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 STATE OF NEW YORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Filed March 29, 2000

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

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The State of New York, joined by the states of California, Hawaii, Maryland, Massachusetts, New Hampshire, Oklahoma, Oregon, Vermont and Washington, respectfully submits this brief in support of respondent James Dale. *Amici* states urge affirmance of the New Jersey Supreme Court's unanimous judgment that application of the New Jersey Law Against Discrimination does not violate petitioner Boy Scouts of America's First Amendment free association rights.

INTEREST OF AMICI CURIAE

Equality of opportunity for all people to participate, benefit and contribute as full members of society, regardless of race, gender, religion or other applicable criteria, is a value of utmost importance to *amici* states. State anti-discrimination laws promote this vital state interest, thereby protecting not only citizens' privileges and rights, but the foundation of a free democratic society, its institutions, and the peace, safety and general welfare of the states and their inhabitants. *Amici* remain firmly committed to ending invidious discrimination by requiring full compliance with their state anti-discrimination laws. Reversal of the decision below would severely hamper the states in the attainment of such goals by carving out a broad, unprecedented exemption to generally applicable anti-discrimination laws with respect to all invidious distinctions sought to be eradicated by the people of a state.

Because petitioner actively promotes and publicly touts its close ties with both state and local government agencies throughout the country, moreover, the states' interest in this case is deeper than in any of this Court's

prior free association membership cases. Allowing petitioner to invoke an unprecedented and overbroad "First Amendment exemption" would make state and local governments unwilling accomplices in discrimination prohibited by their own laws. The fundamental legal and constitutional issues would be identical if petitioner were expelling its members on the basis of race, religion, national origin, or various other invidiously discriminatory grounds prohibited by all *amici* states' laws. The decision that the Court renders in this case, therefore, will determine whether states retain their sovereignty to pass, implement and enforce laws that they determine are necessary to protect their citizens' equality of opportunity and personal dignity.

SUMMARY OF ARGUMENT

Under this Court's free association precedent involving membership organizations, BSA's discrimination cannot be immune from state anti-discrimination law because it does not promote BSA's true expressive purposes or any views that "brought [BSA's members] together." Petitioner argues that the courts should not analyze an organization's expressive purposes but rather must blindly accept its bald statement of its expressive purposes in litigation, no matter how contrary to the record. In addition to finding no support in the case law, petitioner's argument would eviscerate state anti-discrimination law by providing a license for otherwise illegal discrimination.

Even if BSA's discrimination did further an expressive purpose of the organization, New Jersey's compelling interests in eliminating discrimination substantially outweigh the incidental abridgement of

BSA's free association rights. Under settled principles of state sovereignty, a state may determine that its compelling interests in fighting discrimination extend beyond what is required by the Federal Constitution, as long as the state law is not aimed at the suppression of ideas, and requires no more than is necessary for furtherance of the state's compelling interests. New Jersey's anti-discrimination law satisfies both requirements.

BSA's deep entwinement with state and local government agencies strengthens the states' compelling interests in this case, and weakens BSA's claim to a special exemption from state anti-discrimination laws. State statutes extend special access, tax exemptions and other benefits to BSA. The organization trumpets its ties to government in its recruiting efforts. Even if this Court were to adopt a free association analysis that, contrary to its precedent, examines only the nature of the organization, therefore, BSA's unusual and extensive ties to government make a special exemption from that government's law more inappropriate in this case than in any of this Court's prior membership cases.

Petitioner erroneously contends that under *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995), an organization's specific expressive purposes are not "legally relevant" in determining whether its discrimination is protected by the First Amendment. *Hurley* involved direct infringement on pure expression, not the free association interest of a membership organization. This Court's free association membership cases have consistently required the balancing of three factors that are generally not present in pure expression cases: the burden on an organization's particular expressive purposes, the equal

access rights of individuals, and the state's compelling interests in eliminating discrimination. Petitioner would have this Court ignore all of these factors and abandon its free association jurisprudence.

This case provides no basis for departing from this Court's settled free association precedent. For decades, that precedent has been embraced and easily applied by both state and federal lower courts. The states have relied on it in the drafting, implementation and enforcement of their anti-discrimination laws. Individuals have relied on it to protect their equal opportunity and personal dignity. Organizations' memberships have relied on it to protect their First Amendment free association rights. No contrary law has evolved, nor has discrimination been eliminated so as to warrant any change in this Court's free association jurisprudence.

ARGUMENT

I. APPLICATION OF STATE LAW DOES NOT VIOLATE BSA'S FIRST AMENDMENT RIGHTS

Under this Court's free association precedent involving membership organizations (the "membership precedent"),[1] a private organization with expressive purposes may not discriminate in violation of state or federal law, unless it can "show that it is organized for *specific expressive purposes* and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership." *New York State Club Ass'n v. New York City*, 487 U.S. 1, 13 (1988) (emphasis added); *see also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (although Rotary Clubs engage in activities protected by First Amendment, admitting women would not interfere with organization's specific expressive purposes); *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984) (compelling Jaycees to accept women as members did not infringe expressive association rights even though "a 'not insubstantial part' of the Jaycees' activities constitutes protected expression"). Application of anti-discrimination law interferes with an "expressive purpose" only if it "impair[s] the ability of the original *members* to express only those views that *brought them together*." *Roberts*, 468 U.S. at 623 (emphasis added).

In this case, the application of New Jersey's anti-discrimination law does not interfere with any of BSA's expressive purposes. Even if it did, BSA's First Amendment challenge would fail, because compelling state interests in eliminating discrimination substantially outweigh any incidental abridgement of BSA's expressive purposes.

A. BSA's Discrimination Is Not Protected By The First Amendment

Given BSA's policy statements inconsistent with discrimination, concessions that such discrimination is morally offensive to a substantial portion of its

[1] Petitioner refers to three of the membership cases as "the *Roberts* trilogy." As discussed below, numerous other decisions by this Court, including *Bob Jones University v. United States*, 461 U.S. 574 (1983), and *Runyon v. McCrary*, 427 U.S. 160 (1976), also provide guidance on resolving the tension between the First Amendment and invidious discrimination by private organizations. *Amici* states refer to these cases collectively as the Court's "membership precedent."

membership, and entanglement with government that opposes its discrimination,[2] petitioner's litigation contention that discrimination is necessary to one of its expressive purposes lacks credibility. As in *Roberts*, Dale's membership in BSA "requires no change in the [organization's] creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." 468 U.S. at 627. Thus, as in *Roberts*, petitioner's attempt to use the First Amendment to justify its discrimination should be rejected.

While acknowledging that "it does not have an 'anti-gay' policy," Pet. Br. at 6, petitioner contends that the courts must accept its litigation-based "interpretation" of the words "clean" and "morally straight" to require exclusion of gay people, because "*[t]he very argument that the government may impose its own interpretation on an organization's moral message raises First Amendment concerns of the highest order.*" Pet. Br. at 25-26 (emphasis in original).

The essence of petitioner's argument is that a

[2]*See Dale v. Boy Scouts of America*, 160 N.J. 562, 609, 734 A.2d 1196 (1999) (BSA has long maintained an expressly inclusive policy, stating that "any boy" is welcome); *id.* at 612, 615 ("Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality"); Petitioner's Brief ("Pet. Br.") at 26 n. 7 & Petitioner's Reply on Petition for Certiorari ("Reply Pet. Cert.") at 8 & n.6 (conceding that substantial number of members and troop sponsors view petitioner's *discrimination*, not homosexuality, as immoral and contrary to religious teachings). That petitioner has not expelled the tens of thousands of BSA members who belong to faiths that oppose its discrimination further demonstrates that its position in this litigation does not promote an expressive purpose, but is a pretext for invidious discrimination.

party's litigation stance as to its expressive purposes, even if otherwise unsupported by the record, is entitled to unconditional judicial deference. Yet courts can and do make factual determinations that are contrary to a party's claims. Indeed, petitioner's insistence that this Court has always blindly "accepted . . . groups' characterizations of their views" in litigation is erroneous. *See* Reply Pet. Cert. at 2. In *Rotary Club*, for example, Rotary International's Constitution *expressly* excluded women as members. 481 U.S. at 541. Similarly, the General Secretary of Rotary International "testified that the exclusion of women results in an 'aspect of fellowship . . . that is enjoyed by the present male membership,'" and that the policy was necessary to "operate effectively in foreign countries with varied cultures and social mores." *Id.* Yet this Court concluded that "the evidence fail[ed] to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes." *Id.* at 548; *see also Roberts*, 468 U.S. at 627-28 (rejecting Jaycees' express all-male policy and assertion that admitting women would interfere with Jaycees' public positions on political issues).

Moreover, petitioner's argument that the courts must blindly accept an organization's litigation stance as to its expressive purposes would eviscerate all states' anti-discrimination laws. Under petitioner's theory, *any* organization engaging in invidious discrimination could simply assert in litigation (as petitioner has) that its stated purposes, on their face irrelevant to illegal discrimination, implicitly require it. If "morally straight" and "clean" suffice to immunize otherwise illegal discrimination, so must every description of positive character traits, such as "ethical," "proper," "worthy" and

"respectable." Nor could there be any limit as to the kinds of discrimination that would become permissible under this framework. An organization's "interpretation" of "worthy" to exclude people of certain races, religions or national origins would not be subject to judicial assessment. Both state and federal anti-discrimination law would become widely unenforceable, thereby undoing decades of this Court's membership precedent. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 175-76 (1976) (rejecting racially discriminatory private schools' free association challenge to enforcement of federal civil rights statute).[3]

B. States Should Retain Their Sovereignty To Determine The Scope Of Their Compelling Anti-Discrimination Interests

Even if application of New Jersey's law does abridge BSA's free association rights, the compelling state interests served by a law such as New Jersey's

[3]Petitioner also argues that New Jersey law infringes its right of intimate association. Pet. Br. at 39-44. The intimate relationships to which this Court has accorded such protection -- marriage, begetting and bearing children, child rearing and education, and cohabitation with relatives -- provide no support for petitioner's intimate association claim. *See Rotary*, 481 U.S. at 545. Further, each of the factors that this Court considers in determining whether an association is "sufficiently personal or private to warrant constitutional protection," *id.* at 546, weighs against petitioner's claimed right: BSA is large, nonselective, has an inclusive rather than exclusive purpose, and invites nonmembers to attend meetings. *See* 160 N.J. at 608-09. Petitioner's intimate association claim is further contradicted by its extensive ties with government agencies across the country, which sponsor and "own" tens of thousands of petitioner's troops and units, as well as by its affiliations with the federal government. *See infra*, Point II.A.

justify its application. Several *amici* submitting briefs in support of petitioner have argued that New Jersey cannot have compelling interests in eliminating sexual orientation discrimination because it is not entitled to heightened scrutiny under the Federal Constitution. *See* Brief of American Center for Law and Justice et al. at 21-23; Brief of the Public Advocate of the United States et al. at 23. Whether or not sexual orientation is a classification that should be entitled to heightened scrutiny,[4] petitioner's *amici* miss the point. Under settled principles of state sovereignty, states may have compelling interests in providing greater protection for their citizens than the Federal Constitution requires.

[4]Contrary to arguments by petitioner's *amici*, the question remains unsettled for purposes of federal law. In *Romer v. Evans*, 517 U.S. 620, 632 (1996), it was not necessary for this Court to decide whether sexual orientation discrimination should be entitled to heightened scrutiny because Colorado's Amendment 2 failed rational basis scrutiny. Even courts that have declined to apply heightened scrutiny have recognized that gay people "have suffered a history of discrimination." *See, e.g., High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 465 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *cf. Romer*, 517 U.S. at 627 (But for this Court's application of the Equal Protection Clause to strike down Amendment 2, Colorado's voters would have "withdraw[n] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination.") Moreover, the Hawaii Supreme Court recently suggested that sexual orientation may be entitled to strict scrutiny under that State's Constitution. *See Baehr v. Miike*, 1999 Haw. LEXIS 391, at *5 n.1 (Case No. 20371) (Ha. 1999). In any event, *amici* states need not take a position on the constitutional suspect class status of gay people because, as discussed below, the Federal Constitution does not establish an upper limit on state compelling interests.

In consistently holding that anti-discrimination laws serve "compelling state interests of the highest order" in "eliminating discrimination and assuring [the states'] citizens equal access," this Court has made clear that states may define the scope of their "compelling interests," as long as they do so through neutral laws of general applicability, "unrelated to the suppression of ideas," and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of those interests. *See, e.g., New York State Club*, 487 U.S. at 13 (upholding law that "prevents an association from using race, sex *and other specified characteristics* as shorthand measures in place of *what the city considers* to be more legitimate criteria for determining membership") (emphasis added); *Rotary*, 481 U.S. at 549 (public accommodations laws, which protect classes beyond those protected by Federal constitutional heightened scrutiny, "plainly serv[e] compelling state interests of the highest order").

In *Roberts*, this Court noted that "many states . . . ha[ve] progressively broadened the scope of [their] public accommodations law[s] in the years since [they were] first enacted, both with respect to the number and type of covered facilities *and with respect to the groups against whom discrimination is forbidden.*" 468 U.S. at 624 (emphasis added). Indeed, the state law upheld in *Roberts* included disability, which is not entitled to heightened scrutiny under the Federal Constitution. *See* 468 U.S. at 615; *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41 (1985) (classifications based on physical and mental disability not entitled to heightened constitutional scrutiny). This Court nonetheless held that Minnesota's law promoted the state's "compelling interests" in eliminating

discrimination.

This Court's analysis of "compelling state interests" in the membership cases is consistent with its longstanding precedent as well as with principles of state sovereignty. In defining the scope of their anti-discrimination laws, and of their "compelling interests," the states may go beyond what is required by federal or constitutional law. *See Crawford v. Board of Ed. of Los Angeles*, 458 U.S. 527, 542 (1982) (states may go beyond the requirements of the Federal Constitution in their anti-discrimination laws). Indeed, this Court has specifically held that state interests not identified in the Federal Constitution may nevertheless be sufficiently important to outweigh incidental infringements on First Amendment rights. *See Braunfeld v. Brown*, 366 U.S. 599, 602-03 (1961) (plurality opinion), and 366 U.S. at 461-62 (cross-referenced concurring opinion) (Pennsylvania's interests in improving health, safety, morals and general well-being of citizens justify Sunday closing laws despite indirect burden on exercise of religion); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (state statute prohibiting sale of literature by minors, designed to reach crippling effects of child employment, upheld despite infringement on Jehovah's Witnesses free exercise of religion); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) ("Where a [state] restriction . . . is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection").

While this Court has consistently held that state anti-discrimination laws promote "compelling state interests," in this case, at most an "important or

substantial" state interest is necessary to outweigh any "incidental abridgement" of BSA's free association rights (which, as discussed above, were not abridged at all). *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 567, 582, 588-90 (1991) (plurality, concurring and dissenting opinions, with eight members of the Court agreeing upon proper standard); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).[5] The New Jersey Supreme Court's holding that the State's compelling interests in eliminating discrimination outweigh the incidental abridgement of petitioner's associational rights, if any, is therefore firmly rooted in this Court's precedent.

II. THE STATES HAVE COMPELLING INTERESTS IN PROHIBITING ILLEGAL DISCRIMINATION BY ORGANIZATIONS DEEPLY ENTWINED WITH GOVERNMENT

The states' sovereignty in determining the scope of their compelling interests in eliminating illegal discrimination must extend at least as far as an organization such as BSA, which actively promotes and touts its extensive government entanglements, including sponsorships (i.e., ownership) of troops by government agencies and a vast array of government-provided

[5]Under Justice Scalia's concurring opinion in *Barnes*, the application of New Jersey's anti-discrimination law in this case should not be subject to any heightened First Amendment scrutiny because it is a "general law regulating conduct," in this case discrimination, "and not specifically directed at expression." 501 U.S. at 572 ; *see also Roberts*, 468 U.S. at 628 (indicating that a "legitimate state interest" might have sufficed to uphold Minnesota's law).

benefits and privileges.[6] Ignoring its deep entwinement with government, however, petitioner relies in part on Justice O'Connor's concurring opinion in *Roberts* to contend that, as a non-commercial, nonprofit membership organization, it is entitled to a special exemption from the application of state anti-discrimination laws. *See* Pet. Br. at 34-35. Of all organizations, BSA's strong ties to government make it one of the least deserving of any such special exemption.

Indeed, while Justice O'Connor's *Roberts* analysis examines the nature of the organization, rather than its specific expressive purposes, to determine whether it is entitled to First Amendment protection, *see* 468 U.S. at 633 (O'Connor, J., concurring in the judgment), she expressly noted that she was proposing a different analysis from the one adopted by the Court, *see id.* at 632. Even under a logical extension of the analysis in that opinion, petitioner should not be entitled to evade state anti-discrimination law.

[6]*Amici* states do not contend that all state anti-discrimination laws must be applicable to BSA, but that states should retain sovereignty to determine whether their laws do extend so far. Thus, the California Supreme Court's decision in *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P.2d 218 (1998), holding that BSA is not a "business establishment" subject to California's Unruh Civil Rights Act, does not represent a conflict with the New Jersey Supreme Court's decision in this case, but an example of the different reach of different states' anti-discrimination laws that contain very different language.

A. An Organization With Extensive Government Entanglements Is Not Entitled To Special First Amendment Protection

BSA's extensive government affiliations distinguish it from the vast majority of organizations. As of 1993, over 22,000 Scouting units nationwide, approximately one in six, and over 7,000 of the highly prestigious "Explorer Units," approximately one in three, were sponsored by state and local government agencies. *See* Larry A. Taylor, *How Your Tax Dollars Support the Boy Scouts of America*, 55 The Humanist No. 5 at 3-4 (Sept-Oct 1995).[7] Each sponsor actually "owns" its local troop. *Id.* at 1. BSA describes the relationship as similar to "franchising": "local ownership while still using the corporation name and resources." *Id.* at 2 (citing BSA literature).

State laws throughout the country, moreover, confer special benefits on BSA, including numerous tax exemptions, free use of and special access to state property, and use of school facilities, among many other

[7]Because government-sponsored units tend to be substantially larger than those sponsored by other institutions, these "unit-based" statistics understate government involvement in BSA. In 1990, the year that BSA expelled Dale, for example, public schools alone sponsored more than 25 percent of the youth members nationwide, more than any other single institution, and more than three times as many as the second largest sponsor, the Mormon Church. *See* 1990 Boy Scouts of America Annual Report, submitted to the United States House of Representatives, at 8, 16.

privileges.[8] State statutes also authorize direct financial support to BSA funded through, for example, specialty license plate programs.[9] The New Jersey Supreme Court's opinion detailed other links that BSA has to not only state and local governments, but the federal government as well, including the military. *See* 160 N.J. at 591-94.

"An association must choose its market." *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring in the judgment). Petitioner has chosen to actively promote close affiliations with and sponsorships from government agencies, and proudly "markets" those unique

[8]*See, e.g.*, Ark. Code Ann. §§ 26-52-401, 26-52-1004 (exemption from tax on sale and rental of all tangible personal property and services); Cal. Educ. Code §§ 38134, 82542 (use of facilities and grounds of elementary and secondary schools and community colleges); Cal. Rev. & Tax Code § 6361 (exemption from retailer tax for sale of food, beverage and other products); Ind. Code Ann. § 6-1.1-10-25 (exemption from property tax); Kan. Stat. Ann. § 19-2696 (special agreements for use of public lands); Md. Code Ann. Tax-Prop. § 7-233 (exemption from property tax); La. Rev. Stat. Ann., tit. 48, §§ 971, 999 (free passage over toll bridges and ferries); Mich. Comp. Laws § 211.7q (exemption from property tax); N.J.S.A. 23:2-3 (authorizes Division of Fish, Game and Wildlife to "stock with fish any body of water in this state that is under the control of and for the use of . . . Boy Scouts"); N.J.S.A. 39:3-27 (exemption from motor vehicle registration fees); Okla. Stat. Ann., tit. 63, § 4106, tit. 68, § 1356 (exemptions from sales and excise taxes); Tex. Parks & Wild. Code Ann. § 68.082 (special permission to possess and shoot firearms on state lands); Va. Code Ann. §§ 58.1-3609, 58.1-3614 (exemption from property tax); Wis. Stat. Ann. § 70.11 (exemption from property tax).

[9]*See, e.g.*, Ala. Code § 32-6-511; Fla. Stat. Ann. § 320.08058; Ind. Code Ann. § 9-18-37-5; Ohio Rev. Code Ann. §§ 4501.41, 4501.71; V.I. Code Ann. tit. 17, § 362.

advantages in recruiting and public relations materials. *See* 160 N.J. at 592-94. An organization so entangled with government should not be entitled to a First Amendment exemption from that government's generally applicable anti-discrimination laws, even if the organization is not a "state actor," and even if its discrimination arises out of "sincerely held beliefs." *Cf. Bob Jones University v. United States*, 461 U.S. 574, 602-04 (1983) (upholding, against First Amendment free exercise challenge, revocation of tax-exempt status to a religious school "that engage[d] in racial discrimination on the basis of sincerely held religious beliefs")[10]; *Gilmore v. City of Montgomery*, 417 U.S. 556, 573 (1974) (discrimination is prohibited if there is "significant state involvement in the private discrimination alleged"). To hold otherwise would put state and local governments in the untenable position of condoning and facilitating the violation of their own laws and "compelling interests." Thus, if this Court were to follow the approach in Justice O'Connor's *Roberts* concurrence, examining the nature of the organization rather than its specific expressive purposes, the judgment of the court below should still be affirmed.

Respondent should also prevail under Justice O'Connor's approach because BSA does not exist primarily for "expressive" purposes. *See* 468 U.S. at 638. The Jaycees, for example, did engage in "protected expressive activities," but because it was "first and

[10]Although *Bob Jones* did not result in the mandatory termination of a racially exclusionary policy (indeed, no party was seeking such relief), it demonstrates that even an institution with genuine expressive purposes justifying its discrimination may not engage in that discrimination if, like BSA, it receives government benefits.

foremost" a nonexpressive organization, Justice O'Connor concluded that its First Amendment challenge should be rejected. *Id.* at 639.

Like the Jaycees, BSA "is not a political party, or even primarily a political pressure group." *Id.* Petitioner's Internet web site describes the organization's "purpose" as "provid[ing] an educational program for boys and young adults to build character, to train in the responsibilities of participating citizenship, and to develop personal fitness." Http://www.bsa.scouting.org; *see also* 160 N.J. 593-94 (discussing petitioner's "educational and recreational nature," and its special access to military facilities for Scouting shows, meetings and training activities).

Like the Jaycees and the Rotary Club, BSA does have some expressive characteristics, but its activity is not "predominantly" protected expression. *See* 468 U.S. at 636. Because BSA "first and foremost" provides boys with unique opportunities for practical learning, physical fitness, and personal development, it is a nonexpressive organization, and its First Amendment challenge should be rejected under the analysis in Justice O'Connor's *Roberts* opinion. *See id.* at 639. At a minimum, considering both its extensive government entanglements and its predominant nonexpressive purposes, BSA should not be entitled to a special exemption from the application of state anti-discrimination laws.

B. The Application Of State Anti-Discrimination Laws Should Not Be Limited To Commercial Organizations

Petitioner reads Justice O'Connor's concurring opinion in *Roberts* to suggest that only "commercial" organizations should be subject to the full enforcement of anti-discrimination laws. *See* Pet. Br. at 34-35. Justice O'Connor did rely on the commercial aspects of the Jaycees to find that application of Minnesota's anti-discrimination laws to the association should not violate the First Amendment. 468 U.S. at 639. The opinion did not conclude, however, that commercial organizations *alone* should be subject to the full enforcement of anti-discrimination laws. Petitioner's misreading of Justice O'Connor's opinion, moreover, contradicts this Court's settled precedent without promoting any genuine First Amendment purpose, and would defeat the fundamental purposes of state anti-discrimination law: protection of "equal access" and "personal dignity." *Id.* at 625.

This Court has expressly upheld the application of state and federal anti-discrimination law over First Amendment challenges by non-commercial membership organizations that hold themselves out to broad sectors of the public. *See Rotary*, 481 U.S. at 539 (nonprofit corporation dedicated to "provid[ing] humanitarian service, encourag[ing] high ethical standards in all vocations, and help[ing to] build goodwill and peace in the world"); *Roberts*, 468 U.S. at 612-13 (nonprofit membership corporation that promoted "a spirit of genuine Americanism and civic interest, . . . personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation"); *Runyon v. McCrary*,

427 U.S. 160, 164 (1976) ("nonprofit association composed of six state private school associations, . . . represent[ing] 395 private schools.").

BSA bears striking resemblances to the institutions that this Court found unprotected by the First Amendment in *Rotary*, *Roberts*, and *Runyon*: BSA is a nonprofit membership organization seeking "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues." *See* 160 N.J. at 573. BSA substantially differs from the organizations in this Court's membership precedent only in that BSA has extensive state and local government entanglements -- ties that further undermine BSA's claim to First Amendment protection. To find special First Amendment protection for all non-commercial organizations, therefore, would depart from decades of this Court's precedent.

It would also overrule decades of state high court decisions applying state anti-discrimination laws to non-commercial organizations. *See, e.g.*, *Frank v. Ivy Club*, 120 N.J. 73, 576 A.2d 241 (1990) (Princeton's all-male eating clubs subject to New Jersey's anti-discrimination law); *Concord Rod & Gun Club, Inc. v. Mass. Comm'n Against Discrimination*, 402 Mass. 716, 524 N.E.2d 1364 (1988) (nonprofit rod and gun club subject to Massachusetts' anti-discrimination law); *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 707 P.2d 212 (1985) (private charitable boys' club that operates community recreational facility subject to California's anti-discrimination law); *U.S. Power Squadrons v. State Human Rights Appeal Board*, 59 N.Y.2d 401, 452 N.E.2d 1199 (1983) (nonprofit corporation whose purposes

include promotion of safety and skill in boating subject to New York's anti-discrimination law); *National Org. for Women v. Little League Baseball, Inc.*, 127 N.J. Super. 522, 318 A.2d 33 (App. Div.) (baseball league dedicated to "shap[ing] tomorrow's leaders" subject to New Jersey's anti-discrimination law), *aff'd*, 67 N.J. 320, 338 A.2d 198 (1974).

Furthermore, because many non-commercial organizations, especially private nonprofit organizations, provide access to public accommodations or services that are otherwise unavailable in a given community -- BSA being a prime example of such an organization -- according them special First Amendment protection would be even more harmful than according such protection to strictly commercial organizations. The services of commercial organizations are often available from competitors; moreover, in today's society, the profit motive may discourage some corporations from engaging in invidious discrimination, at least in selling their products or services to the public. The accommodations or services of non-commercial organizations, in contrast, tend to be far less fungible, and the general absence of a profit motive renders the need for legal protection all the more compelling.

Finally, no First Amendment expressive interest would be promoted by according special protection to non-commercial organizations that discriminate on grounds that are unrelated to any of their expressive purposes. In contrast to a "commercial" test, the criteria in this Court's membership precedent are precisely tailored to determine whether admission of unwelcome members would interfere with organizations' expressive purposes.

III. *HURLEY* DOES NOT UNDERMINE THE APPLICATION OF STATE ANTI-DISCRIMINATION LAW TO OPEN MEMBERSHIP ORGANIZATIONS

According to petitioner, it is not "legally relevant" whether compliance with state anti-discrimination law would interfere with any of the organization's "specific expressive purpose[s]," because an organization can "decide what not to say." *See* Pet. Br. at 22-23, 26-27 (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995)). Petitioner fails to acknowledge that the pending case involves a membership organization, not pure expression, and is therefore governed by this Court's membership precedent. *Hurley* is relevant to this case only by way of contrast and in its *affirmation* of this Court's membership precedent.

A. As A Pure Expression Case, *Hurley* Has No Bearing On This Case

Petitioner's reading of *Hurley* as a sweeping limitation on the enforceability of state anti-discrimination laws as applied to membership organizations flatly contradicts not only this Court's membership precedent but *Hurley* itself. The Court's unanimous opinion specifically noted that state anti-discrimination laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, *and they do not, as a general matter, violate the First or Fourteenth Amendments.*" 515 U.S. at 572 (emphasis added). Illustrating constitutionally permissible applications of state anti-discrimination laws, this Court

then cited, among other precedent, two of its membership cases: *New York State Club Ass'n* and *Roberts*. *See Hurley*, 515 U.S. at 572.

Central to the holding in *Hurley* was that it involved a "parade," which does not simply involve expressive elements but is in fact "a form of expression." 515 U.S. 568 (citing cases). Further, the participation of the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) as a unit in the parade "was equally expressive." *Id.* at 570. Because both the parade and GLIB's participation in it were pure forms of expression, "the state courts' application of the [anti-discrimination] statute had the effect of declaring the sponsors' speech itself to be the public accommodation." *Id.* at 573.

BSA is not a "form of expression." It is a membership organization with extensive government affiliations. Moreover, unlike the state court in *Hurley*, the court below in this case did not declare BSA's *speech* to be the public accommodation. Rather, it correctly held that BSA as a *membership organization* is a public accommodation because of its active solicitation and open membership policies, its extensive uses of other public accommodations, and its "close relationships with federal and state governmental bodies." 160 N.J. at 591.

Even as a pure expression case, *Hurley* was "peculiar," because the state court had found discrimination even though "no individual member of GLIB claims to have been excluded from parading." 515 U.S. at 572. The parade sponsors only sought to prevent interference with their own pure expression. *Id.* In the pending case, in contrast, petitioner expelled Dale solely on the basis of his status as a gay person. *See* 160 N.J. at 578-79, 617. This Court has specifically refused to extend constitutional protection to such status-based

discrimination, even in cases involving private organizations with *express* discrimination policies (which petitioner in this case lacked before litigation). *See, e.g., Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 539, 541, 549 & n. 8 (1987) (rejecting free association challenge where organization's Constitution expressly limited membership to men, and organization claimed policy was necessary to its effectiveness); *Roberts v. United States Jaycees*, 468 U.S. 609, 627-28 (1984) (rejecting free association challenge where organization's policy expressly limited membership to men, and organization claimed that admission of women would "change [its] message"); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (rejecting free association challenge by private schools with racial discrimination policies because "'the Constitution . . . places no value on discrimination'") (quoting *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)).

Although petitioner attempts to concoct similarity between this case and *Hurley* by arguing that it expelled Dale on the basis of his articulated views and not on the basis of his status, *see* Pet. Br. at 29, the New Jersey Appellate and Supreme Courts' conclusion to the contrary is well supported by the record. BSA's letter explaining the reason for Dale's expulsion stated that "the standards for leadership established by the Boy Scouts of America . . . specifically forbid membership to homosexuals." 169 N.J. at 579. Petitioner's express litigation-based policy, moreover, is to exclude not only those who declare support for gay rights, but "known or avowed homosexual persons," regardless of their stated views. *See* Pet. Br. at 27 (quoting BSA's National Director). Petitioner's repeated citations in its brief to newspaper articles reporting respondent's comments

made *after* the initiation of this litigation shed no light on petitioner's reasons for expelling respondent long before, nor do they demonstrate that Dale would have made comments regarding homosexuality in the context of a Scout meeting. To the contrary, in the newspaper article that was the basis for Dale's expulsion, he "does not identify himself as a Boy Scout leader or member, nor does he express an opinion about any of Boy Scouts' policies, or suggest that Boy Scouts should allow him openly to advocate acceptance of homosexuality. Indeed, Dale has stated that he accepts and endorses Boy Scouts' moral principles." 160 N.J. at 616.

B. This Court's Separate Pure Expression and Free Association Doctrines Should Not Be Merged

Both logic and sound policy considerations support the differences between this Court's pure expression and free association jurisprudence. Aside from the minimal restrictions necessary to maintain the public order (such as time, place and manner), government restrictions on pure expression generally do not promote a countervailing expansion of individual rights. Rigorous judicial protection of pure expression therefore promotes First Amendment freedoms without substantially infringing on the rights of others.

Unlike government restrictions on pure expression, anti-discrimination laws promote equal access, equal opportunity and personal dignity. *See Roberts*, 468 U.S. at 625. "[T]he very exercise of the freedom to associate by some may serve to infringe that freedom for others." *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974) (holding, *inter alia*, that exclusion of

African Americans from recreational facilities was correctly enjoined). Indeed, this Court has consistently recognized that society as a whole benefits from wide participation in its political, economic, civic and cultural life. *See, e.g., Roberts*, 468 U.S. at 625; *Heckler v. Mathews*, 465 U.S. 728, 744-45 (1984); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-26 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 684-87 (1973) (plurality opinion). The analysis that this Court has adopted in its membership cases, therefore, properly balances the burden (if any) on the organization's expressive purposes, the rights of those whom the organization wishes to exclude, and the interests of government and society as a whole.

IV. UNDER PRINCIPLES OF STARE DECISIS, THIS COURT'S PRECEDENT SHOULD NOT BE OVERRULED

Many of the arguments that petitioner has presented to this Court -- including the arguments that the pure expression standards set forth in *Hurley* should apply to free association cases, and that all non-commercial organizations should have automatic special protection against enforcement of state anti-discrimination laws -- amount to a request that this Court overrule its membership precedent. *Amici* states believe that this Court's membership cases were correctly decided based on sound constitutional principles and a proper balancing of compelling state interests and organizations' asserted First Amendment rights. The membership cases are consistent, well-reasoned, and easily applied by lower courts. Under principles of stare decisis, the basis for applying the same analysis to this

case is therefore even stronger than when those cases were decided.

"[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992) (Justices O'Connor, Kennedy and Souter, writing for the Court). In *Casey*, the Court identified four factors to weigh the respective costs of reaffirming and overruling a case. *See id.* These factors weigh strongly in favor of reaffirming this Court's membership precedent.

First, the membership cases "ha[ve] in no sense proven 'unworkable.'" *See Casey*, 505 U.S. at 855. The specific standards set out in those cases for balancing an organization's First Amendment interests against the states' interests in eliminating discrimination give appropriate deference to both and have been consistently and easily applied by lower courts. *See, e.g., McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996); *Louisiana Debating and Literary Ass'n v. City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995); *Elks Lodges 719 & 2021 v. Dep't of Alcohol Beverage Control*, 276 Utah Adv. Rep. 8, 905 P.2d 1189 (1995), *cert. denied*, 517 U.S. 1221 (1996); *State v. Burning Tree Club, Inc.*, 315 Md. 254, 554 A.2d 366, *cert. denied*, 493 U.S. 816 (1989).

Second, this Court's membership cases are "subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." *Casey*, 505 U.S. at 854-55. Based on these decisions, both federal and state courts, as cited above, have rendered numerous decisions affecting the respective equal opportunity and

free association rights of citizens and organizations. *Amici* states have relied on this Court's decisions in drafting, amending and enforcing their anti-discrimination laws. As in *Casey*, "for two decades of economic and social developments," organizations' memberships and individuals' lives have been affected by the Court's membership precedent. *Id.* at 856. The ability of those who are targeted by discrimination "to participate equally in the economic and social life of the Nation has been facilitated by their ability" to have equal access to public accommodations and services. *Id.* at 856. Likewise, the First Amendment free association rights of organizations have been protected. *See, e.g., Invisible Empire of the Knights of the Ku Klux Klan v. Mayor*, 700 F. Supp. 281, 289 (D. Md. 1988) (holding that KKK's racist membership policy promotes its expressive purposes).

Third, "[n]o evolution of legal principle has left . . . the doctrinal footings [of the membership precedent] weaker than they were [when decided]. No development of constitutional law since the case[s] w[ere] decided has implicitly or explicitly left [the membership precedent] behind as a mere survivor of obsolete constitutional thinking." *Casey*, 505 U.S. at 857. *Amici* states are aware of no precedent by this Court or any other that implicitly or explicitly conflicts with this Court's membership precedent. Although petitioner invokes *Hurley*, that case creates no conflict when properly viewed as part of pure expression jurisprudence.

Finally, "facts have [not] so changed, or come to be seen so differently, as to have robbed [the membership cases] of significant application or justification." *Casey*, 505 U.S. at 855. While society has progressed toward greater equality in the past several decades, invidious

discrimination has not been eliminated.

The "widespread acceptance in the legal culture" of this Court's decisions in the membership cases provides "adequate reason not to overrule" them. *See Mitchell v. United States*, 119 S. Ct. 1307, 1316 (1999) (Scalia, J., dissenting) (case involving constitutional issues). "[A] concurring opinion in [a] case," moreover, should not "take precedence over an opinion joined in its entirety by five Members of the Court." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part).[11] The membership cases are "now an important part of the fabric of our law." *See Runyon v. McCrary*, 427 U.S. 160, 190 (1976) (Stevens, J., concurring in majority opinion based on stare decisis principles). To overrule them would shred the fabric of more than two decades of this Court's membership precedent, undermine the enforceability of anti-discrimination law throughout the states as well as on the federal level, and upset the delicate balance that has been achieved in promoting individual rights while preserving harmony in society at large.

[11]In this case, the stare decisis principles weigh even more heavily against overruling precedent: in all three of the membership cases that petitioner refers to as "the *Roberts* trilogy," the judgments were unanimous, and no more than two of the participating Justices departed from any portion of the majority's analyses.

CONCLUSION

For the foregoing reasons, *amici* states respectfully urge the Court to affirm the decision below.

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Respectfully submitted,

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