

**PHOTOCOPY
PRESERVATION**



RECEIVED

200 FEB 11 PM 12:33

U.S. Department of Justice
Civil Division

DWO:REK:AJSteinmeyer
145-0-5549

OFFICE OF THE
SOLICITOR GENERAL

Washington, D.C. 20530

242343

Tel: (202) 514-3388

Fax: (202) 514-8151

February 9, 2000

To: William B. Schultz
Deputy Assistant Attorney
General
Civil Division

WBS Approved

From: Anthony J. Steinmeyer
Assistant Director
Appellate Staff
Civil Division

ajt

Re: Boy Scouts of America v. James Dale, No. 99-699

I recommend that we advise the Solicitor General that Civil has no interest in amicus participation in this case. The petition was granted on January 14, 2000. The Boy Scouts' petitioner's brief is due February 28, and Dale's respondent's brief is due March 29.

The Boy Scouts excluded Dale as an assistant scoutmaster after a local newspaper published an article identifying Dale as the co-president of the Lesbian/Gay Alliance at his college. The New Jersey Supreme Court held (1) that the Boy Scouts are "a place of public accommodation" under the New Jersey Law Against Discrimination, and (2) that their exclusion of Dale violates the statute's ban on discrimination based on sexual orientation. The New Jersey court rejected the Boy Scouts' arguments that the application of the statute to them violates their First Amendment rights to freedom of speech or association.

The Boy Scouts' petition for certiorari does not seek review of the statutory construction holdings of the court below. The Supreme Court has held that it cannot overturn the construction of a state statute by the highest court of that state. Johnson v. Fankell, 520 U.S. 911, 916 (1997). Instead, relying upon Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995), the Boy Scouts argue that they have a First Amendment right to exclude gays. They state that they interpret their "moral code as inconsistent with homosexual

conduct." Pet. 14. The Scouts object to retaining Dale because "by his own description, [he] is a sexually active homosexual" and "has stated publicly that he disagrees with Boy Scouting's moral position against homosexual conduct." *Ibid.* Forcing them to retain Dale, the Scouts argue, violates: (1) their free speech right "to select their leaders without governmental interference" (*id.* at 15), (2) their "freedom to associate or not to associate with whom they please" (*id.* at 17), and (3) their freedom of intimate association in which "small groups of boys and adult leaders" are involved in, *inter alia*, "personal communication on moral and intimate subjects" (*id.* at 18).

Dale argues that Boy Scout "members do not share any view or expressive purpose concerning sexual orientation or related matters," so that "preventing it from discriminating against its gay members would [not] in any way alter or burden the messages, purposes, and values that bring Scouting's diverse members together." Br. in Opp. 9. Dale relies upon the Roberts trilogy, which addressed whether the application of nondiscrimination statutes to private clubs violated their freedom of association. Roberts v. United States Jaycees, 468 U.S. 609 (1984); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988). Dale argues that under those precedents an organization is exempt from a nondiscrimination statute only if it shows that the statute would impose serious burdens on the organization's specific expressive purposes or the actual views of its members that brought them together in expressive association. Even then, enforcement of an anti-discrimination statute could be justified by a compelling interest, Dale argues. Br. in Opp. 19-20.

This case does not raise any of the specific issues we addressed in our defense of the statute governing service by homosexuals in the military. In that litigation our principal arguments were that the statute did not violate either the equal protection or free speech rights of homosexuals, given the unique importance of the military mission and the special circumstances of military life. The government did not participate in any of the Roberts trilogy or in Hurley, where the Court held that a private St. Patrick's Day parade sponsor had a free speech right to exclude a gay-rights float from its parade.

We solicited recommendations from the Department of Defense and its components, but they have not made any recommendation. The Civil Rights Division (per Dennis Dimsey (514-2195)) is still considering its recommendation. If you concur, we will advise Deputy Solicitor General Barbara Underwood that Civil has no interest in participating in this case.

LEVEL 1 - 4 OF 22 STORIES

Copyright 2000 Newsweek
Newsweek

March 20, 2000, U.S. Edition

SECTION: SPECIAL REPORT; Pg. 58

LENGTH: 261 words

HEADLINE: James Dale, Eagle Scout

HIGHLIGHT:

Is it legal to kick him out because he's gay?

BODY:

Only 4 percent of all Boy Scouts make the cut to Eagle Scout, and James Dale of New Jersey was one of the few. His old troop--where both his father and brother had been active--asked him to stay on as a volunteer assistant leader as he headed off to Rutgers University, and he agreed. But now it's up to the Supreme Court to decide whether he can even be a member anymore. When his local Boy Scout council saw Dale quoted in the newspaper as a member of a gay group at Rutgers, they told him he was out. He filed suit, and last year the New Jersey Supreme Court ruled that the Boy Scouts' action was "based on little more than prejudice." It ordered Dale reinstated. The Boy Scouts appealed; oral arguments before the high court are set for April 26.

The Boy Scouts plan to argue that they are a private and "quasi-religious" organization that has the constitutional right to select leaders with the moral values they want to instill in their members. Their attorney, George Davidson, says the Scouts believe that being gay is inconsistent with the Boy Scout oath to be "morally straight."

But Dale's attorney, Evan Wolfson of the Lambda Legal Defense Fund, says the real issue is whether banning gays is essential to the Boy Scouts' purpose; can they teach morality and have gay members? Wolfson points out that there is nothing in the handbook that says they don't permit gay members or that their goal is to promote anti-gay beliefs; instead, he says, their stated ideals are inclusion and respect. The court will decide who's in and who's out.

GRAPHIC: PHOTO: ROLE MODEL: Dale (center) and his lawyers at a press conference

LANGUAGE: ENGLISH

LOAD-DATE: March 14, 2000

6P15 - (G) Bms -
Boy Scouts

LEVEL 1 - 8 OF 22 STORIES

Copyright 2000 The Post and Courier (Charleston, SC)
The Post and Courier (Charleston, SC)

March 18, 2000, Saturday, SATURDAY EDITION

SECTION: A, Pg. 15

LENGTH: 782 words

HEADLINE: Scouts' honor

BODY:

AH: Preserve private groups' rights BY: James J. Kilpatrick

Consider a Boy Scout troop. It consists of 15 to 30 boys, ranging in age from 11 to 18. Typically they meet every week in a church or synagogue, sometimes in a community center, less frequently in a private home.

Under the leadership of an adult scoutmaster, the youths first recite the Pledge of Allegiance and then renew their pledge to abide by the Scout Oath and Law. During a meeting, members of the troop may goof off boywise, as I mostly did, or they may work with the scoutmaster on skills that will lead to merit badges. I remember tying knots until I could tie them blindfolded.

Once our troop went on an overnight hike. Another troop must have joined us, for I remember a long row of pup tents. Naturally, we were all white boys. This was segregated Oklahoma 70 years ago. We never heard of "discrimination." Our scoutmaster taught us to find Orion and the Big Dipper. I dropped out of Scouting when I moved from junior high to high school in 1934, but memories linger on.

The question that jogs the memory of this court reporter may be simply phrased: Is a Boy Scout troop a place of public accommodation? The Supreme Court will hear the question argued on April 26. In this blockbuster term of the high court, the case of Boy Scouts vs. Dale will draw an unusual crowd.

Many of the facts are in dispute, but the core facts are clear. James Dale was an outstanding Scout. He made the rank of Eagle Scout, no easy achievement. At 18, his troop membership automatically expired, but he registered to serve as an adult Boy Scout leader. He went off to Rutgers University and came to regard himself as actively homosexual. In his sophomore year he became co-president of the university's Lesbian/Gay Alliance. In July 1990 he gave an interview to the Newark (N.J.) Star-Ledger. As a gay activist he spoke of the needs of homosexual teen-agers for gay role models.

The interview had immediate repercussions. The Monmouth Council sent him a revocation letter: "Boy Scouts of America does not admit avowed homosexuals to membership in the organization." The state law at the time did not prohibit discrimination based upon sexual orientation, but 18 months later the Legislature amended its public accommodation law. Now the state forbids discrimination on the basis of race, religion, national origin, nationality, sex, or "affectional or sexual orientation."

The Post and Courier (Charleston, SC), March 18, 2000

Dale brought suit in New Jersey state courts, asking for damages and for restoration of his status as an approved scoutmaster. He won. The state Supreme Court ruled last year that Scouting does indeed serve as a place of public accommodation. (Courts in California, Kansas, Illinois, Connecticut and Oregon have held to the contrary.) The Boy Scouts are federally chartered; local councils make use of military facilities and equipment; troops frequently meet in public buildings.

Moreover, the BSA extends its recruiting to "all" eligible boys. The organization does not limit membership to youths who subscribe to a specific set of moral beliefs. Though the Scout Oath speaks of a Scout's "duty to God," Scouting is not a religious institution; it is officially nonsectarian. Because a troop will enroll "any" eligible boy, it is not sufficiently personal or private to warrant constitutional protection under the First Amendment's rule of freedom of association.

Dale wants his registration reinstated as an assistant scoutmaster. The Monmouth Council is adamantly opposed. The council does not want an activist homosexual proselytizing 12-year-olds toward a gay way of life. I am in complete sympathy with that point of view. Moreover, I would strongly defend the right of any private organization to pick its own leaders and role models. This is simply not the business of government.

At least 28 groups have filed friend-of-court briefs in support of the Scouts' position. These include Catholics, Methodists, Lutherans, Mormons, Episcopalians, Reform Jews, Baptists and Unitarians. Other supporting briefs come from war veterans, the National Club Association, the Pacific Legal Foundation, the Cato Institute and the American Civil Rights Union.

Remarkably, the most eloquent brief comes from Gays and Lesbians for Individual Liberty. It says, "The New Jersey Supreme Court's decision restricting the ability of the Boy Scouts of America to choose its own leaders and define its own membership criteria dangerously erodes the freedom of all Americans, including gay Americans, and should be reversed."

I find myself in complete sympathy with that point of view also.

Kilpatrick is a columnist for United Press Syndicate.

LOAD-DATE: March 21, 2000

5TH STORY of Focus printed in FULL format.

Copyright 1992 Bergen Record Corp.
The Record

July 30, 1992; THURSDAY

SECTION: NEWS; 3 Star

ALSO IN 2 Star P, 2 Star B, 1 Star Late, 1 Star Early; Pg. A03

LENGTH: 538 words

HEADLINE: GAY, EXPELLED SCOUT SUES TO REGAIN HIS MEMBERSHIP
CITES N.J. ANTI-BIAS LAW

SOURCE: Wire services

BYLINE: DARA N. SHARIF, The Associated Press

DATELINE: TRENTON

BODY:

James Dale says the Boy Scouts taught him to take pride in who he was. On Wednesday he sued the organization, saying his membership was revoked after they found out he was gay.

"I owe it to the organization to point out to them how bad and wrong this policy is," said Dale, a 21-year-old Rutgers University student.

"Being proud about who I am is something the Boy Scouts taught me. They taught me to stand up for what I believe in."

The Monmouth Council of the Boy Scouts of America said Dale does not meet the standards of leadership set by the national organization, which prohibits homosexuals from membership.

Dale, of Port Monmouth, was an Eagle Scout, the highest rank in scouting, with Troop 73 in Matawan and held 30 merit badges. He received a letter in August 1990 saying his membership was terminated, said his attorney, Evan Wolfson. When asked why he was dismissed, the Monmouth Council told Dale it was because he was gay, the lawyer said.

The Boy Scouts were made aware of Dale's sexual orientation after a newspaper article appeared about a seminar on gay and lesbian youth at which he was a speaker.

The lawsuit was filed Wednesday in Superior Court, Freehold, against the Monmouth Council and the Boy Scouts of America, said Wolfson. It was filed under a January 1992 state law that prohibits discrimination on the basis of sexual orientation.

The suit contends the Boy Scouts' anti-homosexual policy is discriminatory, and asks the court to reinstate Dale and award him compensatory damages.

Wolfson is with the Lambda Legal Defense and Education Fund in New York, a legal advocacy group concerned with the civil rights of homosexuals, lesbians, and AIDS victims.

"The Boy Scouts corner the market in organized activities for boys," said Wolfson. "What message are they teaching our children?

They're teaching a message of hatred and inferiority to gay youth and teaching other kids that it's OK to look down on gay people."

The Boy Scouts said the issue is not whether a person is homosexual, but whether he meets the standards of membership.

"If you don't meet the standards for something, then you don't join," said James Kay, executive director of the Monmouth Council. "It's not an issue of the individual. The issue is purely and simply one that says we have a right to set standards for membership."

"We don't think a homosexual presents a role model that's consistent with the expectations of mainstream American families," said Blake Lewis, spokesman of the Boy Scouts of America, based in Dallas. He said the Boy Scouts' policy against homosexual membership has been around since the group's inception.

"I want to get back into the Boy Scouts," Dale said.

"It should be open to me. It was really great and allowed me to feel a sense of belonging," Dale said. "The Boy Scouts made me what I am today and I'm really happy with who I am. I wish the Boy Scouts could be happy, too."

A similar case against the Boy Scouts is pending in California, said Lewis. In May 1991, the Los Angeles Superior Court ruled in favor of the Boy Scouts, but the plaintiff is expected to appeal, Lewis said.

GRAPHIC: <(3s. 2sp. 2sb) <ASSOCIATED PRESS PHOTO - James Dale of Port Monmouth visiting in San Francisco on Wednesday. Referring to the Boy Scouts, which revoked his membership, he said, "They taught me to stand up for what I believe in."

LANGUAGE: English

LOAD-DATE: October 6, 1995