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 OF THE CITIES OF ATLANTA, CHICAGO, LOS ANGELES, NEW YORK, PORTLAND, SAN FRANCISCO AND TUCSON AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Filed March 29, 2000

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STATEMENT OF INTERESTS

Pursuant to Supreme Court Rule 37.4, *amici curiae* — the cities of Atlanta, Chicago, Los Angeles, New York, Portland, San Francisco and Tucson — submit this brief in support of the affirmance of the opinion of the Supreme Court of New Jersey.

Cities are of necessity on the forefront of the battle against invidious discrimination of all sorts. "Problems arising from racial and other forms of discrimination are especially common in population centers; the cancer of injustice toward members of minority groups is peculiarly virulent on the local scene." *Hutchinson Human Relations Comm'n v. Midland Credit Management, Inc.*, 517 P.2d 158, 162 (Kan. 1973). Local initiative is necessary to solve these problems. Moreover, because the type and extent of discriminatory practices varies from community to community — depending upon, among other things, the composition of the population and the depth of local prejudice — familiarity with local conditions is imperative both for determining whether or not to enact civil rights legislation and for deciding what its contents should be. *Bloom v. City of Worcester*, 293 N.E.2d 268, 276 n.8 (Mass. 1973). "[D]iscrimination is essentially a people problem, and must eventually be dealt with and solved by the people in the localities where they live." *Hutchinson*, 517 P.2d at 162.

The development of our country's civil rights laws highlights the role of cities. Cities passed fair housing laws and public accommodation laws requiring equal access for racial minorities years before similar federal legislation was enacted.[1] More recently, cities have passed or amended ordinances to extend the prohibition against discrimination in public accommodations to include grounds not explicitly covered by state or federal law. These grounds include marital

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[1] *See Sims v. Besaw's Cafe*, ---P.2d---, 165 Or. App. 180, 200 n.24 (Or. Ct. App. 2000); *see also Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. Rev. L. & Soc. Change 215, 240 (1978).

status,[2] sexual orientation,[3] place of residence,[4] HIV and AIDS,[5] political affiliation,[6] personal appearance[7] and familial status,[8] among others. The ability of cities to enact laws that are broader than state anti-discrimination legislation has been

[2] *See, e.g.*, ATLANTA, GA., CODE § 94-68(a) (1995) (Tab A); BOSTON, MASS., CODE §12-9.7 (1985) (Tab B); CHICAGO, ILL., MUNIC. CODE § 2-160-070 (1990) (Tab D); DENVER, COLO., REV. MUNIC. CODE § 28-96(a) (1982) (Tab E); D.C. CODE § 1-2519(a) (1999) (Tab F); NEW ORLEANS, LA., CODE § 86-33(a) (1995) (Tab H); N.Y.C. ADMIN. CODE § 8-107.4 (1999) (Tab I); PHILADELPHIA, PA., CODE § 9-1105(A)(1)(a) (1999) (Tab J); PORTLAND, OR., CODE ch. 23.01 (1997) (Tab K); SAN FRANCISCO, CAL., POLICE CODE § 3305(a)(4) (1999) (Tab L); SEATTLE, WASH., MUNIC. CODE § 14.08.040(D) (Tab M); TUCSON, ARIZ., CODE § 17-12(a) (1987) (Tab N).

Citations to "Tab __" refer to the booklet of materials that *amici* cities have lodged with the Clerk of the Court.

[3] *See, e.g.*, ATLANTA, GA., CODE § 94-68(a) (Tab A); BOSTON, MASS., CODE §12-9.7 (Tab B); CHICAGO, ILL., MUNIC. CODE § 2-160-070 (Tab D); DENVER, COLO., REV. MUNIC. CODE § 28-96(a) (Tab E); D.C. CODE § 1-2519(a) (Tab F); LOS ANGELES, CAL., MUNIC. CODE § 45.95.02 (1999) (Tab G); NEW ORLEANS, LA., CODE § 86-33(a) (Tab H); N.Y.C. ADMIN. CODE § 8-107.4 (Tab I); PHILADELPHIA, PA., CODE § 9-1105(A)(1)(a) (Tab J); PORTLAND, OR., CODE ch. 23.01 (Tab K); SAN FRANCISCO, CAL., POLICE CODE § 3305(a) (Tab L); SEATTLE, WASH., MUNIC. CODE § 14.08.040(D) (Tab M); TUCSON, ARIZ., CODE § 17-12(a) (Tab N).

[4] *See, e.g.*, D.C. CODE § 1-2519(a) (Tab F).

[5] *See, e.g.*, LOS ANGELES, CAL., MUNIC. CODE §§ 45.80 *et seq.* (Tab G) and SAN FRANCISCO, CAL., POLICE CODE § 3805 (Tab L). *See also* N.Y.C. ADMIN. CODE § 8-107.4 (Tab I).

[6] *See, e.g.*, D.C. CODE § 1-2519(a) (Tab F); SEATTLE, WASH., MUNIC. CODE § 14.08.090 (Tab M).

[7] *See, e.g.*, D.C. CODE § 1-2519(a) (Tab F).

[8] BOSTON, MASS., CODE §12-9.7 (parental status) (Tab B); CHICAGO, ILL., MUNIC. CODE § 2-160-070 (parental status) (Tab D); D.C. CODE § 1-2519(a) (Tab F); PORTLAND, OR., CODE ch. 23.01 (Tab K); SEATTLE, WASH., MUNIC. CODE § 14.08.090 (parental status) (Tab M); TUCSON, ARIZ., CODE § 17-12(a) (Tab N).

recognized by state courts. *Sims v. Besaw's Cafe*, ---P.2d---, 165 Or. App. 180 (Or. Ct. App. 2000) (upholding city anti-discrimination law which includes sexual orientation although state anti-discrimination law does not include this ground and upholding enforceability of private rights created under city law in state circuit courts); *Bracker v. Cohen*, 204 A.D.2d 115, 115, 612 N.Y.S.2d 113, 113 (Supr. Ct. App. Div. 1994) (recognizing that New York State Human Rights Law was not intended to preempt the field of anti-discrimination legislation). At least one state legislature has expressly allowed municipalities to enact anti-discrimination measures broader than those adopted by the state. 775 ILL. COMP. STAT. ANN. 5/7-108(A) (West 1999). City attorneys are also called upon to enforce state non-discrimination laws. *See, e.g.*, CAL. CIVIL CODE § 52(c) (West 1999).

The Court's decisions in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987) and *New York State Club Association v. City of New York*, 487 U.S. 1 (1988), have provided an important framework for the cities' fight against discrimination. Following the Court's decisions in these cases, cities from coast to coast enacted or amended ordinances to cover discrimination by private organizations that act as public accommodations.[9] Indeed, numerous cities modeled their statutes on the ordinances upheld by the Court in *Roberts* and *New York State Club Association*.[10] Applying these decisions, lower courts have upheld important applications of city and state anti-

[9] *See, e.g.*, CHICAGO, ILL., MUNIC. CODE §§ 2-160-020(i), 2-160-070(a) (Tab D).

[10] *See, e.g.*, BUFFALO, N.Y., CODE §§ 154-4–154-7 (1989) (Tab C); CHICAGO, ILL., MUNIC. CODE § 2-160-020(i) (addendum effective Dec. 21, 1988) (Tab D); D.C. CODE § 1-2502(24) (Tab F); LOS ANGELES, CAL., MUNIC. CODE §§ 45.95.00–45.95.04 (effective June 29, 1987) (Tab G); SAN FRANCISCO, CAL., POLICE CODE, art. 33B (effective November 17, 1987) (Tab L).

discrimination laws. *See, e.g., Fraternal Order of Eagles, Inc. v. Tucson*, 816 P.2d 255 (Ariz. Ct. App. 1991); *Elk's Lodge No. 719 and No. 2021 v. Department of Alcoholic Beverage Control*, 905 P.2d 1189 (Utah 1995), *cert. denied*, 517 U.S. 1221 (1996).

As discussed in greater detail below, the arguments advanced by petitioners in this case would, if accepted, seriously jeopardize the efforts of cities to combat discrimination. This alone provides the cities with a very keen interest in the outcome of this case. However, cities have a second vital interest in this case: several of the *amici* sponsor Boy Scout units or support them in other ways. This government entanglement provides the cities with a heightened interest in the application of their anti-discrimination laws to groups such as the Boy Scouts. It also provides important context for evaluation of the claims being advanced by petitioners in this case.

SUMMARY OF ARGUMENT

Petitioners argue that the Court should extend the holding in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), to this case and hold that prohibiting the Boy Scouts from excluding a homosexual member would abridge their First Amendment right to choose the content of their message and infringe upon their rights of association. Petitioners further argue that this Court is powerless to examine their claim — asserted for the purposes of litigation — that Boy Scouts of America has a shared anti-gay expressive purpose. If the Court accepts these arguments, the result would be the virtual disarmament of cities in the battle against discrimination. Organizations such as the Boy Scouts could effectively grant themselves an exemption from city and state anti-discrimination laws by merely asserting that enforcement of the laws would interfere with a claimed expressive purpose.

The ramifications of this case do not end there, however. Because of the longstanding and close ties between the Boy Scouts and the government, the discriminatory conduct of the Boy Scouts is, and will continue to be, perceived as endorsed by the government. The interconnection between the Boy Scouts and the government provides cities and states with a particularly compelling interest in eradicating such discrimination. Moreover, if city and state anti-discrimination laws cannot be enforced here, the cities that sponsor Boy Scouts will be put in the untenable position of either offering support to an organization that violates city anti-discrimination ordinances and policy or severing all financial and other ties to currently sponsored Boy Scout troops. A finding that petitioners are immune from city and state anti-discrimination laws could thus result in denying urban youth an important civic opportunity.

ARGUMENT

I. APPLYING *HURLEY* AS URGED BY PETITIONERS WOULD CREATE AN ENORMOUS LOOPHOLE IN THE APPLICATION AND ENFORCEMENT OF CITY ANTI-DISCRIMINATION LAWS.

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the Court held that requiring the St. Patrick's Day parade organizers in Boston to allow gays and lesbians to march as a group with a banner in the parade infringed the First Amendment rights of the organizers. The decision is explicitly founded on the inherently expressive nature of parades in general and on the expressiveness of the particular group sought to be excluded. *Id.* at 568-70, 578-81. Mere participation in the parade by openly gay individuals was expressly not at issue. *Id.* at 572.

Petitioners now urge the Court to stretch the holding in *Hurley* and thereby effectively overrule *Roberts*, *Rotary Club*

and *New York State Club Association*. Petitioners argue for a standard that would allow any group to meet the expressive purpose requirement based upon an unsubstantiated assertion of an expressive purpose alone. Petitioners also argue that the *status* of a prospective member alone renders the prospective member's conduct sufficiently expressive to fall within *Hurley*. Each of these arguments would, if accepted, have dire consequences for cities' anti-discrimination efforts.

A. Removing Courts' Ability To Examine The Claimed Expressive Purpose Of An Organization Would Defeat The Purpose Of Anti-Discrimination Laws.

To attempt to fit themselves into the *Hurley* standard, petitioners allege they have an expressive purpose at odds with the admission of gay members. Petitioners argue that the Court should take this assertion at face value, claiming "it is not the role of government to decide what a private organization's message is." (Pet. Br. at 25)[11] At a minimum, petitioners contend that a reviewing court must give deference to an expressive organization's characterization of its own beliefs. (Pet. Br. at 26) Petitioners thus take issue with the New Jersey Supreme Court's finding that the Boy Scouts do not associate to preserve the view that homosexuality is immoral and in fact do not have a single view on this subject. *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1223-25 (N.J. 1999).

Accepting petitioners' arguments would undermine city and state anti-discrimination efforts to eliminate all forms of invidious discrimination, not only discrimination on the basis of sexual orientation. The law has long recognized that courts are empowered to identify pretextual justifications for discrimination. That principle applies fully to this case. The First Amendment is not offended when a court properly finds

[11] References to petitioners' brief are cited herein as "Pet. Br." followed by the page number.

that an organization's assertion that its expressive purposes would be undermined by application of anti-discrimination laws is merely pretextual.

A directly analogous situation arose in *Brown v. Dade Christian Schools*, 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978). In *Brown*, a private sectarian school sought to exclude black children from the school on grounds that its members "sincerely held a religious belief that socialization of the races would lead to racial intermarriage, and that this belief, sanctioned by the Free Exercise Clause, should prevail against private interests created by Congress." *Id.* at 311. The trial judge examined the written literature of the school which was distributed to members of the church and the public and found that segregation was not mentioned and thus that discrimination was a matter of policy rather than exercise of religion. *Id.* at 312. In affirming the trial judge's decision, the Court of Appeals noted that the patrons of the schools were divided in their beliefs on the religious justification for segregation, and held that:

> "In such a situation the only practical course open to a Court is to examine the corporate beliefs of the institution involved, as adopted or promulgated or carried forward as an institutional concept. To do otherwise would allow the institution to pick and choose which of its members' potentially conflicting beliefs it wished to assert at any given time."

Id. at 313. Had the court in *Brown* been unable or unwilling to examine the basis for the school's purported religious beliefs about segregation to determine whether they were merely pretextual, the door would have been open for parochial schools to discriminate freely based upon unsupported assertions of religious convictions.

Similarly, in *Fiedler v. Marumsco Christian School*, 631 F.2d 1144 (4th Cir. 1980), a parochial school established by a church expelled a student for interracial dating. In its Free

Exercise defense against the student's claims under the federal civil rights statutes, the school argued that interracial dating was in conflict with its fundamentalist Christian views. The Fourth Circuit found that the church's writings, constitution and by-laws did not address interracial dating. Nor was there a common understanding amongst the members of the church of its position opposing interracial dating on religious grounds. The Court of Appeals therefore found the school's Free Exercise defense unsupportable. *Id.* at 1152-54.

Here, as in *Brown* and *Fiedler*, the New Jersey Supreme Court was correct in examining the history and literature of the Boy Scouts to determine whether its asserted expressive purpose is sincere or just a pretext for illegal discrimination. Circumscribing the ability of courts to examine the bona fides of a group's claimed message would endow certain members or officers of organizations with the ability to justify virtually any form of discrimination. Indeed, any organization with by-laws containing a reference to a "moral code" or "belief in God" could claim an expressive purpose sufficient to exempt itself from anti-discrimination laws.

Although *Roberts* has been widely used to uphold application of cities' anti-discrimination statutes, that will necessarily cease to be true if petitioners' distorted characterization of *Hurley* is accepted. For example, in *Fraternal Order of Eagles, Inc. v. Tucson*, 816 P.2d 255 (Ariz. Ct. App. 1991), the City of Tucson challenged the Fraternal Order of Eagles' ("FOE"'s) policy of not admitting women to the organization based on its ordinance prohibiting discrimination in places of public accommodation. FOE is organized as a social club which raises money for charities. FOE requires that its members "must be over 21, believe in a supreme being, not be a member of the Communist party, and be of good moral character." *Fraternal Order of Eagles*, 816 P.2d at 256. In response to FOE's contention that admitting women would violate its members' rights to freedom of association, the court performed an analysis using the standard

set forth in *Roberts* and concluded that the Eagles' First Amendment rights would not be violated if they were compelled to admit women. *Id.* at 258-59. Specifically, the court found that the members' rights of intimate association were not constitutionally protected in these circumstances and that the slight infringement imposed upon the members' right of expressive association was justified by the city's compelling interest in eradicating sexual discrimination. *Id.*

However, if in the future the FOE decides to exclude homosexuals from membership, which is also a violation of Tuscon's anti-discrimination ordinance, *see* note 3 *supra*, FOE could — under petitioners' view — defend itself by claiming that having openly gay members would convey a message with regard to morality with which FOE does not wish to be associated. Even if nothing in FOE's materials refers to disapproval of homosexuality, and even if this disapproval is contrary to the understanding and beliefs of many members, FOE's position would be upheld under the test urged by petitioners. The prior decision, *Fraternal Order of Eagles*, would not be sustainable and FOE would be free to discriminate against women, gays and anyone else it wishes to exclude.

It is thus more than just a group's "multifarious voices" that justifies court scrutiny (Pet. Br. at 27); it is the need to determine whether beliefs claimed for purposes of litigation are merely a pretext for what is otherwise unlawful activity. If no, or only minimal, inquiry were allowed into an organization's expressive purposes, public accommodations could easily hide behind an opportunistic expression of belief in order to evade anti-discrimination laws.

B. Permitting Groups To Discriminate On The Basis Of Status Alone Is An Unwarranted Infringement On Cities' Abilities To Enforce Anti-Discrimination Laws.

The *Hurley* standard requires an expressive component on the part of an individual seeking to participate in an expressive activity. To meet this requirement, petitioners argue that compelling the Boy Scouts to have an openly gay member would in and of itself be forcing the Boy Scouts to convey a message with which they do not wish to be associated. (Pet. Br. at 23-24) Petitioners urge the Court to dispense with consideration of whether the group member affects "'in any significant way' the ability of individuals to form associations that will advocate public or private viewpoints",[12] and instead seek to have the Court make assumptions based on the status of the member alone. Notably, because the policy defended by the Boy Scouts excludes openly gay members as well as leaders, the petitioners seek to ascribe an expressive component to any form of participation by an openly gay individual.

The Supreme Court of New Jersey correctly rejected petitioners' argument. Following the precedent of this Court, the New Jersey Supreme Court declined to indulge in "sexual stereotyping" that amounts to "shorthand measures in place of what the city considers to be more legitimate criteria for determining membership." *Dale*, 734 A.2d at 1225 (quoting *New York State Club Ass'n*, 487 U.S. at 13). The New Jersey Supreme Court rightfully pointed out that "[t]he invocation of stereotypes to justify discrimination is all too familiar. Indeed, the story of discrimination is the story of stereotypes that limit the potential of men, women, and children who belong to excluded groups." *Id.* at 1226.

[12] *New York State Club Ass'n*, 487 U.S. at 13 (quoting *Rotary Club*, 481 U.S. at 548).

Petitioners' First Amendment rights are fully protected by their ability to expel members who engage in conduct that undermines the Boy Scouts' objectives. Scouts who are disruptive, or otherwise unwilling to participate in Scouting activities and curriculum, remain subject to expulsion even under the judgment below. While the First Amendment protects petitioners' rights to decide for themselves what the Boy Scouts' message, objectives and curriculum should be, free from governmental interference, nothing in the judgment below infringes that right. The sexual orientation of a Scout, without more, simply does not undermine petitioners' control over organizational objectives and beliefs, just as the presence of members with varying backgrounds in any social or political organization does not undermine the ability of organizational leadership to control that organization's stated beliefs and objectives.

In *Elk's Lodge No. 719 and No. 2021 v. Department of Alcoholic Beverage Control*, 905 P.2d 1189 (Utah 1995), *cert. denied*, 517 U.S. 1221 (1996), the court used the *Roberts* analysis to uphold application of the State's requirement that a club or other establishment seeking a liquor license comply with the laws of Utah, including the law prohibiting discrimination on grounds of gender. However, the result may well have been different if petitioners' broad *Hurley* argument is accepted. The Utah court rejected the clubs' freedom of association claims and distinguished *Hurley* on grounds that it addressed only the right of a private group of parade organizers to control the message it sought to convey in the parade and did not address the organizers' rights to exclude individuals based on status alone. *Id.* at 1196. However, the standards proposed by petitioners would permit the argument that allowing women to be present at a club would in and of itself promote a message that conflicts with the club's moral standards. The club could assert that it has an expressive purpose of advocating that women stay at home or not drink.

Petitioners' attempt to infer a message from mere participation by members of a particular group is unsupported by the *Hurley* rationale from which they seek sustenance. A ruling in support of petitioners would gravely undermine anti-discrimination laws and serve only to promote harmful stereotyping.

II. PETITIONERS' VOLUNTARY ENTANGLEMENT WITH CITIES BOTH UNDERMINES THEIR ASSERTION OF A COMMON ANTI-GAY EXPRESSIVE PURPOSE AND STRENGTHENS NEW JERSEY'S COMPELLING INTEREST.

City governments, including fire departments, police departments and schools, are major sponsors of Boy Scout troops throughout the country. 1990 Boy Scouts of America Ann. Rep. 8 (Tab O);[13] *Chartered Organizations: Top 30 for 1997 Ranked by Total Youth*, BSA Today, No. 5-886, Feb./March 1998 (Tab R). As of December 31, 1990 — soon after the time petitioners expelled respondent — fire departments sponsored troops with 55,175 youth and law enforcement agencies sponsored troops with 42,924 youth. 1990 Boy Scouts of America Ann. Rep. 8 (Tab O). Public schools, which are the largest type of chartered organization by number of youth participating, sponsored troops with 1,096,425 youth in 1990. *Id.* In New Jersey, law enforcement agencies, fire departments, city governments and the military sponsor approximately 250 scouting units. *Dale*, 734 A.2d at 1201. Public schools and school-affiliated groups in that state sponsor nearly 500 units, comprising approximately 20 percent of chartered organizations statewide. *Id.*

[13] Citations to "Tab __" refer to the booklet of materials that *amici* cities have lodged with the Clerk of the Court.

Amicus curiae City of Los Angeles, through its police and fire departments, sponsors Explorer programs,[14] and Boy Scout groups regularly use city facilities. In fact, each of the Los Angeles Police Department's 18 area stations sponsors Explorer programs. *Amicus curiae* New York City and certain of its agencies provide assistance and funding for Boy Scout posts and activities. Approximately 75 police precinct houses — more than 90 percent of all the precincts in New York City — support Explorer posts. 1996 Boy Scouts of America Ann. Rep. 5 (Tab Q). Through the New York Police Department, "the law enforcement Exploring program . . . reaches into every community in New York City". *Id.* Fire department precincts sponsor Explorer programs in The Bronx and Brooklyn, and other Boy Scout groups regularly meet at New York City public schools. In Newark, 19 of the city's 40 public schools host Cub Scout packs and Boy Scout troops. *Id.* at 10. *Amicus curiae* City of Tucson provides direct financial assistance to the Boy Scouts and its police department participates in Boy Scout programs.

Explorers, wearing Explorer uniforms, perform volunteer service at these government posts, "assum[ing] . . . adultlike roles, identif[ying] with adult careers, and participat[ing] in community and citizenship responsibilities." JA412.[15] *See also* Larry A. Taylor, *How Your Tax Dollars Support the Boy Scouts of America*, The Humanist, Sept./Oct. 1995, at 6, 6 (Tab S) (describing Explorers giving public tours of city police department). In Los Angeles, Explorers can be seen assisting in traffic control. In New York, Explorers secure crime scenes for city police officers and "gain appreciation for front-line police work by doing it themselves". 1996 Boy Scouts of America Ann. Rep. 5 (Tab Q). In Hartford, Connecticut,

[14] Explorers is a Boy Scout membership program for young men and women between the ages of 14 and 20.

[15] Citations to "JA" refer to the Joint Appendix submitted by petitioners and respondent.

Explorers periodically accompany police officers on city patrols, assisting motorists at traffic accidents and helping control crowds. 1994 Boy Scouts of America Ann. Rep. 7 (Tab P). They also help enforce the traffic laws. *Id.*

Municipal sponsorship is the result of a conscious decision by the Boy Scouts to solicit municipalities as their partners in Scouting. The Boy Scouts' choice to affiliate itself with the government is relevant to this case for three reasons. First, it undermines petitioners' position that the Boy Scouts has a common, shared anti-gay expressive purpose. The voluntary and intentional decision of petitioners to associate themselves with municipalities that are dedicated to anti-discrimination wholly discredits petitioners' claim that requiring them to obey applicable anti-discrimination laws would undermine the Boy Scouts' organizational purpose. Second, government entanglement magnifies the harm caused by petitioners' invidious discrimination and accordingly provides New Jersey with a compelling interest in enforcing its Law Against Discrimination. Third, if government is not permitted to enforce anti-discrimination laws against petitioners, cities ultimately will be unable to sponsor petitioners' activities, thereby depriving urban youth of an important civic opportunity. Preserving the participation of urban youth further supports government's compelling interest in this case.

A. Cities' Participation In The Boy Scouts Undermines Petitioners' Assertion That The Boy Scouts Has A Common Anti-Gay Expressive Purpose.

Cities are major participants in the Boy Scouts. Cities do not participate in the Boy Scouts for the purpose of expressing the view that homosexuality is immoral. Like state governments, many religious organizations and other civic organizations, as well as many individual adult Scout leaders, cities do not share the expressive purpose articulated by the petitioners for the purpose of this litigation. *See, e.g.*, Brief of

Amici Curiae The General Board of Church and Society of The United Methodist Church *et al.* in Support of Respondent, Petition for a Writ of *Certiorari*, *Boy Scouts of America v. Dale* (U.S. 1999) (No. 99-699); Affidavits (JA655, JA673-JA674, JA626-JA627). The prominent involvement of these organizations and individuals belies the petitioners' factual contention — rejected by the New Jersey Supreme Court — that an expressive purpose of the Boy Scouts is to affirm heterosexuality as moral and homosexuality as immoral.

In fact, *amici* cities — and many other cities around the country — condemn discrimination based on a number of characteristics, including sexual orientation. Cities' views on these issues are clear and manifest. For instance, many of the *amici* cities have adopted laws explicitly prohibiting discrimination in public accommodations based on sexual orientation. *See* note 3 *supra*. Nationwide, 119 cities and counties have adopted laws or policies that provide varying degrees of protection against discrimination on the basis of sexual orientation. *See* Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 Harv. L. Rev. 1905, 1908 n.24 (1993).

Moreover, petitioners are aware of the views of some of their unit charterers and yet have continued to accept their active participation and sponsorship.[16] For instance, in 1998, the Los Angeles Board of Police Commissioners unanimously adopted a motion that the Los Angeles Police Department's Explorers' program "has not discriminated and will not discriminate against gays and lesbians or members of other protected classes as Explorers and Explorer Advisors." Bd. of Police Commissioners, Motion, May 12, 1998 (Tab T).

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[16] "When deciding whether to grant an individual unit charter, BSA investigates 'the general objectives, purpose, character, intent, and programs of the prospective chartered organization or community group and its compatibility with the aims and purposes of the Boy Scouts of America.'" *Dale*, 734 A.2d at 1201.

Although the decision by the L.A.P.D. was well publicized, the Boy Scouts did not revoke the L.A.P.D. Explorers' program charter and has continued to renew it. *See* Paul O'Donoghue, *LAPD Explorers*, City News Service, May 12, 1998 (Tab U) ("'What's interesting here is that the [commission] is telling the Boy Scouts that it will not be a party to discrimination. The question is what the response of the Boy Scouts will be'".).

Similarly, in New Jersey, where many public entities sponsor Boy Scout units, the lower court found no evidence of charter applicants having been rejected because of their expressed views on any subject. *Dale*, 734 A.2d. at 1202 n.2. Indeed, the charters of troops that have adopted resolutions expressly condemning the Boy Scouts' anti-gay policy have not been revoked. *See, e.g.*, JA628, JA630 (Santa Clara troop that passed resolution condemning Boy Scouts' anti-gay policy was renewed); JA640-JA644 (Baden-Powell Council passing resolution objecting to the Boy Scouts' anti-gay policy). In contrast, the petitioners expelled James Dale, who expressed no view on homosexuality within the context of the Boy Scouts prior to his expulsion.

B. Boy Scouts' Entanglement With Cities Increases The Harmfulness of Discrimination And Heightens Government Interest In Regulating Petitioners.

Discrimination "denies society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625. Invidious, status-based discrimination in accommodations offered to the public is abhorrent even without the imprint of government approval or sponsorship. *See Runyon v. McRary*, 427 U.S. 160 (1976) (small private schools denying admission to children solely on basis of race). Discrimination based on status deprives the individual of his or her "individual dignity" and "stigmatiz[es]" that individual. *Roberts*, 468 U.S. at 625. Discrimination is "humiliation, frustration, and embarrassment that a person must surely feel

when he is told that he is unacceptable as a member of the public" because of such characteristics as race or color. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (quoting S. Rep. No. 872, 88th Cong., 2d Sess., 16).

The stigmatizing injury is more pernicious, and the costs to society are greater, where the discriminating organization enjoys government endorsement. Discrimination that carries the imprint of government support sends a message to an individual that he or she is an unequal member of society and a second-class citizen. It represents an especially hurtful affront to individual dignity.

Similarly, the barriers erected by status-based discrimination to political and social integration and economic advancement are enlarged by the perception of government sponsorship. Petitioners' discrimination does not simply involve a large private club shutting its doors to a segment of citizens possessing a certain, shared characteristic, as was the case in *Roberts* and *Rotary Club*. Here, one of the nation's premier civic youth organizations, one that enjoys the active and direct support of local governments, is acting in defiance of valid, local civil rights laws. Denying gays leadership positions and excluding gay youth from participating in such an organization forecloses significant civic opportunities from citizens on an invidious basis and denies society the benefits of their participation.

The added injury and costs of discrimination that result from perceived government endorsement heightens the already compelling interest of cities (and the State of New Jersey) to enforce their anti-discrimination laws against petitioners. The New Jersey Supreme Court held that, as a matter of New Jersey law, the Boy Scouts qualify as a "place of public accommodation" within the New Jersey Law Against Discrimination. In evaluating whether such enforcement unjustifiably infringes the First Amendment rights of the Boy

Scouts, the Court must evaluate the nature of the government interest at issue. *See Rotary Club*, 481 U.S. at 549. This is essentially a balancing-of-interests test, *see Roberts*, 468 U.S. at 626-29, and the scales should reflect the seriousness of the harm. Where the private actor not only operates a public accommodation, but also acts with the imprimatur of government endorsement, the government has an especially compelling interest in ensuring non-discriminatory access and preventing the harm that flows from invidious discrimination.

Having actively sought and obtained government sponsorship such that it is a quasi-public organization, the Boy Scouts should not be permitted to exempt itself from the anti-discrimination laws enacted by the same governmental entities. Government has a compelling interest to prevent discriminatory conduct that enjoys the imprimatur of government endorsement.

C. Cities Have A Further Compelling Interest In Eradicating Invidious Discrimination Where The Failure To Do So Will Result In Denying An Important Opportunity To All Urban Youth.

Petitioners' voluntary entanglement with cities and other governmental entities provides the *amici* cities with a further compelling interest here — an interest in preserving an important opportunity for thousands of urban youth. As noted above, many cities are not permitted by law to support organizations that follow discriminatory policies in violation of applicable anti-discrimination statutes. *See, e.g.,* LOS ANGELES, CAL., MUNIC. CODE § 49.75[a][3] (1999) (Tab G) ("It shall be . . . unlawful . . . to deny any individual the full and equal enjoyment of . . . any . . . program . . . wholly or partially funded or otherwise supported by the City of Los Angeles, on the . . . basis of such individual's sexual orientation."); *see also Dale*, 734 A.2d at 1212 n.7 ("New Jersey governmental entities are, of course, bound by the LAD. Their sponsorship of, or conferring of special benefits on, an

organization that practices discrimination would be prohibited.").

Thus, to the extent that cities are prevented from enforcing their anti-discrimination laws by an unduly constricted interpretation of what the First Amendment permits them to do to fight identity-based discrimination, they may be forced to sever all ties to the Boy Scouts and require the disbanding of the hundreds of city-sponsored Boy Scout troops in which thousands of urban children currently participate. Such a result would not only contravene the Boy Scouts' own policy,[17] but could have potentially devastating consequences in urban areas where participation in the Boy Scouts is a particularly important civic opportunity.

In response to the current litigation strategy of the Boy Scouts' corporate headquarters, some cities have already severed their ties with the Boy Scouts. *Amicus curiae* Chicago no longer sponsors Boy Scout units. *Chicago Drops Ties to Boy Scout Program*, Chronicle of Philanthropy, Feb. 26, 1998, at 47 (Tab V). The police department of San Diego discontinued its charter, ending a program that had been a part of the department for more than 25 years. *Police Drop Scout Post Over Policy on Gays*, L.A. Times, Oct. 21, 1992, at A16 (Tab W). The public schools of *amicus curiae* San Francisco have eliminated their Scouting programs. Nanette Asimov, *Scouts Hold Fast to Homosexual Ban*, S.F. Chronicle, Sept. 18, 1991, at A15 (Tab X). Other *amici*, like Portland and Los Angeles (through its police department), sponsor troops but on the understanding that the troops will not discriminate on the basis of sexual orientation.

If petitioners' arguments here are accepted — and the Boys Scouts are permitted to create for themselves an exemption

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[17] *See* JA64 ("The national objective, as well as for regions, areas, councils, and districts is to see that all eligible youth have the opportunity to affiliate with the Boy Scouts of America and receive the finest possible quality program under the best leadership available.").

from city and state anti-discrimination laws — the situation will only become worse. Additional city-sponsored troops will be required to close their doors and turn away prospective members.

The Boy Scouts is perhaps *the* premier civic youth organization in the United States; more than 82 million American boys have participated since 1910, and many girls participate through the Explorer program. JA107. Like its counterpart the Girl Scouts, which does *not* discriminate on the basis of sexual orientation, the Boy Scouts is a proven training program for good citizenship and instills values that local governments also wish to foster. It is for this reason that cities have actively participated in Scouting and that cities have a compelling interest in continuing to do so in the future. That compelling interest extends to preventing discriminatory practices that would make future participation impossible.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of New Jersey should be affirmed.

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