues, or a group designed to demonstrate that one can live a certain vision of the moral life and still enjoy the out-of-doors and group activities, is a question not given to an objective answer.

An appropriate analogy is this Court's repeated insistence that in judging free exercise of religion claims the courts are precluded from judging the 'centrality' of a practice to the faith. This Court noted that it could no more make that determination in the religious context than in the political one:

> It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than *it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field.*

Employment Division v. Smith, 494 U.S. 872, 886-87 (1990) (emphasis added).

III. The Absence of a Clear Policy on Sexual Orientation Dooms the Claim that Scouts Associated for Purposes of Expressing a View on Sexual Orientation

While recognizing the importance of maintaining the right of expressive association, *Amicus* remains convinced that the decision below should be affirmed. The right of expressive association is "the right to combine with others to expound one's views," *New York State Club Association v. City of New York, supra,* 487 U.S. at 13. The right presumes a deliberate melding of individuals into a collective for the purpose of more effectively advancing ideas held in common.

While we believe, as noted above, that the state may not insist that a discriminatory idea be endorsed unanimously by members of a group, we believe that it is unintelligible to insist on a right of collective expression – especially in derogation of a non-discrimination law – where there is no objective, factual basis for believing that individuals bonded together to advance a specific idea. If no idea is communicated, then the application of the public accommodation law cannot and does not interfere with protected First Amendment activity.

Here, as the New Jersey Supreme Court found, there was no explicit, stated policy about sexual orientation, such that Boy Scouts, their parents and volunteers, could be said to have at least agreed to tolerate, much less advance, by participating in scouting activities. It asks too much, we know all too well, to insist on proof that members are actually aware of even explicit organizational statements. It is sufficient if a statement has been plainly made, and is available for those seeking it. Government may not second guess whether the organization has correctly applied its own principles. But an idea which has not been expressed cannot be the basis of a expressive association claim.

This Court insists that for a claim that conduct constitutes expression to succeed, it must have both an intended communicative purpose and perceived message. Thus, in *Chicago v. Morales*, 527 U.S. 47, _____ (1999), the Court rejected a claim that an anti-loitering ordinance impinged on associational freedoms, because it did "not prohibit any form of conduct that is apparently intended to convey a message."

Morales cited *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). *Clark*, considered a claim that sleeping was protected speech. For purposes of decision, this Court assumed sleeping was speech, because "a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative," 468 U.S. at 294. The sleep-in in *Clark* was intended to communicate an idea about the government's failure to house all citizens and, in the context of a protest in front of the White House, was reasonably likely to be understood as such.

City of Dallas v. Stanglin, 490 U.S. 19 (1989), upheld an ordinance limiting admission to certain dance halls to adolescents aged 14-18. Plaintiffs unsuccessfully asserted the ordinance denied them a right of expressive association:

> The hundreds of teenagers who congregate each night at this...dance hall are not members of any organized association; they are patrons of the same business establishment. Most are strangers to one another, and the dance hall admits all who are willing to pay the admission fee. There is no suggestion that these patrons "take positions on public questions" or perform any of the other similar activities described in *Spence v. Washington,* 418 U.S. 405, 409 (1974).
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> 490 U.S. at 24-25

In *Spence,* the Court held that a flag flown upside down with a peace symbol affixed was communicative because "an intent to convey a particularized message was present, and in the surrounding circumstances, the likelihood was great that the message would be understood by those who viewed it." 418 U.S. at 410-11; *Accord, White v. Napolean,* 897 F.2d 103, 114 (3rd Cir. 1990) (refusal of prisoner to be treated not protected speech); *James v. City of Long Beach,* 18 F. Supp. 2d 1078 (C.D. Cal. 1998) (attendance at sporting event not expressive association).

The Court below found that the Boy Scouts had never publicly announced a position on sexual orientation. There were several internal memos expressing such views, but they were never widely circulated. The Boy Scout oath is not explicit on this score, and neither are various Scout handbooks. It cannot be said that in joining the Scouts, Scouts and Scout leaders knew that they "intended to communicate" anything at all about sexual orientation.

It certainly cannot be said that any of the Scout's policies would "reasonably be understood by the viewer to be communicative" of any idea about homosexuality. As noted, the Scouts are entitled to interpret their own rules as they wish, and the state may not "correct" that interpretation. But in the face of the compelling interest in social equality a state may demand a plain statement of a discriminatory rule as a prerequisite for making an expressive association claim.

With such a statement, it may fairly be said that persons who join the Scouts do so knowing that their membership will help communicate an exclusionary message. Citizens may

express such views in exclusionary group associations (subject to any countervailing narrowly tailored compelling interest the state may credibly assert in non-discrimination), but they should have to do so expressly. Without a clear statement, there is no reason to conclude that Scouts associate to express a view on sexual orientation.

This "plain statement" rule easily explains why the Boy Scouts may limit membership to boys and insist on a belief in God. The Scouts unambiguously communicate the view that boys ought to band together in single sex entities in order to further certain purposes. That view to some is archaic and stereotyped. It is a plainly communicated ideological position, and a classic example of protected expressive association.

The same is true of the Scouts' insistence that Scouts affirm a belief in God. *cf. Welsh v. Boy Scouts of America*, 793 F.2d. 1267 (7th Cir. 1996) Boy Scouts know – because they are explicitly reminded by the oath and other ceremonies – that in joining the Scouts they are acceding to the view that a belief in God is essential to this organization's purpose. An individual who joins may believe in his heart of hearts that it would be best not to so limit eligibility for scouting. But by joining a group which has openly expressed its beliefs, a member must be taken as assenting to the group's message.

No one can make such a claim about the Scouts sexual orientation policies, and no one could contend with anything approaching certainty that Scouts in New Jersey gathered together to say something about sexual orientation. Perhaps, if asked, they would agree to a position about gay scoutmasters. Perhaps not. The absence of a clear statement of the reasons for

coming together in an association is fatal to a claim of expressive association.

A clear statement rule would also facilitate the state's discharge of its responsibility not to subsidize discrimination. *City of Montgomery v. Gilmore, supra*; *Evan v. Newton, supra*. Without attempting to catalog what the government may or may not do in the way of withholding subsidies, *see, e.g., Rust v. Sullivan*, 500 U.S. 173 (1991), a state should not be required to yield to a discriminatory policy in the name of freedom of expressive association and inadvertently subsidize that same discrimination because the views said to be expressed have been kept secret.

CONCLUSION

For the reasons stated, the judgment should be affirmed.

Respectfully submitted,

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