GRANTED

No. 99-699

IN THE
Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a state law requiring a Boy Scout Troop to appoint an avowed homosexual and gay rights activist as an Assistant Scoutmaster responsible for communicating Boy Scouting's moral values to youth members abridges First Amendment rights of freedom of speech and freedom of association.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

1. Petitioners Boy Scouts of America and Monmouth Council, Boy Scouts of America.

2. Respondent James Dale.

Boy Scouts of America and Monmouth Council, Boy Scouts of America are not-for-profit corporations without stockholders. The only affiliate of Boy Scouts of America is Learning for Life, a not-for-profit corporation. Boy Scouts of America charters approximately 318 not-for-profit corporations as local Councils such as Monmouth Council to support Boy Scouting and other Scouting programs in particular geographic areas, and charters numerous churches, synagogues and other community groups in localities throughout the country to operate Boy Scout Troops and other Scout units.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey, 1a-101a,[1] is reported at 160 N.J. 562, 734 A.2d 1196 (1999). The opinion of the Superior Court of New Jersey, Appellate Division, 102a-154a, is reported at 308 N.J. Super. 516, 706 A.2d 270 (1998). The opinion of the Superior Court of New Jersey, Chancery Division, 155a-224a, is unreported.

JURISDICTION

The decision of the Supreme Court of New Jersey was entered on August 4, 1999. 1a. The Writ of Certiorari was granted by this Court on January 14, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ; or the right of the people peaceably to assemble . . . ." U.S. Const. amend. I.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.

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1. Numbers followed by "a" refer to pages in the bound Appendix submitted with the Petition for Writ of Certiorari. Numbers preceded by "JA" refer to pages in the bound Joint Appendix. Numbers preceded by "R" refer to pages in the joint appendix submitted below. Numbers preceded by "L" refer to pages in the bound Joint Lodging Materials.

The pertinent New Jersey statutes, New Jersey Statutes Annotated, title 10, chapter 5, sections 10:5-4, 10:5-5(*l*), 10:5-5(hh) and 10:5-12(f)(1), are reprinted *infra* at pp. xii-xv.

STATEMENT OF THE CASE

Boy Scouts of America

Petitioner Boy Scouts of America is a private, non-profit organization. Its mission is to instill the values of the Scout Oath and Law in youth:

> It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.
>
> The values we strive to instill are based on those found in the Scout Oath and Law:
>
> *Scout Oath*
>
> On my honor I will do my best
> To do my duty to God and my country
> and to obey the Scout Law;
> To help other people at all times;
> To keep myself physically strong,
> mentally awake, and morally straight.
>
> *Scout Law*
>
> A Scout is . . .
>
Trustworthy	Obedient
Loyal	Cheerful
Helpful	Thrifty
Friendly	Brave
Courteous	Clean
Kind	Reverent

JA 184. At virtually every meeting and ceremony, Boy Scouts and their adult leaders recite the Oath and Law in unison. JA 175-176, JA 274-288, JA 464. The Oath and Law provide a positive moral code for living; they are a list of "do's" rather than "don'ts," setting forth affirmative character traits. JA 187-189, JA 215-226. Through the Boy Scouting program, boys learn how to live by this moral code. JA 450.

Boy Scouting takes place primarily in Troops, small units typically consisting of 15 to 30 boys led by a uniformed Scoutmaster and Assistant Scoutmasters. JA 172. Almost 65 percent of Boy Scout Troops are sponsored by churches or synagogues, more than 25 percent are chartered to private community organizations, and fewer than 10 percent are chartered to public institutions. JA 159. Boy Scouting is an integral part of many church youth programs. JA 155-161, JA 722-723 (Catholic), JA 707-709 (United Methodist), JA 710-713 (Conservative Jewish), JA 714-718 (Lutheran-Missouri Synod), JA 719-721 (Latter-day Saints), JA 724-726 (Southern Baptist), JA 727-730 (Presbyterian).

Responsibility for inculcating Boy Scouting's values is entrusted to the volunteer Scoutmaster and Assistant Scoutmasters. JA 180-181, JA 232-233, JA 244, JA 246, JA 261, JA 299-300, JA 303. If a boy is in doubt about how to conduct himself, the *Boy Scout Handbook* tells him that he may look to his Scoutmaster, "a wise friend to whom you can always turn for advice." R 2539. "If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your . . . Scoutmaster." JA 211. In turn, the *Scoutmaster Handbook* advises adult leaders to be responsive: "Be accepting of their concerns about sex. Be very open and clear when talking with them." JA 249.

Because Boy Scouts and their leaders are together 24 hours a day on weekend campouts and in summer camp, JA 173-174, the Scoutmaster and Assistant Scoutmasters necessarily teach by

example as much or more than they teach by proscription. Boy Scouts do not simply see one aspect of an adult leader's character; they see it all. The *Scoutmaster Handbook* tells leaders: "Your Scouts need to rely on you to be consistent in your behavior and beliefs. Your actions also demonstrate what you expect of them." "[P]ractice what you preach. . . . The most destructive influence on boys is adult inconsistency and hypocrisy." JA 257.

Given these responsibilities, Boy Scouting seeks to appoint leaders who will represent Boy Scouting's "[h]igh moral standards." JA 300. No adult leader can be appointed without approval of the sponsoring institution, the local Council (such as petitioner Monmouth Council) that oversees Scouting in the geographical area in question, and Boy Scouts of America. JA 359, JA 387, JA 392. As noted by the New Jersey Supreme Court, adult volunteers must not only commit to the Scout Oath and Law and the Declaration of Religious Principle, but must pass muster under a number of "informal criteria designed to select only individuals capable of accepting responsibility for the moral education and care of other people's children in accordance with scouting values." 38a, JA 182-183, JA 299-303. Adults have been denied leadership positions in Scouting for various views and behaviors which Boy Scouts of America deems inconsistent with the Scout Oath and Scout Law, from openly adulterous behavior to the bringing of alcohol to Scouting events to known substance abuse outside of Scouting. JA 694-695, JA 751-752, JA 760.

With respect to sexual behavior, Boy Scouting "espouses family values" based on marriage and fatherhood. JA 457-459, JA 697. The *Boy Scout Handbook* describes how a young man attains "[t]rue manliness" by accepting his "responsibility to women," his "responsibility to children" when he marries and has a family, his responsibility to his religious beliefs, and his

responsibility to himself. JA 210-211. "Abstinence until marriage," the *Handbook* counsels, "is a very wise course of action." JA 210.

Official Scouting materials addressed to the boys do not refer to homosexuality or inveigh against homosexual conduct; rather, they teach family-oriented values and tolerance of all persons. JA 203-208, JA 221-222. In keeping with the view that boys learn best by positive example, rather than by "thou shalt nots," the handbooks for boys do not catalog immoral behavior for Boy Scouts. It cannot be inferred that unmentioned misconduct is consistent with Scouting's moral code.

For most of Scouting's history, no one could have had any doubt about the organization's view on homosexuality. *See Boy Scouts of America v. Teal*, 374 F. Supp. 1276, 1277 (E.D. Pa. 1974) (Higginbotham, J.). Indeed, homosexual sodomy was a criminal offense in New Jersey until 1979, N.J. Stat. Ann. § 2A:143-1 (repealed 1979), and homosexuals were barred from immigration until 1990, 8 U.S.C. § 1182(a)(4) (repealed 1990). After 1981, when an openly gay man sought to become a leader in a California Boy Scout Troop, *see Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P.2d 218 (1998),[2] Boy Scouts of America promulgated a series of position statements for Scout officials who might be asked to articulate Boy Scouting's position. One such statement promulgated on February 15, 1991 — prior to the institution of the suit at

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2. Curran affirmatively alleged that members of Boy Scouting "'must hold to the Judeo-Christian belief that to be a homosexual is to be immoral per se,'" claiming that this requirement violated California's public accommodation law. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 48 Cal. App. 4th 670, 678, 29 Cal. Rptr. 2d 580, 588 (1994) (quoting Curran's Complaint), *review granted and opinion superseded by* 17 Cal. 4th 670, 952 P.2d 218 (1998).

issue and prior to the amendment of New Jersey law to cover sexual orientation — declared:

> We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed . . . .

and explained that not accepting homosexual members as leaders was based "solely upon our desire to provide the appropriate environment and role models which reflect Scouting's values and beliefs." JA 458. Other official statements, to similar effect, are dated March 1978, June 1991, May 1992, and January 1993. JA 453-461. Nine current and former Scout leaders or officials testified by certification or deposition that the organization regards homosexual conduct as inconsistent with the Scout Oath and Law. JA 160-161, JA 183, JA 312, JA 444, JA 451, JA 465, JA 692-693, JA 746, R 3254.

Boy Scouting makes no effort to discover the sexual orientation of any person. JA 460. Its expressive purpose is not implicated unless a prospective leader presents himself as a role model inconsistent with Boy Scouting's understanding of the Scout Oath and Law. Boy Scouting does not have an "anti-gay" policy, it has a morally straight policy.

State Public Accommodations Laws

The New Jersey public accommodations law forbids discrimination on the basis of race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation, or nationality. N.J. Stat. Ann. § 10:5-12(f)(1) (West 1993). *See infra* at pp. xiv-xv. "Affectional or sexual orientation" is defined as "male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation."

N.J. Stat. Ann. § 10:5-5(hh). *See infra* at p. xiii. Scouting programs "discriminate" on the basis of sex, age and creed. In jurisdictions where substance or alcohol abuse is treated as a disability, Scouting "discriminates" on that ground as well.

The vast majority of states in the Union, many cities and counties, and the federal government have laws prohibiting places of public accommodation from discriminating on the basis of various criteria. Most states attempt to avoid obvious freedom of association problems with such statutes by confining their reach through statutory exclusions. The New Jersey statute excludes: (1) any institution or club "which is in its nature distinctly private," (2) any "educational facility operated or maintained by a bona fide religious or sectarian institution," and (3) "the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control." N.J. Stat. Ann. § 10:5-5(*l*). *See infra* at pp. xii-xiii.

Numerous suits have been brought against Scouting on behalf of girls, atheists, and avowed homosexuals who have not been permitted to participate in the organization. Four state supreme courts and the U.S. Court of Appeals for the Seventh Circuit have ruled that Scouting is not a place of public accommodation.[3] Other cases remain pending.[4]

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3. *See, e.g., Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993); *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P.2d 218 (1998); *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 952 P.2d 261 (1998); *Quinnipiac Council, Boy Scouts of America, Inc. v. Comm'n on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P.2d 385 (1995); *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976).

4. *See, e.g., Broward County Human Rights Board v. Boy Scouts of America*, No. PA-754-11-99 (Broward County Human Rights Div.) (complaint filed Nov. 12, 1999) (Board alleges discrimination against

Respondent James Dale

James Dale had been a prominent Boy Scout in Monmouth Council and achieved the rank of Eagle Scout. Dale ceased to be a Boy Scout at the age of 18, when youth membership automatically ends. JA 14-16, JA 180. As is not uncommon, Dale registered as an Assistant Scoutmaster for his Troop after his youth membership expired. JA 16. Since he had gone away to college; however, Dale had very little involvement with Boy Scouting or the Troop as an adult leader. JA 465, JA 632-633, R 3346-3350.

After going to college, Dale came to regard himself as homosexual, came to believe that homosexual conduct "is not immoral," and "became deeply involved in gay rights issues and maintained a high profile on campus." JA 126-127, JA 495, JA 503, JA 526-527. He became Co-President of the Rutgers University Lesbian/Gay Alliance in his sophomore year. JA 126, L 10. On July 8, 1990, the Newark *Star-Ledger* published a picture of Dale and an interview with Dale as a gay activist describing the needs of homosexual teens for gay role models. L 10.

Adult leaders "throughout Monmouth Council" saw the *Star-Ledger* article and forwarded it to Council headquarters. JA 753, R 3576. As a result, Dale's registration as an adult

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agnostics and homosexuals); *Richardson v. Chicago Area Council of Boy Scouts of America*, No. CCHR 92-E-80 (Chicago Comm'n on Human Relations 1996), *aff'd in rel. part*, No. 96 CH 3266 (Ill. Cir. Ct. Aug. 12, 1999), *appeal docketed*, No. 99-3018 (Ill. App. Ct. Aug. 23, 1999) (gay activist seeking to be uniformed professional); *Downey-Schottmiller v. Chester County Council of the Boy Scouts of America*, No. P-3986 (Pa. Human Relations Comm'n July 27, 1999), *appeal docketed*, No. 2291 CD 1999 (Pa. Commw. Ct. Aug. 27, 1999) (atheist activist seeking to be volunteer leader); *Pool v. Boy Scouts of America*, Nos. 93-030-PA, 93-031-PA (D.C. Dep't of Human Rights & Minority Bus. Dev.) (post-hearing briefing concluded May 18, 1998) (openly gay men seeking to be volunteer leaders), *sub judice*.

volunteer Boy Scout leader was revoked. JA 753, JA 135. Upon request for review, Dale was informed by higher Scouting authorities that he was ineligible to serve as Scout leader because "Boy Scouts of America does not admit avowed homosexuals to membership in the organization." JA 138. At that time, public accommodations law in New Jersey did not extend to sexual orientation.

About 18 months later, the legislature amended New Jersey's public accommodations law to extend to "sexual orientation." N.J. Stat. Ann. §§ 10:5-5(*l*), 10:5-5(hh), 10:5-12(f)(1). *See infra* at pp. xii-xv. Eleven days later, Dale sued petitioners, seeking reinstatement as an Assistant Scoutmaster and compensatory and punitive damages, and alleging that volunteer service as an Assistant Scoutmaster was one of the "advantages" of "a place of public accommodation." JA 10-28. In his Complaint, Dale alleged that "the only gay Scouts singled out for exclusion are those, such as James Dale, who, in part as a result of Boy Scout training, become leaders in their community and are open and honest about their sexual orientation." JA 11.

Upon filing the Complaint, Dale stated in an interview published in *The New York Times*:

> I owe it to the organization to point out to them how bad and wrong this policy is. . . .
>
> Being proud about who I am is something the Boy Scouts taught me. They taught me to stand up for what I believe in.

JA 513. After filing his law suit, Dale proclaimed on television:

> . . . [Y]es, I am gay, and I'm very proud of who I am . . . . I have pride, I stand up for what I believe in, I mean, what you see is what you

> get. I'm not hiding anything. But the Boy Scouts don't like that.

JA 470.

The Superior Court of New Jersey, Chancery Division

All parties moved for summary judgment. The Superior Court of New Jersey, Chancery Division, granted petitioners' motion, 224a, ruling that Boy Scouting is not a place of public accommodation and in any event is a "distinctly private" group exempted from coverage under the public accommodations law.

The Chancery Court also held that it would be unconstitutional to force a Troop to accept respondent as a volunteer leader. The court described the expressive character of Boy Scouting:

> Youth membership in scouting is restricted to boys between 11 and 18. To become a member, each must submit a completed Boy Scout application and health history signed by his parents; each must repeat the Pledge of Allegiance; demonstrate the Scout salute, the Scout sign and handclasp and how to tie a square knot. Each, with his parents, must complete a child protection program; participate in a Scoutmaster conference and pay the national dues. Each must understand and agree to live by the Scout Oath, Law, motto, slogan and Outdoor Code.
>
> Similarly, Adult Leadership is not open to the public. One must be . . . over the age of 21 (except, for assistant scoutmasters, over 18). He must possess the moral, educational and emotional qualities deemed necessary by BSA

> for leadership before he will be commissioned. He must be recommended by the Scout Executive and approved by the Local Council executive board. He must subscribe to the Statement of Religious Principle, the Scout Oath and the Scout Law.
>
> Each troop meeting begins with the recitation of the Scout Oath and Law. On a regular basis there then follows a group discussion of various parts of the Oath and Law stimulated by the Scoutmaster or troop leader. Before the close of each meeting, it is the usual practice that the Scoutmaster offer the boys a moral lesson, known as the Scoutmaster's Minute.
>
> At each level of advancement, the individual boy describes to his Scoutmaster or review board of adult leaders how he is living his life in accordance with the Scout Oath and Law.

222a-223a. The Chancery Court found that "[s]ince its inception Scouting has sincerely and unswervingly held to the view that an 'avowed,' sexually-active homosexual is engaging in immoral behavior which violates the Scout Oath (in which the person promises to be 'morally straight') and the Scout Law (whereby the person promises to keep himself 'clean')." 223a. Relying on Justice O'Connor's concurring opinion in *Roberts v. United States Jaycees*, 468 U.S. 609, 631 (1984), 212a-215a, the Chancery Court held that petitioners "have First Amendment freedom of expressive association rights preventing government from forcing them to accept Dale as an adult leader-member." 212a-214a, 224a.

The Superior Court of New Jersey, Appellate Division

The Appellate Division reversed by a 2-1 vote, holding that Boy Scouting was a public accommodation and that Boy Scouting had no First Amendment right to exclude Dale because of his "statements as a 'gay activist,'" "his 'message,'" or "his avowed homosexuality." 139a. The majority noted much evidence with respect to Boy Scouting's expression, including the following:

1) Dale's 1972 *Scoutmaster's Handbook* advised leaders:

> 'You are providing a good example of what a man should be like. What you do and what you are may be worth a thousand lectures and sermons.
>
> * * * *
>
> What you are speaks louder than what you say. This ranges from simple things like wearing a uniform to the matter of your behavior as an individual. Boys need a model to copy and you might be the only good example they know.' 108a, JA 543.

2) In 1978, Boy Scouts of America prepared a policy statement providing 'that an individual *who openly declares* himself to be a homosexual would not be selected to be a volunteer [S]cout leader, be registered as a unit member, or be employed [by the Boy Scouts of America] as a professional. . . .' Later position statements affirmed that stance. 109a, JA 453-461 (emphasis added).

The majority first dispensed with the freedom of intimate association claim, focusing on the national membership numbers of Boy Scouts of America rather than on the

relationships in individual Troops, 131a, as this Court's decisions in *Roberts*, 468 U.S. at 619-620, and *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 546-547 (1987), require.

While not disputing that Boy Scouting is an expressive association, the majority concluded that enforcement of the New Jersey law would not "significantly impair" its ability to "express its fundamental tenets" because an "anti-gay" view was not "what 'brought [the original members] together.'" 135a-136a (quoting *Roberts*, 468 U.S. at 623). Boy Scouting does not exist to "provide a public forum for its members to espouse the benefits of heterosexuality and the 'evils' of the homosexual lifestyle." 135a. The majority concluded that the official statements issued by Scouting on the subject of homosexuality from 1978 to 1993 did not represent the "beliefs that brought the boy scouts together" because the latest one had been issued 76 years after the founding of Boy Scouts of America. 141a.

The majority rejected application of *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), as a "pure speech" case. 147a-148a. It distinguished parades from Boy Scouting because parades involve "people marching in costumes and uniforms, carrying flags and banners with all sorts of messages" and constitute "'public dramas of social relations'" in which the protected expression extends beyond banners and songs to "its communicated symbolism as well." 145a (quoting 515 U.S. at 568-569). The majority concluded that Scouting could claim no constitutional "privilege" to exclude Dale "when the sole basis for the exclusion is the gay's exercise of his own First Amendment right to speak honestly about himself." 149a.

Judge Landau dissented on the First Amendment issue. He noted that what had "been lost in the majority's opinion"

was that Dale "has been prominently publicized as an avowed, practicing homosexual and also as a leader in organizational activities given to the promotion of the interests of gay and lesbian students." 150a-151a. Judge Landau stated that although Scouting must be aware that statistically some of its leaders are likely to have been homosexuals and "[t]here obviously has been no anti-gay witch hunt in the Boy Scout movement," Scouting "condemns homosexual practice as morally unacceptable and so acts negatively with respect to its open avowal because it is inconsistent with one of the expressed moral policies of the organization." 152a. Citing *Hurley*, 515 U.S. at 581, Judge Landau wrote:

> We may not compel the Boy Scouts to alter a message which they wish to convey by including messages more acceptable to others. This principle is not changed merely because the altered message is implicitly, but no less strongly, conveyed by example rather than by verbal articulation or by signs.

153a.

As for the majority's questioning the "fundamental nature" of Scouting's view of homosexual conduct, Judge Landau responded that "it is not for this court to tell the Boy Scouts what to believe or what to profess." Boy Scouts of America's "consistent litigation stand . . . and the representations of [its] governing officials are enough for me." He also responded that "whether or not the Boy Scouts' stand on homosexuality is fundamental to that organization's creation is entirely irrelevant." 153a-154a.[5]

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5. Judge Landau opined that Dale might remain a member without holding a leadership position. 151a, 154a. However, there are no roles for adult "members" beyond serving as volunteer leaders for youth.

The Supreme Court of New Jersey

The Supreme Court of New Jersey affirmed. It held that Boy Scouting is a place of public accommodation, that the statutory exemptions are inapplicable, and that the First Amendment provides no defense.

The Statutory Question. The court ruled that Boy Scouting was a public accommodation on the basis of "various factors." Scouting publicly solicited members through, among other things, "the symbolism of a Boy Scout uniform" worn in public places. Furthermore, Scouting received several benefits from government, including a federal charter, the support of Presidents and members of Congress, access to some military facilities and equipment, use of public buildings and spaces for meetings, and sponsorship of some Troops by government entities. 24a-30a.

The court refused to apply several exceptions to the public accommodations law. First, the court held that Boy Scout Troops are not "distinctly private" within the meaning of the law. 31a-39a. It held that "the principal determinant of 'distinctly private' status" is the organization's "selectivity." 32a-33a. The court found that Boy Scouting encouraged local Councils and Troops "to see that *all* eligible youth have the opportunity" to join. 35a. Even though members must "comply with the Scout Oath and Law," the Scout Oath and Law did not operate as "genuine selectivity criteria" because the record disclosed "few instances in which the Oath and Law have been used to exclude a prospective member." 37a. "Here, there is no evidence that Boy Scouts does anything but accept at face value a scout's affirmation of the Oath and Law." *Id.* The court found it "[m]ost important" that Boy Scouting "does not limit its membership to individuals who belong to a particular religion *or subscribe to a specific set of moral beliefs*." 37a-38a (emphasis added). *But see* 53a (Boy Scouting "expresses a belief in moral values and . . .

encourage[s] the moral development of its members."). While adult leadership standards were more restrictive than youth membership, Boy Scouting could not be held to be private only with respect to leaders, "a small subset of the larger group." 38a.

Second, Boy Scouting could not qualify as an "'educational facility operated or maintained by a bona fide religious or sectarian institution,'" 39a (quoting N.J. Stat. Ann. § 10:5-5(*l*)), because Scouting was "nonsectarian." 40a. Repeated expression of belief in God through recitation of the Scout Oath did not qualify Boy Scouting as a religious institution; its commitment to education did not qualify it as an educational facility. 39a-40a & n.10.

Third, despite the close relationships between adult leaders and Boy Scouts, JA 250, the responsibility of adult leaders to act as role models of Scouting values, JA 446, and the round-the-clock supervisory role of adult leaders on camp-outs and other outings, JA 741, the court concluded that Boy Scouting did not act in loco parentis because a Boy Scout leader does not "'maintain, rear and educate'" children in the place of the parent. 40a-41a (quoting *Miller v. Miller*, 97 N.J. 154, 162 (1984)).

The First Amendment. The court rejected petitioners' assertion of First Amendment freedoms of intimate association, expressive association, and speech. It held that Boy Scouting is not "'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association." 48a (quoting *Rotary*, 481 U.S. at 546). Although a Troop is typically composed of 15 to 30 boys and their adult leaders, the court relied on *Rotary*, 481 U.S. at 546, for the proposition that "a local club with as few as twenty members did not qualify as [an intimate association]." 48a-49a. Other factors included Scouting's attempts at inclusiveness, and its practice of inviting "nonmembers" to

attend recruiting meetings and award ceremonies. 49a-50a. Moreover, the court added, an adult leader does not "have private or intimate relationships with troop members." 49a.

The court rejected the expressive association defense by rejecting Boy Scouting's statements of its moral values and substituting the court's own definition of Scouting's moral messages. 52a. Furthermore, the court held that the statute satisfied the compelling state interest in eliminating sexual orientation discrimination "without regard to an organization's viewpoint." 63a.

The court acknowledged that Scouting engaged in expressive activity "designed to build character and instill moral principles." 64a. "We agree that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members." 53a. However, the court found that it was not a "'shared goal[]'" or "single view" of Scouting's members to "associate in order to preserve the view that homosexuality is immoral." 53a (quoting *Roberts*, 468 U.S. at 622), 56a. "The words 'morally straight' and 'clean' do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral." 55a. The court noted the absence of reference to homosexual conduct in the youth material, but failed to note the references in the *Boy Scout Handbook* to sexual responsibility, marriage, and fatherhood. It dismissed Boy Scouting's 1978 Position Statement as "[un]disseminated" and four later position statements as "self-serving." 54a. Having essentially agreed with the Appellate Division that Scouting was not sufficiently "anti-gay" to receive First Amendment protection for its views, the court nevertheless labeled Scouting's stated position on homosexual conduct as "prejudice," "bigotry," "assumptions in respect of status," and "invocation of stereotypes." 56a, 59a, 61a.

With respect to freedom of speech, the court distinguished *Hurley* because in the court's view Dale did not "come to Boy Scout meetings 'carrying a banner'" and his "status as a scout leader [was] not equivalent to a group marching in a parade" since there was "no indication that Dale intends to actively 'teach' anything whatsoever about homosexuality as a scout leader." 65a-66a.

In a concurring opinion, Justice Handler concluded that only an organization with "a core purpose," "a unifying purpose that motivates its members to join together as an association," could support an exclusion of a person whose views are incompatible: "The critical point is that a 'specific expressive purpose' must be clear, particular, and consistent." 82a-83a. In Justice Handler's interpretation of Scouting values, Scouting accepted diverse "individual morality." 92a-93a. Reciting New Jersey's 1979 "repudiation" of its own sodomy laws, he insisted that Scouting's views must have changed with "contemporary times": It is "untenable to conclude, in the absence of a clear, particular, and consistent message to the contrary, that Boy Scouts . . . remains entrenched in the social mores that existed at the time of its inception." 99a-100a. Boy Scouting must accept "Dale's open avowal of his homosexuality." 101a.

SUMMARY OF ARGUMENT

This case involves constitutional rights at the heart of our free society: the freedom of a private, voluntary, non-commercial organization to create and interpret its own moral code, and to choose leaders and define membership criteria accordingly. This Court has called it "beyond debate" that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth

Amendment, which embraces freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

First, the New Jersey Supreme Court's decision that a Boy Scout Troop must appoint an open homosexual and gay rights activist as Assistant Scoutmaster violates Scouting's freedom of speech. An organization cannot speak except through its agents. The adult Troop leader is the embodiment of the ideals of Boy Scouting. In light of the roles of uniformed adult leaders and their symbolic position in Scouting, JA 180-181, JA 232, JA 244, JA 250, JA 257-258, JA 299-300, JA 446, JA 543, JA 741, to force Scouting to appoint persons who intend to be "open" and "honest" about their homosexuality, JA 133, would violate the organization's right to control its own message and to avoid association with a message with which it does not agree. On this point, this case is controlled by the Court's recent, unanimous decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).

Second, the criteria for membership, leadership or other representative roles in an expressive association are themselves expressive, and constitutive of the identity of the organization. *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 229-230 (1989). As Justice O'Connor has explained: "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts v. United States Jaycees*, 468 U.S. 609, 633 (1984) (O'Connor, J., concurring). Without First Amendment protection against intrusion of public accommodations laws into the voluntary sector – where many organizations consist of members of or provide services to a single sex, ethnicity or religion – American society would be fundamentally transformed. A society in which each and every organization

must be equally diverse is a society which has destroyed diversity.

Third, the decision below violates Boy Scouting's freedom of intimate association. The Court has explained that "certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State." *Roberts*, 468 U.S. at 618-619. The relationship of members and leaders is one of trust and friendship, which cannot be forced or compelled by the state.

ARGUMENT

REQUIRING A BOY SCOUT TROOP TO APPOINT AN AVOWED HOMOSEXUAL AND GAY RIGHTS ACTIVIST AS AN ASSISTANT SCOUTMASTER UNCONSTITUTIONALLY ABRIDGES FIRST AMENDMENT RIGHTS OF FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION

A. Requiring a Boy Scout Troop to Appoint an Adult Leader Who Opposes the Organization's Moral Code Violates Freedom of Speech

Boy Scouts of America has certain moral beliefs and values that it wishes to convey to its members. Dale has moral beliefs and values that are, in at least one important respect, contradictory to those of Scouting. Under the First Amendment, private expressive associations have the right to choose leaders and spokespersons who are willing to communicate the organizations' chosen messages and inculcate their chosen values, and the right to decline the services of persons who would – either explicitly through speech or implicitly through public identity and conduct – communicate beliefs with which the organizations do not wish to be associated.

That fundamental principle of freedom of speech applies to all expressive groups, whether the state finds their beliefs admirable or objectionable.

The freedom at issue here has both affirmative and negative aspects. The affirmative aspect is the right of the expressive association to select leaders who will communicate the organization's beliefs. For Boy Scouts of America, the values of the Scout Oath and Law are communicated to youth members and to all by uniformed leaders. In a variety of ways in Boy Scouting – through the formal "Scoutmaster's Minute" at each Troop meeting when Scoutmasters discuss parts of the Oath and Law with the assembled Scouts, JA 175; through Boards of Review with the boys at times of rank advancement, when the boys explain to adult Troop leaders how they are attempting to live out the Oath and Law, JA 178-179, R 2562; in innumerable informal conversations on the trail, around the campfire, or in times of stress and confusion, when an adult leader's guidance is especially important, JA 445; and perhaps most of all, through personal character and example, JA 253, JA 257 – Troop leaders are entrusted with conveying Scouting values to boys. To require a Troop to appoint leaders who would not convey those principles deprives Scouting of its right to speak.

The negative aspect is the right *not* to be associated with ideas and beliefs the organization does not wish to endorse. The right to control its own message includes the organization's right to be silent about issues if it so chooses. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573-575 (1995). Boy Scouting does not convey an explicit "anti-gay" message to the boys under its care; but it does not wish to convey approval of homosexual conduct either. Dale, on the other hand, believes teenage boys need positive gay role models, JA 549, L 10, says that Boy Scout leaders should be able to be "open and honest

about their sexual orientation," JA 133, and wishes to use the bully pulpit of the Scoutmaster's position to communicate "how bad and wrong" Boy Scouting's policy is. JA 513. Dale cannot force Boy Scouting to grant him a platform upon which to expound those beliefs, or to garb him in the uniform of a Scoutmaster when he does so.

1. *Hurley* Controls This Case

This case follows *a fortiori* from this Court's unanimous decision in *Hurley*. In *Hurley*, this Court held that application of a state public accommodations law to force private organizers of a St. Patrick's Day parade to include the Gay, Lesbian, and Bisexual Group of Boston ("GLIB") was unconstitutional. 515 U.S. at 566. In a decision almost identical in its reasoning to that of the court below, the Massachusetts Supreme Judicial Court had held that the parade was a "public accommodation" under state law, that exclusion of GLIB from the parade constituted discrimination on the basis of sexual orientation, and that requiring the parade organizers to allow GLIB to march would not violate the organizers' First Amendment rights. *Id.* at 563-564. The Massachusetts court rejected the organizers' First Amendment claim on the rationale that the parade lacked any "'specific expressive purpose'" that would be threatened by the presence of the marchers. *Id.*

This Court unanimously reversed. The Court specifically rejected the lower court's argument that "a narrow, succinctly articulable message is . . . a condition of constitutional protection." *Id.* at 569. Moreover, the relative nonselectivity of the parade organizers in choosing participants did not deprive the group of the right to exercise selectivity when it chose to do so. "[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 as the exclusive subject matter of the speech." *Id.* at 569-570.

This Court found that GLIB's participation in the parade was "equally expressive." *Id.* at 570. Notwithstanding the fact that GLIB sought only to display its own name, and not to make any other political or moral statement, the Court recognized that self-identification of the group would serve the purpose of "celebrat[ing] its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade." *Id.*

The Court held that requiring the parade organizers to include GLIB in their parade "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. This includes the right to decide "what not to say." *Id.* The organizing committee "clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." *Id.* at 574. The Court noted that the "message it disfavored" was GLIB's message "bear[ing] witness to the fact that some Irish are gay, lesbian, or bisexual," and its "view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals." *Id.*

To the extent there are any differences between this case and *Hurley*, this case presents an even stronger case for constitutional protection. The parade's intended message was not readily apparent; the Scout Oath and Law embody a distinct moral message. JA 170-172. Even the court below concedes: "We agree that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members." 53a. Likewise, Dale's intended participation in Scouting is "equally expressive." *Hurley*, 515

U.S. at 570. By donning the uniform of an adult leader in Scouting, he would "celebrate [his] identity" as an openly gay Scout leader in precisely the same way that the GLIB marchers wished to conscript the parade to celebrate their identity as gay descendants of Irish immigrants, and to "bear witness" to his "view that people of [his] sexual orientation[] have as much claim to unqualified social acceptance as heterosexuals." *See id.* at 570, 574.

Just as including the GLIB group in the St. Patrick's Day parade would "violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," *id.* at 573, putting Dale in an adult leader's uniform would interfere with Boy Scouting's ability to control the content of *its* message. Indeed, the very service of an openly gay person as a role model would convey a message with which Boy Scouting does not wish to be associated.

2. The New Jersey Supreme Court's Reasons for Refusing First Amendment Protection to Boy Scouting Are Insupportable

The New Jersey Supreme Court held that "Dale's expulsion is not justified by the need to preserve the organization's expressive rights," 59a, for two reasons: (1) Boy Scouting does not hold a moral position regarding homosexuality, 53a-59a, 64a, and (2) Dale's presence as an openly gay leader would not communicate any message regarding the morality of homosexuality. 65a-67a. These arguments fail both legally and factually.

As an initial matter, the decision below was based on characterizations of the facts of the case that contradict the findings of the trial court and are utterly indefensible on the record. In *Hurley*, this Court observed that it has a "constitutional duty to conduct an independent examination of the

record as a whole," and is not bound by "the state court's conclusion that the factual characteristics of petitioners' activity place it within the vast realm of nonexpressive conduct." 515 U.S. at 567.[6] The Court is therefore "obliged to make a fresh examination of crucial facts." *Id.* Those include the nature of Boy Scouting's beliefs and the expressive quality of Dale's participation as an openly gay Assistant Scoutmaster.

a. Boy Scouting's Beliefs About Homosexual Conduct

The New Jersey Court's assumption that Boy Scouting does not have a purpose "to promote the view that homosexuality is immoral," 64a, is wrong for three reasons.

First, it is not the role of government to decide what a private organization's message is. The New Jersey Supreme Court may think that Boy Scouts of America should interpret its Oath and Law as expressing nothing about sexuality, or as endorsing the morality of homosexuality. *See* 55a (Oath and Law "do not on their face, express anything about sexuality"), 59a (Boy Scouts of America's "stance on homosexuality appears antithetical to the organization's goals and philosophy"). But Boy Scouts of America thinks otherwise, and the Constitution protects its ability to control its own message. "[T]he point of all speech protection," this Court has said, "is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley*, 515 U.S. at 574. *The very argument that the government may impose its own interpre-*

6. Here again, this is a more extreme case than *Hurley*. In *Hurley*, the factual characterizations of the lower court were in the form of actual factual findings based on a trial. 515 U.S. at 561-563. The factual characterizations of the New Jersey Supreme Court were imposed without benefit of a trial, and directly contradicted the Chancery Court's findings on cross-motions for summary judgment.

tation on an organization's moral message raises First Amendment concerns of the highest order.

At a minimum, a reviewing court must give deference to an expressive organization's characterization of its own beliefs. The court below, however, gave no credence to either formal position statements or the testimony of Scouting officials. 54a. Indeed, it is evident that the court allowed its own strong disagreement with Scouting's position to color its judgment. *See* 59a-64a (denouncing "stereotypes," "prejudice," and "bigotry").[7]

Second, the court below misapprehended the legal standards for evaluating the content of an association's beliefs. According to the New Jersey Supreme Court,

> Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts include sponsors and members who subscribe to different views in respect of homosexuality.

52a (emphasis in original).

None of this would be legally relevant even if true. The South Boston Allied War Veterans Council in *Hurley* did not "associate for the purpose of disseminating the belief that homosexuality is immoral," 52a, but it nonetheless had the right to exclude those who wished to make their own message "part of the existing parade." 515 U.S. at 570. And even if it

7. Most Americans are members of religions which regard homosexual conduct as sinful. JA 722-723 (Roman Catholic-28% of the population), JA 725-726 (Southern Baptist-10%), JA 714-715, (Lutheran-8%), JA 728 (Presbyterian-7%), JA 708-709 (United Methodist-4%), JA 711-712 (Orthodox and Conservative Jewish), JA 720 (Latter-day Saints). R 4771-4773.

were true that Scouting discourages leaders from discussing sexual issues, which it is not, *Hurley* established that the organization has the right to exclude those who wish to proclaim their sexual identity as part of the organization's message.

The government may not use a group's "multifarious voices" as a justification for intervention. *Hurley*, 515 U.S. at 569. It is not uncommon for groups to have members who "subscribe to different views," 52a, on some issues. Associations have the right to resolve such internal disagreements for themselves through their internal processes of governance. And even if it were true that Boy Scouts of America had never articulated moral disapproval of homosexuality until now, that would be completely irrelevant. A private organization has the right to decide for itself what it believes, and to change those beliefs when it sees fit.

Third, the lower court's characterization of Scouting's beliefs is simply incorrect. Five official position statements of the organization, JA 453-461, and nine current and former Scout officials and volunteers attested to Boy Scouts of America's moral view, JA 160-161, JA 183, JA 312, JA 451, JA 465, R 3254, JA 444, JA 746, JA 692-693, JA 761, and its expert attested to the fact that the "presence of avowed homosexuals in Scouting would interfere with transmitting the value that homosexual conduct is not morally straight or clean." JA 742. The National Director of Boy Scouting certified:

> Boy Scouts believes that homosexual conduct is not 'morally straight' under the Scout Oath and not 'clean' under Scout Law. Consequently, known or avowed homosexual persons or any persons who advocate to Scouting youth that homosexual conduct is 'morally straight' under the Scout Oath, or 'clean' under the Scout Law will not be registered as adult leaders.

JA 746. While respondent introduced affidavits by a number of individuals connected to Scouting that they were unaware of this belief or did not agree with it, respondent presented no evidence that the organization had ever taken the position that homosexual conduct *is consistent* with the Scout Oath and Law.

The court below had no basis in fact or law for second-guessing Boy Scouts of America's statement of its own beliefs.

b. The Expressive Impact of Dale's Participation As an Openly Gay Uniformed Adult Leader

The New Jersey Supreme Court also rested its decision on the assertion that Dale's presence as a uniformed Assistant Scoutmaster would not interfere with Scouting's message because Dale would simply do his job and would not "'teach' anything whatsoever about homosexuality as a scout leader." 66a. There are three reasons to reject that argument.

First, even if it were true that Dale would not participate in Scouting "'to make a point'" about sexuality, 66a, his very presence as an openly gay uniformed Boy Scout leader would inevitably make such a point. Boy Scout leadership is inherently expressive: "Adult leaders set a positive example for the boys by living the Scout Oath and Scout Law themselves." JA 181; *see* JA 543. If Boy Scouting were required to accept a known Ku Klux Klansman as a leader, this would interfere with the organization's message of racial harmony even if he never uttered a word on the subject of race while in Scout leader uniform. *See Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 729, 952 P.2d 218, 257 (1998) (Kennard, J., concurring) ("Could the NAACP be compelled to accept as a member a Ku Klux Klansman? Could B'nai B'rith be required to admit an anti-Semite?"). Whether he intends it or not, Dale's

presence as an openly gay Scoutmaster would convey the message that homosexuality is consistent with Scouting ideals and values.

The New Jersey Supreme Court implicitly recognized that placing an individual in the uniform of a Scout leader constituted symbolic speech when it noted "the symbolism of the Boy Scout uniform" when worn in public. 26a-27a. Yet the court failed to recognize the symbolism of allowing those who disagree with Scouting's message to don the Scout leader's uniform. Wearing the uniform of Boy Scouts of America is a "medium[] of expression" that Boy Scouts of America has the right to control. *See Hurley*, 515 U.S. at 569.

Second, the court misconstrued respondent's claim. Dale has never sought the right to serve as a silent Boy Scout leader, keeping his sexuality to himself; nor has he claimed that Boy Scouts of America would deny him a position on those terms. By his own allegations, "the only gay Scouts singled out for exclusion are those, such as [Dale], who . . . become leaders in their community and are open and honest about their sexual orientation." JA 11, JA 133. Dale's expressions to the media of pride in being gay cannot be put back in the bottle, and it is undisputed that he has no interest in doing so. JA 470 ("[Y]es, I am gay, and I'm very proud of who I am"; "Being proud about who I am is something the Boy Scouts taught me."), JA 513. Dale first came to the attention of Monmouth Council officials as a result of a speech regarding teenagers' need for gay role models, JA 753, L 10, and he explained that his quest for a leadership position in Scouting is "about giving adolescent boys a role model." JA 549.

Third, apart from the actual effect of appointing Dale as a leader, private organizations have the right to make leadership decisions for themselves, without threat of lawsuits, damages, punitive damages, and injunctions. The prospect of such suits

has a severe chilling effect on the exercise of First Amendment rights. *See Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343-44 (1987) (Brennan, J., concurring). Each time an adult presents himself to a Boy Scout Troop as a potential leader, it is the responsibility of the Troop Committee, and ultimately of Boy Scouts of America, to evaluate his potential as a moral exemplar for the boys of the Troop. JA 299-303. To serve as an adult leader, a person must, *in Scouting's opinion*, "possess the moral . . . qualities deemed necessary . . . for leadership." 222a, JA 359. To subject such decisions to second-guessing by the government, armed with punitive sanctions, is a denial of that autonomy. *See Hurley*, 515 U.S. at 575 ("the choice of a speaker . . . is presumed to lie beyond the government's power to control").

B. The Decision Below Also Violates Boy Scouting's Freedom of Expressive Association

1. Private Expressive Associations Have the Right to Choose Their Own Members

As Tocqueville long ago observed, voluntary associations are at the heart of American civic life:

> Americans of all ages, all stations in life, and all types of disposition are forever forming associations.
>
> * * * *
>
> Better use has been made of association and this powerful instrument of action has been applied to more varied aims in America than anywhere else in the world.

Alexis de Tocqueville, Democracy in America 513, 189 (J.P. Mayer ed. & George Lawrence trans., Harper-Perennial 1969) (1835).

This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Freedom of association is "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

Part of the freedom of association is "the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). *See Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 288 (1984) (First Amendment guarantees appellees' "freedom to associate or not to associate with whom they please"). Without the freedom to exclude those who disagree with the association's beliefs, the freedom of expressive association would be an "'empty guarantee.'" *Id.* at 122 n.22. (quoting Lawrence Tribe, American Constitutional Law 791 (1978)). As this Court stated in *Roberts*:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. *Freedom of association therefore plainly presupposes a freedom not to associate.*

468 U.S. at 623 (emphasis added). *See New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988). Freedom of expressive association protects the right of any group,

whether expressing minority or majority views, or religious or secular views, to protect the strength of its "ideologies or philosophies" by limiting membership to those who accept them. *Roberts*, 468 U.S. at 627. *See Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

2. Private Expressive Associations Have the Unqualified Right to Choose Their Leaders

The freedom to select leaders is even more essential to freedom of association. The personality, character, ideas, and commitments of a leader often define the character of the group. This Court has recognized the right of political organizations to select their leaders free of state interference. *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224 (1989) ("Freedom of association means . . . a right to 'identify the people who constitute the association' . . . and to select a 'standard bearer who best represents the party's ideologies and preferences.'") (internal citations omitted). Similarly, courts have recognized the right of churches and synagogues to choose their own ministers and rabbis.[8] Charitable youth organizations likewise have been afforded discretion to employ leadership representing their

8. *See, e.g., Gellington v. Christian Methodist Episcopal Church, Inc.*, No. 99-10603, 2000 WL 192100, at *6 (CA11 Feb. 17, 2000); *Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (CA5 1999); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 470 (D.C. Cir. 1996); *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 187-88 (CA7 1994); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (CA8 1991); *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168-69 (CA4 1985); *McClure v. Salvation Army*, 460 F.2d 553, 560 (CA5 1972). After *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), these decisions can best be explained as arising from freedom of expressive association.

value systems.[9] The selection of adult leaders in Scouting falls within this principle. As the California Supreme Court has noted:

> In any organization, *the leader occupies a sensitive role with respect to the articulation and transmittal of the group's values.* This is particularly true of the Boy Scouts. The Scouting program is organized around the principle that *the most effective way to teach the values of Scouting is through the leadership, counseling and example of the Scoutmaster.*

9. *See Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 703-705 (CA8 1987) (living by certain code of behavior constitutes bona fide occupational qualification for Girls Club counselors expected to act as role models); *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 414-415 (CA6 1996) (unmarried pregnant teacher dismissed for not setting Christian example); *Little v. Wuerl*, 929 F.2d 944, 951 (CA3 1991) (Catholic school permitted not to rehire divorced and remarried teacher because school could hire only those whose beliefs and conduct were consistent with its purposes); *Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 (CA7 1987) (plaintiff's controversial beliefs regarding abortion would have prevented Catholic school from hiring plaintiff); *Harvey v. YWCA*, 533 F. Supp. 949, 954-955 (W.D.N.C. 1982) (unmarried pregnant woman who wished to model an alternative lifestyle to teenagers properly discharged because Christian sexual morality was bona fide occupational qualification for position of YWCA girls counselor); *Gosche v. Calvert High Sch.*, 997 F. Supp. 867, 871 (N.D. Ohio 1998) (Catholic school teacher properly dismissed because her sexual conduct was not fulfilling the legitimate expectation that she would "by word and example . . . reflect the values of the Catholic Church"); *Bishop Leonard Reg'l Catholic Sch. v. Unemployment Compensation Bd. of Review*, 140 Pa. Commw. 428, 436-437, 593 A.2d 28, 32 (Pa. Commw. Ct. 1991) (unemployment benefits denied to discharged teacher because her marriage to divorced man constituted violation of Catholic principles).

Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670, 683, 952 P.2d 218, 226 (1998) (citations omitted) (emphasis added). We urge this Court to hold that private, non-commercial, expressive associations have the unqualified right to select their own leadership.

3. Boy Scouting's Expressive Association Claim Is Supported by the *Roberts* Trilogy

In a trilogy of cases, this Court held that the State could compel certain clubs to accept women as members. *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). These cases are distinguishable on two grounds. First, they involved quasi-commercial organizations. Second, the clubs did not have any moral code or philosophy that was logically related to their challenged membership criteria. In fact, the *Roberts* trilogy supports petitioners' expressive association claim.

a. As a Non-Commercial Expressive Association, Boy Scouting Enjoys Full Protection of the Freedom of Association

In *Roberts*, Justice O'Connor explained that, rather than apply a "compelling interest" standard indiscriminately to all private associations, the Court should distinguish between those that are "primarily engaged in protected expression" and those that are sufficiently "commercial" that they do not enjoy full rights of freedom of association. 468 U.S. at 633-636 (O'Connor, J., concurring). The Jaycees, which she pointedly noted are "otherwise known as the Junior Chamber of Commerce," are engaged in "the art of solicitation and management," which gives its members "an advantage in business." *Id.* at 639. Similarly, the purpose of the Rotary Clubs was to involve a "'cross section of the business and professional life of the community.'" *Rotary*, 481 U.S. at 546 (citation omitted). Participation in such business and professional organizations is important to equality of opportunity in the commercial marketplace, and the First Amendment protection of their exclusionary practices is correspondingly lower.

Far from having commercial goals, Boy Scouting has goals exclusively related to personal, moral, and physical development. Adults do not participate in Scouting in order to gain "an advantage in business," but to help boys grow up to be morally straight young men. Indeed, in her *Roberts* concurrence, Justice O'Connor used Boy Scouting and Girl Scouting as illustrations of expressive associations enjoying full constitutional protection:

> Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.

468 U.S. at 636 & n.* (quoting Paul Fussell's observation that *The Official Boy Scout Handbook* is "another book about goodness").

b. The Exclusion of Dale Is Related to Boy Scouting's Moral Beliefs

The Court in the *Roberts* trilogy held that those organizations could be required to accept female members because there was no logical connection between the political or ideological positions taken by the organizations and exclusion of women. The Act "imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Roberts*, 468 U.S. at 627. *Accord New York State Club Ass'n*, 487 U.S. at 13; *Rotary*, 481 U.S. at 548-549. The Court acknowledged the possibility "that women might have a

different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations," but found this supposition "[un]supported by the record."[10] *Roberts*, 468 U.S. at 627-628. In cases where there is such a connection between membership criteria and the group's ideology, however, the *Roberts* trilogy makes clear that freedom of association protects the right of exclusion. Thus, in *Hurley*, this Court interpreted *New York State Club Association* as "recogniz[ing] that the State did not prohibit exclusion of those whose views were at odds with positions espoused by the general club memberships." 515 U.S. at 580. The dispositive question, therefore, is whether "compelled access" would "trespass on the organization's message." *Id.* at 580-581 (a "private club" may "exclude an applicant whose manifest views were at odds with a position taken by the club's existing members"); *New York State Club Ass'n*, 487 U.S. at 13 ("private" associational viewpoints protected).

As explained above, Dale's "manifest views" are that Boy Scouting's policy on homosexuality is "bad" and "wrong." JA 513. Accordingly, under *Hurley* and the *Roberts* trilogy, Boy Scouting is entitled to decline his offer of services as a volunteer leader. It is of no constitutional moment that Scouting has a broad message and is not focused on an "anti-gay" theme. *See* 53a, 135-136a, 153a. The First Amendment does not require that Scouting become an "anti-gay" organization to enjoy protection for its expression of what is "morally straight." As Justice O'Connor noted in *Roberts*, "protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young." 468 U.S. at 636 (citations omitted).

10. The Court did not question the organization's own statements regarding its philosophy or beliefs. It merely questioned whether those beliefs were logically related to the exclusion of women.

4. The New Jersey Supreme Court's Expansive Interpretation of the Public Accommodations Law Conflicts with Core First Amendment Principles

The New Jersey Supreme Court's interpretation of its state public accommodations law is considerably more expansive than that of other state supreme courts or the federal courts, which uniformly have found that Boy Scouting is not a place of public accommodation. *See supra* note 3. The court extended New Jersey law to organizations – like Boy Scout Troops — that are neither public nor quasi-commercial. The decision below declares that any organization that publicly solicits members, uses public facilities or has connections to government officials, and is "similar" to organizations previously recognized as public accommodations is subject to the law. 24a.[11] This interpretation is so sweeping that almost any organization could find itself the target of a state's desire to enforce conformity to its ideas of desirable social change. The logic of the decision below does not stop with petitioners or respondent. New Jersey prohibits covered groups from using membership or leadership criteria based on a broad range of prohibited characteristics: race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation, or nationality. Thus, Boy Scout Troops would be forced to admit girls as members, Girl Scout Troops would be forced to admit boys, and a Croatian cultural society would be forced to admit Serbs. That would be an extraordinary limitation on freedom of association as it is commonly understood. *See Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974)

11. Much of the conduct that the court used as a basis for declaring Boy Scouting a public accommodation – such as advertising in national media, 25a; wearing uniforms in public, 26a; meeting in public facilities, 29a-30a; and having members of Congress and military personnel as members, 28a; – is itself constitutionally protected.

("'The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.'") (quoting *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-180 (1972) (Douglas, J., dissenting)).

The decision below subjects virtually all contested membership and leadership decisions of covered private organizations to the superintendence of governmental authorities.

Moreover, although the court below assures us that respondent has no intention to use leadership status to "'teach' anything whatsoever about homosexuality," 66a, it provides no guidance about what Boy Scouting may do if he does just that. What if, during a discussion of sexual morality, Dale interjects his own opinion? What if Dale brings his significant other to a Boy Scout banquet? What if Dale wears his Scouting uniform in a gay pride parade? At what point does Scouting have a right to sever its connection with Dale?

In the employment context, an employer's allowance of a "hostile environment" constitutes "discrimination." Employers must alter their speech (and police the speech of their workers) so as not to offend members of protected classes. New Jersey and several other jurisdictions have extended the logic of these decisions to public accommodations laws. *See* New Jersey Dep't of Law & Pub. Safety, *Sexual Harassment: Your Rights* (Jan. 1998) ("Sexual harassment . . . is against the law . . . when you try to enter or join an organization that solicits members from the general public"); New York City Comm'n on Human Rights, (visited Feb. 17, 1999) <http://www.ci.nyc.ny.us/nyclink/html/serdir/html/missions.html#CHR> (New York City Human Rights law bars public accommodations harassment "on the basis of race, color, creed, age, national

origin, alienage or citizenship status, gender, sexual orientation, disability, marital status . . . lawful occupation . . . and record of conviction or arrest").

The implications for First Amendment rights are profound. If Scouting were a place of public accommodation, and if it could not "discriminate" against openly gay applicants for leadership positions, how could it continue to teach that homosexual conduct is not morally straight?

C. As Intimate Associations, Boy Scout Troops Have the Constitutional Right to Decide for Themselves Whom to Select to Supervise Other People's Children

1. Boy Scout Troops Are Intimate Associations

The First Amendment also protects the "formation and preservation of certain kinds of highly personal relationships" from unjustified interference by the state. *Roberts*, 468 U.S. at 618. The relationships of the Scouts to their leaders "presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'" *Rotary*, 481 U.S. at 545 (quoting *Roberts*, 468 U.S. at 619-620). In determining whether a group is an intimate association, the relevant characteristics are the group's "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Roberts*, 468 U.S. at 620. When the organization at issue has both a national entity and local groups, the focus is on the local groups, where the personal relationships actually occur. *See Rotary*, 481 U.S. at 546-547; *Roberts*, 468 U.S. at 621. *See also* Recent Cases, *Civil Rights — Public Accommodation Statutes — New Jersey Supreme Court Holds That Boy Scouts May Not Deny Membership to Homosexuals*, 113 Harv. L. Rev. 621, 624 (1999) ("a local [Boy Scouts of America] unit . . .

fosters close interpersonal and mentoring relationships that seem worthy of consideration"). All of the factors discussed in *Roberts* support Boy Scouting here.

Boy Scout Troops are small groups of boys and adults, JA 172; their functions are utterly non-commercial and unrelated to business opportunities; they engage in hiking and camp-outs far from the public gaze, JA 173, JA 741; they are involved in the transmission and cultivation of shared ideals and beliefs, JA 241, JA 446-447; they are an integral part of the youth programs of many churches and synagogues, JA 159, JA 707-730; and they discuss moral and intimate subjects, JA 209-214, JA 249.

A boy joining a Troop becomes a member of a Patrol, a subgroup composed of three to eight boys. JA 172. Scouting activities, such as camp-outs, are primarily conducted in Troops, with each Patrol camping together. JA 173, R 2536, R 2538. "The Troop and Patrol are organized for face-to-face interaction . . . ." JA 446. Each Patrol has its own name, meetings, and its own leader. "[B]oys in a Patrol participate together as a team." JA 172, JA 235-236. At Troop meetings, Boy Scouts wear their uniforms. "The uniform gives the boy a sense of identity with other Boy Scouts and with Boy Scout values, and reminds him that he is expected to live up to these values." JA 174, JA 270. Troops are incontrovertibly small, closely knit groups. A typical Troop is a group of only 15 to 30 boys. JA 172. By contrast, the Jaycees chapters at issue in *Roberts* had more than 400 members each, 468 U.S. at 621, and the Rotary chapters in *Rotary* ranged from 20 to more than 900. *Rotary*, 481 U.S. at 546.

Troops have a distinct mission and purpose: to instill the values of the Scout Oath and Law in youth members and to equip them to become responsible men, citizens, and family members. JA 170-171. Scouts and, even more so, Scout

leaders must commit themselves to these values. JA 172, JA 182-183.

The relationship between Boy Scout and Scoutmaster is also intimate within the meaning of *Roberts*. In addition to serving as a role model for Boy Scouting values, JA 446, the adult leader is expected to serve as a "wise friend" to whom the Boy Scout can turn for guidance on all kinds of problems and issues, including sex. JA 211, R 2539. Boys are encouraged to develop close personal relationships with leaders because "Boy Scouts believes that providing a close personal relationship with an adult outside the home helps boys in the difficult process of maturing to adulthood." JA 181. Indeed, even after they have grown up, former Troop members often return to consult their Scoutmaster and ask for "advice on a variety of important life decisions." JA 741-742. Since Boy Scout Troops take many overnight camping trips and typically spend a week together in summer camp, JA 173-174, there is a far greater degree of intimacy among members than would be the case in a group that met only for formal meetings. JA 181-182, JA 741-742. Indeed, a Scout leader may spend "more time actually interacting directly with a Scout than do his parents." JA 741. When an 11 year-old boy away from home for the first time becomes afraid at night, skins his knee, or forgets his sleeping bag, he looks to his Scoutmaster for support.

Given these responsibilities for the moral education and care of other people's children away from home, considerable selectivity is exercised in choosing adult leaders. Such a role cannot be treated as an "advantage" of a "place of public accommodation," open to all members of the public. To impose the "public accommodation" straitjacket on an intimate association violates the First Amendment by stripping it of its ability to be selective.

2. As Associations Formed Principally of Parents to Provide Moral Education to Their Sons, Boy Scout Troops Enjoy Enhanced Constitutional Protection

This Court has repeatedly recognized constitutional protection of the right of parents to control the education and upbringing of their children. Whether framed in terms of freedom of association under the First Amendment, as in *Roberts*, 468 U.S. at 619-620, or as a liberty protected by the Fourteenth Amendment, as in *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), or as an interest protected by the Free Exercise Clause of the First Amendment, as in *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972), parental direction of the moral education of their children has a high place in the hierarchy of constitutional values. Different parents have different ideas about upbringing, and seek out different organizations to assist them in the task of moral education. In a free society, organizations fail or flourish according to the private choices of innumerable families.

There can be no doubt that parents are "direct[ing] the upbringing and education," *Pierce*, 268 U.S. at 534-535, of their sons by placing them in Boy Scout Troops. Scouting's *Rules and Regulations* unequivocally state that "[e]ducation is the chief function of the Scouting movement." JA 411.

The fact that parents place their sons in the environment of a Boy Scout Troop in order to instill values in them strongly reinforces the claim for intimate associational protection. *See, e.g., Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 742, 952 P.2d 261, 265 (1998). This Court has repeatedly emphasized that it is not for the state to interfere with parental choices regarding the upbringing of their children with respect to religious and moral values. For example, in upholding the right of Old Order Amish not to send their children to high school "because [of] the values they teach," the Court held that

the state was not empowered to "save" children from their parents' choice of education in "moral standards, religious beliefs, and elements of good citizenship." *Yoder*, 406 U.S. at 210, 232-233. *See Pierce*, 268 U.S. at 534-535; *Meyer*, 262 U.S. at 399-400; *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 541 (1973) (Douglas, J. concurring).

As this Court recognized in *Roberts*, the instrumental aspect of freedom of association — expressive association — and the intrinsic aspect — intimate association — may coincide. *Roberts*, 468 U.S. at 618. The Boy Scout Troop is a perfect example of both aspects coming together in a single group. The state may not dictate who parents select as the "wise friend," R 2539, to undertake the moral education of their sons in Troops.

In a press interview, Dale was asked whether he would want a son of his to join Boy Scouting. His response is instructive:

> Assuming that the discriminatory policy's not there, I would definitely like the kid to be in the Scouts. But I would want to know who the people were that were influencing him – his Scoutmaster, the other Scouts. A kid can be highly impressionable, and I wouldn't want some narrow-minded person leading my son's troop. For all the hysteria around gays in the Boy Scouts, I think any parent who trusts just anybody with their child is crazy.

David Rakoff, *Camping Lessons*, N.Y. Times, Aug. 22, 1999, § 6 (Magazine), at 17. Putting aside any disagreement with Dale over what constitutes a good influence, he is exactly right. To say that public accommodations laws can apply to selection of Scoutmasters is to say that these positions must be open to all members of the general public – just like rooms

in hotels or seats on airplanes. That, in Dale's words, is "crazy." It also violates the First Amendment.

D. No State Interest Justifies These Infringements of First Amendment Rights

In *Roberts*, this Court held that even limited regulation of expressive associational activity could be justified only by a state interest that was both "unrelated to the suppression of ideas" and "compelling." 468 U.S. at 623. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 n.47 (1982); *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968).

Here, application of the public accommodations law is directly "[]related to the suppression of ideas" and, if permitted by this Court, would "hamper[] the organization's ability to express its views." *Roberts*, 468 U.S. at 623-624. When the New Jersey justices were not claiming that Scouting has no moral view on homosexuality, they were condemning Scouting's view as "prejudice" and "bigotry" and opining that the state has a vital interest in eradicating it. 59a, 61a. The concurring justice pronounced it "untenable" that Scouting "remain[ed] entrenched in the social mores that existed at the time of its inception." 100a. Dale himself admits that he seeks to wear the Scouting uniform because he wants "to point out to [Scouting] how bad and wrong this policy is." JA 513.

The court below wholly failed to identify a compelling interest that trumps Boy Scouting's First Amendment rights. The court made the same error here as did the Massachusetts court in *Hurley*: it failed to distinguish a compelling interest for existence of the statute *on its face* from the lack of a compelling interest for the statute *as applied*. *See Hurley*, 515 U.S. at 564-565. Whatever the State's interest in the public accommodations law in the abstract, the State has no legitimate interest in demanding that private associations open their doors to volunteer

leaders who do not share their philosophy. As Justice Souter observed in his opinion for the Court in *Hurley*, elimination of supposed bias is not a justification:

> It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. *Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective.*

Id. at 578-579 (emphasis added).

The "compelling state interest" discussion in the *Roberts* trilogy should not be cited to preclude an African-American big sisters organization from mentoring youth of one race and sex, a Jewish dating service from presenting singles with the opportunity to socialize with those of the same religion, or Second Generation, an Asian-American theater company in New York, from accepting only second generation Asian-Americans as participants. American pluralism thrives on difference. Private groups need not act like governments or public utilities, serving the entire population. Gay rights groups might wish to exclude Biblical fundamentalists, in violation of the prohibition on discrimination based on religion. Single-sex associations such as male Promise Keepers prayer groups and Women Anglers of Minnesota are obviously valuable to the participants as single-sex groups. The autonomy of such groups is vital to a diverse and free civil society. *See* William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three*

Sources of Liberal Thought, 40 Wm. & Mary L. Rev. 869, 875 (1999) ("[I]f we insist that each civil association mirror the principles of the overarching political community, meaningful differences among associations all but disappear, constitutional uniformity crushes social pluralism.").[12] Pluralism requires that we tolerate groups with which we disagree.

Tocqueville recognized the central role of the right of association to personal liberty:

> The most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together. Therefore the right of association seems to me by nature almost as inalienable as individual liberty. Short of attacking society itself, no lawgiver can wish to abolish it.

Alexis de Tocqueville, Democracy in America 193 (J.P. Mayer ed. & George Lawrence trans., Harper-Perennial 1969) (1835).

We recognize that the underlying question of the morality of homosexual conduct is controversial, and that many people of good will believe that Scouting's position on the matter is

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12. *See also* National Comm'n on Civil Renewal, *A Nation of Spectators: How Civic Disengagement Weakens America and What We Can Do About It* (1999); Nancy L. Rosenblum, Membership & Morals: The Personal Uses of Pluralism in America (1998); Seedbeds of Virtue: Sources of Competence, Character, and Citizenship in American Society (Mary Ann Glendon & David Blankenhorn eds. 1995); Aviam Soifer, Law and the Company We Keep (1995); Stephen L. Carter, The Culture of Disbelief 37 (1993) ("Although the influence of many intermediate institutions (particularly political parties, civic clubs, and state governments) has weakened over time, the continued vitality of intermediaries is crucial to preventing the reduction of democracy to simple and tyrannical majoritarianism, in which every aspect of society is ordered as 51 percent of the citizens prefer.").

misguided. That is not the issue in this case. It is our belief that controversial questions of personal morality, often involving religious conviction, are best tested and resolved within the private marketplace of ideas, and not as the subject of government-imposed orthodoxy. We can respect the plea of many gay and lesbian Americans not to have the majority's morality imposed upon them. By the same token, we ask that a contrary morality not be forced upon private associations like Boy Scouts of America, at the expense of its First Amendment freedoms of speech and association.

CONCLUSION

The judgment of the New Jersey Supreme Court should be reversed and the case remanded with directions that judgment be entered for Petitioners.

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Respectfully submitted,

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